SECTION REPORT

FAMILY LAW

http://www.sbotfam.org Volume 2011-2 (Spring)

Message from the Chair

Happy New Year to all our Members!

The Family Law Toolkit is coming. Look for it in the mail around the end of April or early May. Toolkits are sent on the basis of last year's 2010 enrollment. **To insure timely delivery of the Toolkit, it is imperative that you check the State Bar site to determine that the Bar has your most current address and that you are shown to be a current member of the Section**. If not, you might consider paying your 2010 dues current to get on the Toolkit mailing list. You will also soon receive your 2011 dues statement from the Bar, so be sure to renew your membership in order that you continue to get the many benefits of membership: the Section Report (5-6 times a year); the annual Bibliography; the Family Law Toolkit each Spring; and the Legislative Report in odd-numbered years. Section membership also brings with it the fellowship, friendship, scholarship and camaraderie of 5000+ other lawyers in this state who practice Family Law armed with the most advanced education and practice tools in the Nation.

Marriage Dissolution Course. I also want to encourage you to attend the Marriage Dissolution Course hosted by Hon. Judy Warne at the Capitol Sheraton in **Austin on April 28-29**. In addition to timely and educational subjects, the Section Annual Meeting is also slated to take place at the Course, so plan to attend and hear about the many accomplishments we have made. Please join us and get involved with the section.

Legislature in Session. All section bills have been filed and bills addressing fraud on the community estate, child hearsay, and spousal maintenance have been heard by house committee. No bills have been voted of committee at this time, but a vote is anticipated shortly.

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

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Section Wear and Publications

2011 recommended nominations slate
State bar of texas
Family law section

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

Officers

CHAIR:	**THOMAS L. AUSLEY**
CHAIR-ELECT:	**DIANA FRIEDMAN**
VICE-CHAIR:	**SHERRI EVANS**
TREASURER:	**JIMMY VAUGHT**
SECRETARY:	**HEATHER KING**
IMMEDIATE PAST CHAIR:	**CHARLIE HODGES**

Nominations to the Class of 2016

1. **STEVE NAYLOR (Fort Worth)**
2. **RICHARD SUTHERLAND (Wichita Falls)**
3. **FRED ADAMS (Dallas)**
4. **BRUCE BAIN (Tyler)**
5. **ANGELA PENCE (Houston)**

JONATHAN BATES is nominated to fill the vacancy in the Class of 2012.

EDITOR'S NOTE

Spring has sprung. In addition to our regular columns, this Report is packed with timely articles including one regarding the new tax regulations governing dependency exemptions that all of us need to know in regards to negotiation settlements and drafting decrees. There is also an article addressing the many changes in the past year regarding the calculation of child support. Finally, we have two student articles. One addresses same-sex divorces focusing on two recent Texas cases—*In re H.B. and J.B.* and *State v. Naylor*. The second takes down memory lane comparing the then and now of the American family. If any of you feel like writing an article to share with the rest of the section, please submit it to me. Or, if any of you see a timely family-law related article pass it along so the rest of us can share.

I also want to give a bit thank you to Steven Morris, who is at the top of his class at Texas Wesleyan School of Law and who gets to summarize all of the family law cases for the Section Report.

Everyone please join us at Marriage Dissolution!!!!!!!!!!1

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Ask the editor

Dear Editor*:** My client's husband quit his job as an executive with a management firm approximately four months before my client filed for divorce. He gave no basis for quitting, other than he wanted to do something different. He has a master's degree in management and has made in excess of $100,000 for the last five years. They have two children. Her husband has started a handyman business and now makes approximately $1500/month. I plan to ask the court to base the husband's child support on what he made prior to quitting his job. Other than introducing the parties' tax returns for the last 2-3 years, what do I have to prove. ***Agonizing in Austin

***Dear Agonizing in Austin*:** It depends on where you live. The applicable statute is TFC § 154.006, which allows a trial court to apply the child support percentage guidelines based upon earning potential if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment. If you live in the counties that are covered by the Dallas, Houston 1st, and Fort Worth Courts of Appeal and most of the other courts of appeal, then you must show that the husband purposefully decreased his income to avoid child support. *See* *In re J.G.L.*,, 295 S.W.3d 424 (Tex. App. – Dallas 2009, no pet.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex. App.—Fort Worth 2000, no pet.). Luckily for you, you reside in Austin over which the Austin Court of Appeals has jurisdiction. Here, all you need to show is that the husband had recently earned over $100,000 per year. *See* *Iliff v. Iliff*, 2009 WL 2195559 (Tex. App. – Austin 2009, pet. granted) (memo op.). The Court in *Iliff* based its decision on a strict interpretation of § 154.006, which does not state that decrease in net resources had to be for the specific purpose of avoiding child support. If I lived in the jurisdictions covered by the Dallas, Houston, and Fort Worth Courts of Appeal, I would, in addition to putting on evidence that the husband purposefully sought to decrease his earnings to avoid child support, argue that the *Iliff* case and its arguments were not considered by these courts and, if they had considered those arguments, the courts would have reached a different conclusion. For a definitive answer, we will need to wait for the Supreme Court to rule in *Iliff*.

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,

This isn't about me. I have a friend whose wife thinks he might be a sex addict. So first of all, how can sex be an addiction like alcohol or drugs? It's not an addictive substance. It's a chosen behavior (right? Or is that just me?). Do you think sex addiction is real or is it just normal guys having too much fun? Also, I'm finding that my clients want to use it as an excuse to justify their fooling around. Like, "I'm an addict. I can't help it." I'm not buying it.

Dear FRIEND,

I have to say, I was with you on the "how can sex possibly qualify as an addiction" thing until my practice, The LifeWorks Group, sponsored a seminar on the issue. In fact, much of the material in this column will be shamelessly swiped from that seminar. Just fyi.

Ok – first thing you should know is that addiction is a tricky concept in the first place. Addiction implies physical need. Your brain eventually thinks it needs opiates if you take them often enough and long enough. The drug itself is addictive. It creates a chemical need for itself over time.

It turns out that excessive and compulsive forms of many behaviors (gambling, eating, sex) can do the same thing. Excessive pleasurable behaviors share a pathway in the brain that links to survival and reward. This same pathway leads to the area of the brain responsible for higher thinking, judgment and rational thought. This is why true addicts engage repeatedly in irrational, self-damaging behavior. They aren't thinking straight. Literally. Their brains are just off course.

This is no excuse, obviously. People are responsible for their behavior at all times, whether they're fighting with an addiction or just hitting the bars. This is one of the reasons you and I have jobs, by the way. Addiction and other behavior patterns that are not self-responsible leave a wake of chaos behind them. The body count can be high. Marriages break up, kids deal with divorce, extended families are forced into even more unpleasant holiday choices than usual, jobs can be lost.

Ok, back to sex addiction specifically. I want to provide plenty of useful information for your FRIEND. The DSM IV (the bible of mental health care diagnosis) specifies criteria for diagnosing addiction. Sex addiction has not yet made the official list of diagnosable conditions, but it's widely expected that sex addiction will show up as a newly classified disorder in the next addition of the DSM (presumably, the DSM V).

There are ten criteria to diagnose addiction. They all apply to sex addiction as well. A person who has five or more of these has a diagnosable sex addiction.

1) A pattern of failing to resist recurrent, specific, impulsive, or excessive sexual behavior
2) Frequently engaging on the impulsive sexual behavior more & more often or for a longer period of time than intended.
3) Persistent desire and unsuccessful efforts to stop, reduce, or control these behaviors.
4) Excessive amount of time spent seeking and obtaining sex, engaging in sexual activity, or recovering from a sexual experience.
5) Preoccupation with the behavior or the preparation activities associated with it. (eg: a person whose addictive behavior involves prostitutes will often spend hours driving around looking – the preparatory activity – even if they resist the urge to satisfy their impulse.)
6) The excessive behavior begins to take time normally reserved for professional, academic, home and family, or social obligations.
7) Continuation of the behavior, in spite of the persistent or recurrent or increasing social, financial, professional, physical, or psychological consequences.
8) A need to increase the intensity, frequency, number or risk level of behaviors to achieve the desired result, because the desired effect has diminished with previous levels of use.
9) Avoiding or abandoning social, relational, occupational, or recreational activities to engage in the behavior.
10) Marked distress, anxiety, irritability if unable to engage in the behavior.

Now, you, and I both know that I just described most teenage boys we know. A really, um, chemically aroused person, might do any of these things at any one time. The difference between Johnny High School and an addict is that the addict's behavior, which is often inappropriate and excessive in the first place, becomes a compulsion and an obsession, increasing in intensity over time, resulting in marked disruption of normal life activities.

That's why sex addicts and/or their families end up in our offices. The addict's behavior has run a bowling ball through his or her life and the lives of those around them.

So – what to do if you have a sex addict on your hands, so to speak?

In my opinion, sex addiction typically requires some level of professional treatment. A good rule of thumb: if you suspect or know about someone else's excessive sexual behavior, it's gotten bad enough that it's no longer possible to keep it a secret. That's one sign that it's time for professional help.

In my opinion, addiction is an area of psychology that is specialized enough that clinicians not specifically trained in addiction should not be working with serious addictions. This applies to me, by the way. This is NOT my area of clinical expertise. I refer addiction cases in order to provide optimal care for the client – always a priority. Any good licensed mental health professional who specializes in sex addiction will do. Finding those people can be a little tricky.

The LCDC (licensed chemical dependency counselor) is the "addiction" license in Texas, but this is not a necessary credential for good treatment. AASECT is the credential for a sex therapy specialization, but this does not necessarily mean that the clinician is trained to treat sex addiction. So – look for someone who specializes in addiction – preferably sex addiction - or a therapist who is honest enough to refer you to a sex addiction specialist rather than taking a case he or she is not qualified to handle. Please note that an addict is *not* the FRIEND you send to the guy who helped your sister with her post-college career decisions. Sex addicts need to see addiction specialists, preferably someone who specializes and is trained in sex addiction. That's just a fact in the universe.

There are many levels of treatment for sex addiction. Outpatient treatment – meeting with a licensed mental health professional on a regular basis and working toward recovery - is sometimes enough. Individual therapy is often combined with group therapy and/or a group twelve-step program. Sex Addicts Anonymous (SAA), Sex and Love Addicts Anonymous (SLAA) are a couple of good ones. Some people, whose behavior is extreme or has gotten them into legal trouble, who have other addictions (this is quite common), or whose behavior is out of control, need inpatient treatment. There are many good treatment centers around the country. Your (FRIEND's) mental health professional should be able to make some recommendations.

Intensive Outpatient treatment is sometimes sufficient if a person can't pick up and leave their life for 30-90 days, or has an addiction that's escalating but reasonably under control. These are facilities that require daily attendance and participation in their addiction recovery program. It's not a program someone can drop in and out of. Like any other treatment form, IOP requires a commitment from addicts AND their families. Much of the therapy in IOP is after work hours. Family therapy is encouraged if not required. Ask your (FRIEND's) therapist about IOP facilities. A good clinician will help you find the right treatment for each clinical situation.

There are also a couple of good websites for information and support – helpful to addicts and their spouses. We recommend people check out sexhelp.com or gentlepath.com. Both are terrific resources and can get your FRIEND started on the road to recovery.

Sex addiction is a little-understood disorder that can damage every aspect of the addict's life, as well as the lives of those who love them and work with them. It's a serious disorder that deserves serious attention. I would strongly encourage your FRIEND to seek help. There's plenty of help out there.* And, like any addiction, sex addiction can be a manageable disorder. Recovery, though, requires honesty, commitment, self-discipline, vulnerability, and spiritual and emotional growth. Any addict who is truly in recovery practices these qualities every day, all day long. Not a bad habit to get into, whether you're struggling with addiction or not.

Please do not let a sex addiction go un-treated. Time and treatment are the only things standing between a sex addict and the disasters that go hand in hand with addictions.

Good luck to your FRIEND and keep me posted.

*If you are looking for a therapist who specializes in sex addiction and need a referral, please feel free to call The LifeWorks Group @214.357.4001 or email us at staff@wefixbrains.com. If we can't help you, we will find someone who can.

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.

Agreements: A California appellate court held that California Family Code § 1615, which creates a presumption that a spouse did not voluntarily execute a premarital agreement unless that spouse had at least seven calendar days to review the agreement and was advised to seek independent counsel, does not apply when the party against whom enforcement is sought "was represented by counsel from the outset of the transaction." *Caldwell-Faso v. Faso*, 191 Cal. App. 4th 945 (2011). Upon the appeal of a wife, who prior to marriage held substantial amounts of real estate, an Alabama appellate court reversed the trial court's holding that the parties' premarital agreement was invalid, finding sufficient consideration for the agreement and that the husband, a lawyer, entered into the agreement voluntarily. *Robinson v. Robinson*, -- So.3d --, 2010 WL 5030120 (Ala. Civ. App. 2010). A New York court of appeals affirmed an ex-wife's suit to vacate the parties' settlement agreement, holding the agreement unconscionable because it required the wife to pay child support even though she had residential custody of the children, allowed the husband to live in the martial residence indefinitely, and made the wife responsible for repaying $90,000 that the parties had borrowed from the wife's parents to buy the residence. *Libert v. Libert*, 78 A.D.3d 790, 911 N.Y.S.2d 133 (2010).

Dissipation: A New York trial court properly considered the husband's wasteful dissipation of assets for purposes of equitable distribution when the husband quit his job to compete with his employer, liquidated his 401(k) and borrowed money to fund his businesses, made unsecured loans to friends and business associates, traveled extensively and spent thousands of dollars on country club dues, restaurants, golf expenses, hotels, furnishings for his apartment and websites, yet failed to pay the mortgage on the marital home and court-ordered child support and maintenance. *Noble v. Noble*, 78 A.D.3d 1386, 911 N.Y.S.2d 252 (2010). A Connecticut trial court also properly considered a husband's dissipation of assets when distributing the parties' estate, commenting that "the conclusion I can reach is that this was a wilful attempt to spend every nickel you had so that the court had less to put its hands on" and that the husband had been "spending like a drunken sailor." The court chastised the husband for buying jewelry for his fiancée, spending $150,000 to furnish his house, and going on cruises. *Shaulson v. Shaulson*, 125 Conn. App. 734, 9 A.3d 782 (2010).

Government benefits: The Minnesota Supreme Court held a divorcing mother whose son had died in Iraq solely entitled to insurance proceeds received from the federal Servicemembers' Group Life Insurance program when the son had named his mother but not his father as beneficiary and Congress had spoken "with

force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Angell v. Angell*, 791 N.W.2d 530 (Minn. 2010). A Colorado appellate court held that Social Security benefits received by a wife for the benefit of her children from a former marriage, payable upon the death of her former husband, could not be included in the wife's income for alimony purposes on dissolution of the wife's second marriage because these Social Security benefits belonged to the children, not to the surviving parent who received them in behalf of the children. *Ross-Ooley v. Ooley*, -- P.3d --, 2010 WL 4492448 (Colo. App. 2010).

Imputation of income: An Indiana appellate court affirmed a trial court's imputation of income to an unemployed, full-time student father in the amount the father earned in his last job, rejecting the father's argument that "becoming a full time student is inherently work related" so that the father should not be considered unemployed or underemployed. *J.M. v. D.A.*, 935 N.E.2d 1235 (Ind. App. 2010). In a child support case brought by the state against a mother, a Florida appellate court reversed a trial court's imputation of income to the unknown father because there was "no evidence regarding the biological father's earnings or potential earnings," a result that required the mother to pay 100% of the child support due to the state rather than only part of it. *Department of Revenue v. Pipkin*, 48 So. 3d 1010 (Fla. App. 2010).

Life insurance: The Oregon Supreme Court held neither ex-wife nor girlfriend entitled to a summary judgment when both claimed the proceeds of the decedent's life insurance naming the girlfriend as beneficiary even though the divorce decree required that the decedent name his ex-wife as beneficiary for the benefit of their child, reasoning that there was some evidence that the girlfriend had paid valuable consideration in exchange for being named as beneficiary of the policy. *Tupper v. Roan*, 349 Ore. 211, 243 P.3d 50 (2010). A Wisconsin federal court held a decedent's girlfriend, rather than his ex-wife for the benefit of his children, entitled to the interpleaded proceeds of a life insurance policy when the divorce decree required then-existing life insurance policies to be made payable to the ex-wife but the decedent purchased the policy post-divorce. *Reliastar Life Ins. Co. v. Keddell*, 2011 WL 111733 (U.S.D.C. E.D. Wis. 2011).

Res judicata/estoppel: A California appellate court refused to apply res judicata to dismiss a post-divorce tort action based on domestic violence during the marriage, even though the divorce court had considered domestic violence for purposes of setting spousal support, because "a request for spousal support in a marital dissolution proceeding is not based on the same primary right as a tort action based on domestic violence." *Boblitt v. Boblitt*, 190 Cal. App. 4th 603, 118 Cal. Rptr. 3d 788 (2010). The Third Circuit affirmed a bankruptcy court's conclusion that a wife was not judicially estopped from filing a $398,950.39 proof of claim, based on an equitable distribution award in the parties' divorce, in her ex-husband's bankruptcy, as against her ex-husband's argument that the wife had tried to hide the award from creditors in her own, prior bankruptcy by describing it in only in general terms. *In re: Kane*, 628 F.3d 631 (3d Cir. 2010).

The Mafia: According to a Massachusetts appellate court, a trial court did not err by awarding a husband approximately 90% of the marital estate when the unhappy wife asked an Italian-surnamed coworker if her husband could "take care of a problem" for the wife, later got her husband drunk so that he fell off a boat and suffered severe injuries, then asked a cousin whether he knew someone in the Mafia who could make her husband "disappear," and finally was convicted and served time for solicitation to commit murder. *Wolcott v. Wolcott*, 78 Mass. App. Ct. 539, 939 N.E.2d 1180 (2011).

columns

HOW QUALIFIED IS QUALIFIED?
by John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Ms. Smith, dad's lawyer in a child custody case involving sexual abuse allegations against him, sat down to prepare her cross-examination of the psychologist and his evaluation. Quickly, she assumed that the court would find the psychologist's doctoral level training and board certification sufficient to qualify him as an expert under Rule 702 of the Texas Rules of Evidence.

But Ms. Smith was troubled. After reviewing her case with her consulting expert, Ms. Smith saw that she would need to ask sharper questions about the psychologist's qualifications. Noting the evaluation's methods, statements in the report, and conclusions, Ms. Smith and her consultant suspected that the psychologist's qualifications and experiences did not fit the subject matter of his planned testimony.

How qualified is qualified? Ms. Smith understood that Texas courts do not offer a bright-line test to address the question. Like other evidentiary inquiries, an appellate court will review the trial judge's acceptance of a witness's qualifications only for a clear abuse of discretion— "whether the trial court acted without reference to any guiding rules or principles." *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). So to organize her thinking about expert qualifications and to clarify the issue to the court, Ms. Smith's consulting expert suggested she invoke three sources: Texas caselaw, regulations from the Texas psychology licensing board, and professional ethics codes and professional guidelines.

The first source, Texas caselaw, offers guidelines to address questions about whether experts are qualified to testify about specific issues before the court. In an important Texas Supreme Court case, the Court held that "the expert's expertise goes to the very matter on which he or she is to give an opinion." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). The focus is on the "fit" between the subject matter at issue and the expert's competence to testify about the matter. *Id.* A key example of the Court's holding: a medical doctor is not automatically an expert in every medical issue merely because he or she holds a medical school degree or has achieved certification in a medical specialty. *Id.* (read "psychology" for "medical"). But the Court also noted that the holding does not mean that only a neurosurgeon can testify about the cause of death from a brain injury, or even that an emergency room physician could never so testify *Id.* The trial court's primary concern is that the expert's opinion about the specific issue is reliable and relevant—more likely if the "fit" is established. *Id.*

The second source Ms. Smith should use to organize her thinking about expert qualifications and to clarify the issue at trial is the Texas State Board of Examiners of Psychologist's *Rules and Regulations*. Several provisions, which the Board may use to discipline psychologists who violate them, echo Texas caselaw's expert testimony "fit" requirements. For example, "Licensees provide only services for which they have the education, skills, and training to perform competently." Also, "Licensees who engage in forensic services must

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

have demonstrated appropriate knowledge of and competence in all underlying areas of psychology about which they provide such services."

The third source at Ms. Smith's disposal to address expert qualifications lies in the American Psychological Association's (APA) *Ethical Principles of Psychologists and Code of Conduct* (Ethics Code) as well as in professional forensic guidelines. APA's Ethics Code reads that "psychologists provide services … only within the boundaries of their competence, based on their education, training, supervised experience, consultation, study, or professional experience." Further, APA's *Guidelines for Child Custody Evaluations in Family Law Proceedings* state that "psychologists strive to gain and maintain specialized competence" when conducting child custody evaluations. And APA Division 41's *Specialty Guidelines for Forensic Psychologists* states that "forensic psychologists provide services only in areas of psychology in which they have specialized knowledge, skill, experience, and education."

Trial courts will more likely highlight the "fit" requirement in a particular discipline the more specialized the subject matter of the testimony. For example, trial courts will likely qualify a clinical child psychologist who, based on reliable methods, offers an opinion about whether a child is experiencing debilitating anxiety—diagnostic methods underlying this opinion are skills most clinical child psychologists have the expertise to apply and interpret. But courts should not qualify a child psychologist to offer an opinion about whether evaluation data in the case is sufficient to support an allegation that a child was sexually abused if the psychologist, even if board certified, lacks adequate skill, training, or experience with abuse cases or knowledge of the professional literature in that area.

If Ms. Smith can show that the psychologist's qualifications and experiences did not "fit" the subject matter of his planned testimony (sexual abuse allegations in a child custody case), she may use the three source structure to support her argument to the court that absent "fit," an expert opinion is "mere speculation" that cannot "assist the trier of fact"—a matter of relevance addressed by Texas Rule of Evidence 702 as well as by Rules 401 and 402.

PLANNING FOR RETIREMENT— WOMAN FACE UNIQUE CHALLENGES

by Christy Adamcik Gammill, CDFA[1]

Men and women may have been created equal. However, when it comes to retirement security, women typically find themselves at a disadvantage. In planning for retirement, women face a variety of unique challenges and obstacles:

- **Women earn less money over their lifetime.** On average, a woman earns 80 percent of what a man earns in the same job.[1] Women are also more likely to leave the workforce to care for young children or aging parents, and will work an average of 12 years less than men over their lifetimes due to caregiving responsibilities.[2] With less income, women already have less money to invest, but in leaving the work force, they also have less time to contribute to employer-sponsored retirement plans or benefit from the employee match provided by many of those plans.
- **Women live longer.** More than two-thirds of Americans age 85 or older are women, and more than three quarters of all American women age 65 are expected to live to age 80; approximately 40 percent of them will live to age 90.[3] Greater longevity means that women have to plan for living expenses, and the impact of inflation, and the potentiality of increased medical expenses.

[1] This article is provided by Christy Adamcik Gammill, CDFA. Christy Adamcik Gammill offers securities and investment advisory services through AXA Advisors, LLC (member FINRA, SIPC) 12377 Merit Drive, #1500, Dallas, Texas 75251 or 972-455-9021 GE 51937 (10/09). She offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC and its subsidiaries.

- **Women are conservative investors.** According to a July 2009 research study by Hewitt Associates, women are less aggressive than men when investing in their 401(k) plans. Women also save 8 percent less money in 401(k) plans than men.[4] This means that woman, if they invest conservatively over their lifetimes, will likely receive a lower rate of return on their retirement dollars.
- **Women will likely face retirement alone.** Roughly 40 percent of marriages end in divorce,[5] and nearly 60 percent of older American women are single, including more than 42 percent who are widowed.[6] When widowed, some benefit payments may be reduced. As an example, if you become a widow, you will probably receive less Social Security. Generally, both spouses receive a Social Security benefit as a married couple, but the surviving widow will receive only the larger benefit payment. Pension benefits may also be reduced, often by half, or payments may stop entirely.

Addressing Women's Unique Retirement Needs

To address these issues, many women may need to consider saving more, investing less conservatively and, perhaps, working a little longer. There are several steps women can take to build a roadmap to a more independent retirement future.

Take control of your finances now. Since women are likely to live alone in retirement, get involved with your family finances early. Save or invest in your own name. Become comfortable making personal monetary and investment decisions. Establish credit in your own name. Balance the family checkbook, write the checks and pay the bills yourself. Know what your family owns and owes.

Plan ahead. To improve your retirement future, you have to know where you're going. Your retirement plan should begin with the basics – net worth, income and expenses. Determine when you want to retire, how much you will need to live in retirement, how much time your investments have to grow, and how much you can afford to save. Analyzing these factors will help you determine how long your assets could potentially last at various rates of return, inflation and spending.

Save and Invest. Defined contribution plans, such as 401(k) plans, offer you a way to defer compensation for your retirement. Save as much as you can in the plan, ideally at least as much as your employer is willing to match. The maximum deferral contribution for 401(k) plans is $16,500 for 2010.

If you are over 50 and can afford to, you can make a catch-up contribution of an additional $5,500 before tax. Individual Retirement Accounts are another option which will allow you to put away $5,000, pre-tax in 2010, and if you are 50 or older, you can put away up to $6,000 this year, paying taxes only when the money is withdrawn.

If your financial professional deems it appropriate, consider investing in an annuity. Annuities are insurance products that can help provide income during retirement. You purchase an annuity by investing a sum of money, either all at once or over a period of time. In return, the insurance company agrees to provide you with a steady income beginning at an established date in the future and usually until the time of your death.

Diversify. Some women may possibly need to be less conservative in their investing to help increase their retirement savings. When deciding what investment options to consider with the help of your financial professional, be sure to first assess your risk tolerance. If you have a higher risk tolerance and are starting to invest when you are younger, consider an investing strategy that is fairly aggressive. This gives you the opportunity for greater gains. As you get older and if your risk tolerance changes, you can switch to more conservative options as retirement draws near. Whatever your time horizon or risk tolerance, diversification should be considered throughout the entire investing process. A diversified asset allocation can help you manage risk. It does not, however, assure a profit or provide against loss in declining markets.

Consider working longer. If you're near retirement, rethink when you retire. Delaying retirement may help you save more to offset market losses. For someone who has been looking forward to retirement, it may not

be what you planned on, but working longer, even just another year or two, is probably the best way to accumulate additional retirement savings. This will also allow you to hold off on retirement account withdrawals. The longer you can let retirement accounts accumulate and, hopefully, grow, the better off you'll be. You will, however, need to begin taking distributions eventually. The law specifies that you generally must begin taking Required Minimum Distributions (RMD) as of April 1 of the year after you reach age 70 1/2. You will likely need the help of your tax advisor to determine the exact amount of these required distributions, which are based on your life expectancy and, in some cases, those of your beneficiaries.

Enlist the help of a financial professional. A financial professional can help you assess your current situation, identify your goals, risk tolerance, income sources and work with you to develop a personalized retirement strategy. Research shows that women who use financial professionals are more focused on their financial situations and retirement. According to the 2009 AXA Equitable Market Volatility survey, more than seven in ten (71%) women with financial professionals considered preserving assets for retirement significantly more important following market volatility, compared to just 60 percent of women without financial professionals.

When it comes to saving for retirement, time is of the essence. The longer your investment horizon, the more time your money has to work for you. Contact your financial professional today to arrange a meeting to assess your situation. Planning and preparation can help women overcome obstacles for a financially healthy retirement.

This article is for informational purposes only. This is not investment advice. Investments are subject to market risk, will fluctuate and may lose value. Please be advised that this document is not intended as legal or tax advice.

1) U.S. Bureau of Labor, Highlights of Women's Earnings in 2008, 2009
2) Americans For Secure Retirement, "The Female Factor 2008."
3) Society of Actuaries Annuity 2000 Tables
4) National Center for Policy Analysis; *Women in the Economy,* July 2008.
5) CDC Fast Stats, Divorce www.cdc.gov/nchs/fastats/divorce, 2004

U.S. Bureau of the Census, "A Profile of Older Americans: 2008"

TEXAS FORUM XXVII

By Misti Janes[2]

I had the pleasure of attending the Texas Forum XXVII on February 25, 2011 in Dallas, Texas. The Texas Forum is sponsored each year by the Standing Committee on Paralegals. The first Texas Forum was held in 1982 for the purpose of gathering attorneys, paralegals, educator, and paralegal mangers together to discuss paralegal utilization best practices and professional development practices.

This year the Forum was a two-panel discussion offering 3 hours of CLE, including 2.25 of ethics. The First Panel was "Does Social Media Demand Legal Ethics?" The panel consisted of Vista Lyons from Ford Harrison, L.L.P.; Gene Major, who is the Director of Advertising Review for the State Bar of Texas; Sheila Sheley from Sheley Marketing, L.L.C.; and Amy Stewart of Amy Stewart Law serving as moderator.

This panel discussed the implications involved in using social media and networking in a legal setting, such as "friending" an adverse witness in an investigation. The consensus is no, it is not ethical to "friend" the

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witness. While we would love to friend that cheating husband to find out what he has been up to, we should refrain.

What about the use of cell phones in public places for client communications? We all need to be reminded that others around us can hear what we are saying on our cell phones. We often feel that our conversation is private, but we could be disclosing confidential client information without even realizing it.

Blogging is a hot trend right now with 61% of top firms now blogging. Blogging can be a great marketing tool, but to be effective do not let your blog take the place of your website. Keep your blog purely educational. As with any type of marketing or advertisement, a blog needs to adhere to Rule 707 of the Texas Disciplinary Rules of Professional Conduct. A blog can be a great education tool, just be careful that it does not violate Rule 707. If you have any doubt, you can always submit the content to the Director of Advertising Review for the State Bar of Texas for pre-approval.

The second panel was "Do You Know When You've Crossed the Line?" This panel consisted of Maura I. Brady, Senior Counsel, Ethics and Compliance from JCPenney; Allen Mihecoby, Paralegal for Burlington Northern; Ellen Pitluck, Ethics Attorney, Chief Disciplinary Counsel's Office for the State Bar of Texas' and Earl Harcrow from the Law office of Earl Harcrow serving as moderator.

This panel examined the ethical responsibilities that attorneys and paralegals owe to each other and must maintain when interacting with clients. Whose responsibility is it to train paralegals about ethics? Since the attorney is the one who could ultimately lose the license to practice law, then you could say that it would be the attorney's responsibility. The Paralegal Division is currently in the process of developing tools to help support staff to become better educated about their ethical obligations.

What if you are a paralegal and you are working for an attorney who is overstepping the boundaries and needs to be reported to the State Bar? Even though the State of Texas is very big and there are approximately 88,000 licensed attorneys, the legal community is very tight knit. If you are taken down by an unethical attorney, you will forever be branded as the paralegal of an unethical attorney. It is better to have to find a new job than to have a tarnished reputation as an unethical paralegal.

What if you work with or know of an attorney that is unfit to practice law, usually for issues such as mental illness, extreme stress, or substance abuse? There is a hotline number, (800) 343-8527, and an informative DVD on that subject.

The keynote address was delivered by Kari Wangensteein, Senior Director of Legal for Best Buy. Ms. Wangensteein spoke on "Embracing Transparency—The Business and Legal Impact of Social Media." As you could imagine, since Best Buy's business is technology, Best Buy is in the forefront of social media and allows its employees to have a voice. Best Buy's opinion is do not ban what you cannot control. She suggested that everyone should have a social media policy in place just to avoid problems in the future. You can get help with setting up a social mediation policy at socialmediagovernance.com.

This year was a great Texas Forum, and I look forward to seeing what they have to offer in the future.

articles

REQUIREMENTS FOR RELEASE OF THE DEPENDENCY EXEMPTION UNDER THE NEW IRS REGULATIONS

By
Jim Wingate and Dawn Fowler[3]

Introduction

Internal Revenue Code ("IRC") § 151(c) allows the deduction of a personal exemption amount on a federal income tax return for each dependent of a taxpayer, including a child of the taxpayer. Usually, a child of divorced parents can be claimed as a dependent only by the parent having custody for the greater portion of the year (i.e., the "custodial parent").[4] The custodial parent can, however, release the claim for the exemption to the noncustodial parent by means of an unconditional written declaration releasing the exemption to the noncustodial parent.[5] These requirements have recently been changed by the replacement of prior temporary Treasury regulations with permanent regulations in 2008.[6] In certain circumstances, the prior temporary regulations remain in effect, resulting in a dual system of requirements for the custodial parent relinquishing the right to claim a dependency exemption for dependent child. This article provides a summary of the requirements under both sets of regulations, and an explanation for the change in the regulations.[7]

Written Declarations Executed before July 3, 2008

In those instances in which a custodial parent signed a written release of the dependency exemption in a taxable year beginning before July 3, 2008, the release remains effective if it meets the requirements for the form of a written declaration under the prior temporary regulations.[8] The prior temporary regulations permitted the use of a signed statement that conformed to the substance of Form 8332, and this was interpreted by the Tax Court as including a decree of divorce if the decree met certain requirements.[9] The requirements are that 1) the release of the exemption may not be conditional, e.g., conditioned upon payment of child support; 2) the custodial spouse must have signed the decree of divorce or separation agreement, and 3) the decree or separation agreement must provide the information required by Form 8332.[10]

Thus, an agreed decree of divorce that otherwise meets the requirements established by the Tax Court can constitute a conforming release, but a decree that is signed by the Court and confirmed by the attorneys

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[4] Title 26 IRC, § 152(e)(1) and (4). For ease of reference, all citations to statutes in Title 26 will in the remainder of this article be denominated as "IRC" sections.

[5] IRC § 152(e)(2). The provisions of IRC § 152(e)(2) apply regardless of whether the parents were ever married. *See King v. Comm'r*, 121 T.C. 245, 250 – 251 (2003).

[6] Regs. § 1.152-4.

[7] The discussion in this article assumes that the child meets the requirements for being a dependent under IRC § 151(c).

[8] 26 C.F.R. § 1.152-4(e)(5). For ease of reference, future references in this article to the Code of Federal Regulations will simply be cited as "Regs." followed by the applicable section number.

[9] *Miller v. Comm'r*, 114 U. S.T.C. 184, 190 (2000) (aff'd on other grounds *sub nom. Lovejoy v. Comm'r*); Regs. § 1.152-4T(a), Q&A-3. Copies of all cases cited in this article may be obtained from the Tax Court's searchable case database, which can be found at http://www.ustaxcourt.gov/UstcInOp/asp/HistoricOptions.asp (as of February 26, 2011).

[10] *Miller*, 114 U.S.T.C. at 190; *Thomas v. Comm'r*, T. C. Memo 2010-11(at p. 8 on the Tax Court's PDF publication of this case on its website).

only as to form would never qualify.[11] The noncustodial parent must attach a signed Form 8332 or other conforming document to each tax return in which he or she claims the dependency exemption.[12]

Written Declarations Executed after July 3, 2008

Since the permanent regulations are effective for taxable years beginning after July 2, 2008, any release executed since that date must conform to the new permanent regulations.[13] For calendar year taxpayers, which most likely includes nearly all individual taxpayers, any release executed after December 31, 2008 must be accomplished using either Form 8332 or a document that is executed "for the sole purpose of serving as a written declaration" under IRC §152(e)(2), that conforms to the substance of Form 8332, and that is not conditional.[14] The permanent regulations specifically exclude decrees of divorce and separation agreements from qualifying as a written declaration.[15]

Determining the Custodial Parent

Determining the custodial parent can be problematic in this age of true shared parenting time. For purposes of IRC §152 (e), the custodial parent is defined as a parent who has custody for the greater portion of the year.[16] However, there is a tie-breaking rule that, if the child resides for an equal number of nights with each parent, the parent with the highest adjusted gross income is treated as the custodial parent.[17] Typically, this will be the father.

Revocation of a Release

A custodial parent may revoke a release of the dependency exemption by providing a written notice of the revocation to the other parent.[18] However, a written notice revoking the release of the exemption can be effective "no earlier than the taxable year that begins in the first calendar year after the calendar year in which the parent revoking the written declaration provides, or makes reasonable efforts to provide, the written notice" to the other (noncustodial) parent.[19] In other words, a revocation of the release cannot be effective until the year after attempts are made to provide it to the noncustodial spouse. A revocation of the release can either be on Form 8332 or other written declaration that conforms to the substance of that form, and it must be "executed for the sole purpose of serving as a revocation."[20] A written declaration that indicates it is to apply to all future years is treated as applying to "the first taxable year after the taxable year revocation is executed" and all subsequent years. *Id.*

Expiration of a Release

A release signed by a custodial parent is no longer effective once the parties' child turns eighteen years of age. This is because a child is not considered to be in possession of either parent after reaching the age of majority.[21]

Effect of the Release of the Exemption on Head of Household Status and Child-Related Credits

In addition to the dependency exemption, there are six other commonly used tax benefits available to taxpayers with children if they meet the statutory requirements: a) the child and dependent care tax credit; b) the child tax credit; c) the earned income credit; d) the American opportunity credit; e) the lifetime learning credit; and f) head of household filing status. Each benefit has separate criteria to determine a taxpayer's eligibility to claim the benefit with respect to any given child. These criteria include, *inter alia*, the taxpayer's rela-

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[11] *See Miller*, 114 U. S.T.C. at 190.
[12] Regs. § 1.152-4(e)(2).
[13] Regs. § 1.152-4(h).
[14] Regs. §1.152-4(e)(ii).
[15] *Id*.
[16] IRC § 152(e)(1) and (4).
[17] Regs. § 1.152-4(a).
[18] Regs. § 1.152-4(e)(3)(i).
[19] *Id*.
[20] Regs. § 1.152-4(e)(3)(ii).
[21] Regs. § 1.154-4(d)(1); *see also Thomas*, T. C. Memo 2010-11 (at p. 12 on the Tax Court's PDF publication of this case on its website).

tionship to the child, the child's age, and whether the child is claimed as a dependent of the taxpayer.[22] Release of the dependency exemption to the noncustodial spouse does not necessarily result in the release of the foregoing credits. The release of the dependency exemption by the custodial parent results in the following credits also being "released" to the noncustodial parent:

- the child tax credit[23];
- the American opportunity credit;[24] and
- the lifetime learning credit.[25]

However, the following credits remain available to the custodial parent (and unavailable to the noncustodial parent) in spite of the signing of a release:

- the child and dependent care credit;[26] and
- the earned income credit.[27]

Head-of-household status is also retained by the custodial parent.[28]

Medical Care Expenses of Dependents

For purposes of claiming a deduction for medical care expenses, a child is treated as a dependent of both parents if IRC § 152(e) applies.[29] Therefore, it does not matter which parent is entitled to claim the dependency exemption. The IRS will also treat a child as the dependent of both parents for certain employer reimbursements of expenses for medical care of the employee's child, contributions to an accident or health plan for the benefit of the employee's child, Health Savings Accounts to pay medical expenses of the taxpayer's child, and other similar expenses regardless of whether the custodial parent releases the dependency exemption if the following conditions are met: 1) the taxpayers are divorced or legally separated under a written agreement or have lived apart for the last six months of the calendar year; and 2) their child receives over one-half of his/her support from the parents, is in the custody of one or both parents for more than one-half of the calendar year, and qualifies under § 152(c) as a qualifying child. See Rev. Proc. 2008-48, http://www.irs.gov/irb/2008-36_IRB/ar08.html (as of February 26, 2011).

History of the Release of the Exemption

In order to understand the significance of the permanent regulations published in 2008, it is necessary to understand the problems they were meant to address. Prior to amendment by the Deficit Reduction Act of

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[22] IRS Publication 503 discusses the child and dependent care credit and outlines the requirements for claiming this credit. Similar information is provided in IRS Publication 972 with respect to the child tax credit; Publication 17 (2010), Chapter 36, with respect to the earned income credit; and IRS Publication 970 with respect to both the American opportunity credit and the lifetime learning credit. Links to all of the foregoing IRS publications can be found on the IRS's searchable webpage at http://www.irs.gov/publications (as of February 26, 2011).

[23] IRC § 24(a) specifies that the child tax credit is available only "with respect to each qualifying child of the taxpayer for which the taxpayer is allowed a deduction under section 151." IRC § 151(c) is the subsection that allows a dependency exemption to be claimed against taxable income.

[24] IRC § 25A (f) defines the term "qualified tuition and related expenses" as applying to tuition and fees of the taxpayer, the taxpayer's spouse or any dependent of the taxpayer for whom the taxpayer is allowed a dependency exemption under IRC § 151. This definition applies to both the American opportunity credit and the lifetime learning credit.

[25] IRC § 25A (f) defines the term "qualified tuition and related expenses" as applying to tuition and fees of the taxpayer, the taxpayer's spouse or any dependent of the taxpayer for whom the taxpayer is allowed a dependency exemption under IRC § 151. This definition applies to both the American opportunity credit and the lifetime learning credit.

[26] IRC § 21(e)(5) specifically limits the availability of the child and dependent care credit to the custodial parent regardless of any release of the dependency exemption to the noncustodial parent.

[27] IRC § 32(c)(3). For purposes of the earned income credit, a qualifying child of a parent is limited to those children who have "the same principal place of abode as the taxpayer for more than one-half of" the taxable year. *Id*. Thus, the noncustodial parent will never qualify for this credit, and the custodial parent, by virtue of his or her status as a custodial parent, will always qualify.

[28] To file as head of household with respect to a son or daughter, a parent must maintain "as his home a household which constitutes for more than one-half of such taxable year the principal place of abode" of that son or daughter. IRC § 2(b)(1). Thus, head-of-household status is available only to the custodial parent.

[29] IRC § 213(d)(5).

1984 (P. L. 98-369, hereafter the "DRA"), the noncustodial parent was allowed to claim the dependency exemption for his or her child if "the decree of divorce or separate maintenance, or a written agreement between the parents applicable to the taxable year beginning in such calendar year" provides that the noncustodial parent is entitled to the exemption, and the noncustodial parent provides at least $600 of support for the child during the year.[30] However, in the absence of a provision in the decree, the noncustodial parent could still claim the benefit of the dependency exemption if the noncustodial parent provided more support for the child than the custodial parent.[31]

As a result of the test of who provided a greater amount of support, the Service frequently became embroiled in disputes between ex-spouses regarding competing claims to dependency exemptions that were based upon the respective levels of support provided by each parent.[32] The cost to the Government for these disputes was relatively high, but with very little revenue at stake for the Government.[33] In order to give clarity to the law, the DRA revised § 152(e) to limit the deduction to the custodial parent unless he or she releases it to the other parent.[34]

In an attempt to reduce this litigation burden, the DRA amended § 152(e)(2) to provide that, for decrees entered or separation agreements signed after 1984, as between the custodial and noncustodial parents, the custodial parent will always receive the benefit of the dependency exemption unless he or she releases it to the noncustodial parent. Thus, the amended statute completely eliminated all disputes regarding who contributed the most for the support of the dependent child. Amended IRC § 152(e) left in place the exception for decrees and separation agreements entered or signed prior to 1985 that awarded the dependency exemption to the noncustodial parent.[35]

Although Congress and the Service believed in 1985 that they had eliminated the cause of many contentious Tax Court cases and IRS audits involving competing claims to dependency exemptions, former spouses simply moved to a new battleground. Instead of battling over who had paid the most towards support for the child, they now fought over the failure of the custodial parent to execute Form 8332. It seems that the IRS made one small mistake in its drafting of the temporary regulations under section 1.152(e) – the temporary regulations allowed the use of a written declaration other than on Form 8332 so long as it conformed to the substance of that form.[36] This exception was the undoing of the Services' attempts to reduce Tax Court litigation regarding disputes arising from competing claims to dependency exemptions. As noted above, the Tax Court read this provision of the temporary regulations as permitting the use of a written separation agreement or decree of divorce as a substitute for Form 8332 so long as it contained the information required by that form and was not a conditional release of the exemption. When custodial parents failed to execute this Form 8332, the noncustodial parents frequently relied upon provisions contained in their decrees of divorce that either required the custodial parent to sign Form 8332 or that specifically allocated the dependency exemption to the noncustodial parent.

Frequently, the decrees of divorce that were relied upon by noncustodial parents conditioned the release of the exemption upon the payment of child support. The Tax Court has consistently held that any requirement in a decree of divorce that the release of the exemption is conditioned upon payment of child support results in the decree not qualifying as a written declaration that releases the exemption. For example, in *Clinton*, the decree of divorce, which was signed by both parties, provided that the release of the dependency exemption to the husband was contingent upon his making all child support payments prior to December 31 of

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[30] IRC § 1.152(e)(2)(A).
[31] IRC § 152(e)(2)(B) (1954).
[32] *See* Joint Committee on Taxation, *General Explanation of The Revenue Provisions of the Deficit Reduction Act of 1984* (HR 4170, 98th Congress; Public Law 98-369), at 717 – 718.
[33] *Id*.
[34] *Id*.
[35] IRC § 152(e)(4).
[36] Regs. § 152-4T (Q&A-3).

the tax year.[37] A few years after the entry of the decree, the ex-wife refused to sign Form 8332, alleging that her former husband had not timely paid all child support. Mr. Clinton filed a petition in state court, and obtained a ruling that he had satisfied his child support obligations and that he was entitled to the dependency exemptions for the applicable years. In spite of this ruling, the former wife would still not execute a Form 8332.

Mr. Clinton reported his children as dependents in his tax return, and the exemptions were disallowed by the IRS. He then filed a claim with the Tax Court. The Tax Court held that because the release that was contained in the decree of divorce was conditioned upon the payment of child support, and because the ex-husband had not attached to his tax return a copy of the state court finding that he was current on his child support, the decree by itself could not qualify as a written declaration of the release of the dependency exemptions.[38] Therefore, because there was neither an executed Form 8332 nor a qualifying decree of divorce, Mr. Clinton was not entitled to claim his children as dependents.

Conclusion

Beginning with decrees entered after taxable years beginning after July 2, 2008 (i.e., beginning after calendar year 2008 for nearly all taxpayers), noncustodial parents can no longer rely upon their divorce decrees to support a claim of a dependency exemption in their tax returns. Instead, based on the new permanent regulations, they can rely only on Form 8332 or other written declaration that is executed solely for the purpose of releasing the dependency exemption to the noncustodial parent. Regardless of whether the declaration of the release of the exemption is accomplished with a Form 8332 or with a written declaration that conforms to the substance of that form, the declaration must comply with the following requirements:

a. It must be unconditional. The declaration may no longer state that it is conditional upon the meeting of an obligation, such as payment of child support or the maintenance of life insurance for the benefit of the child.

b. It must state the year or years for which it is effective. "All future years" is treated as applying to the first taxable year after the year in which the release is signed and all subsequent years.[39]

c. The declaration must be attached to the noncustodial parent's tax return for every year in which the parent is relying upon such declaration.

We recommend that:

- The noncustodial parent obtain a signed release prior to the entry of an agreed decree of divorce;
- The custodial parent be ordered not to revoke any release of the exemption; and
- The attorney for the noncustodial parent warn his client that the custodial parent can revoke the release of the exemption simply by providing notice to the other parent.

Since tax laws are frequently revised either by statute or regulation, it is advisable to have your client consult with a CPA, tax attorney or other qualified tax advisor regarding the effects of the release of a dependency exemption to a noncustodial attorney.

One final note: If there is a post-divorce dispute regarding the release of a dependency exemption, it is important to keep in mind that the statute of limitations with respect to amending any federal income tax return is normally three years. Therefore, any district court action to enforce the release of a dependency exemption would have to be completed before the expiration of that limitations period. We recommend that the noncustodial parent obtain a signed release prior to the entry of an

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[37] *Clinton v. Comm'r*, T. C. Summary Opinion 2010-75.
[38] The state court order was not entered until two years after the ex-husband filed his tax return.
[39] Regs. § 1.152-4(e)(1)(i).

agreed decree of divorce. Additionally, attorneys should perhaps warn their clients that, under the IRS regulations, the custodial spouse may revoke his or her release of the exemption by providing written notice to the other parent.

TO INFINITY, AND BEYOND THE GUIDELINES: CHILD SUPPORT CASES EVERY SPACE RANGER SHOULD KNOW

By Michael D. Wysocki[40]

This article highlights several important child support issues that have been addressed by the Texas Supreme Court and various intermediate appellate courts, with the hope that these cases will help you bulk up net resources and buzz lightyears beyond the guidelines.

Child Support

The purpose of child support is to help a custodial parent maintain an adequate standard of living for a child.[41] A parent's child support obligation is not limited to that parent's ability to pay from current earnings, rather it extends to his or her financial ability to pay from any and all available sources.[42]

Net Resources

When looking for ways to maximize net resources, start with Texas Family Code Section 154.062. The code provides a list of approximately twenty-six sources of income to consider when determining an obligor's net resources. To expand net resources, Texas courts have given us some sources of income that are not specifically included in the statute, but that may be included in an obligor's net resources.

Inheritance – Can funds received from inheritance be included in net resources? The Dallas Court of Appeals recently addressed the inclusion of an inheritance in the net resources of an obligor for the purposes of calculating child support.[43] Although the trial court concluded that a cash inheritance received by the obligor of about $400,000 was not included in the statutory definition of "net resources" for the purpose of setting his child support obligation, the Dallas Court of Appeals reversed the trial court. The appellate court concluded that a cash inheritance from a third party paid to the obligor of child support is a "resource" under the inclusive language of Family Code Section 154.062(b)(5).

Personal Injury Award – Can a one-time personal injury settlement award be considered in determining net resources? Yes. The First Court of Appeals recently upheld a trial court's consideration of a personal injury settlement in determining net resources available for child support.[44]

Alimony – Can a reduction in alimony being paid lead to an increase in child support? Possibly.[45] In *Thomas v. Thomas*, the trial found that the obligee's income had decreased nearly 88% due to termination of alimony and that the children's proven needs were significant. The court increased the obligor's child support from $1,250 to $3,000 per month. The court of appeals affirmed.

Tax Credits – Can a court include tax credits, like depreciation, in determining net resources? The Fort Worth Court of Appeals added the depreciation taken in prior years back into the obligor's gross income to determine his gross income for the purpose of calculating child support.[46]

Unemployment/Underemployment

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[41] *Farish v. Farish*, 982 S.W.2d 623, 627 (Tex. App.-Houston [1st Dist.] 1998, no pet.).
[42] *McLane v. McLane*, 263 S.W.3d 358 (Tex. App.-Houston [1st Dist.] 2008, pet. denied).
[43] *In re P.C.S.*, -- S.W.3d --, 2010 WL 3171767 (Tex. App.—Dallas 2010, pet. filed).
[44] *Smith v. Hawkins*, -- S.W.3d --, 2010 WL 3718546 (Tex. App.—Houston [1st Dist.] 2010) (memo. opinion).
[45] *Thomas v. Thomas*, 895 S.W.2d 895, 897-98 (Tex. App.—Waco 1995, writ denied).
[46] *Laprade v. Laprade*, 784 S.W.2d 490, 493 (Tex. App.—Fort Worth 1990, writ denied).

When the income being earned by an obligor, or lack thereof, is significantly less than the obligor's earning capacity, always question whether that parent is intentionally unemployed or underemployed. Courts may impute income to an obligor based on the obligor's earning potential, however, the unemployment or underemployment must be intentional.[47] Some courts have held that in addition to being intentional, the court must also determine whether unemployment or underemployment is maintained for the purpose of decreasing resources available for child support,[48] while other courts have declined to recognize such a requirement.[49]

> **Incarceration** – Can acts that led to incarceration be considered intentional acts that lead to unemployment? Several appellate courts seem to say - yes.[50] In *Slaughter v. Slaughter*, the trial court refused to reduce the obligor's child support, finding that the acts which landed him in prison were intentional and that he had other assets of minimal value from which support could be paid if necessary. The court of appeals found no abuse of discretion.
>
> **Retirement** – Can retirement be a form of intentional unemployment? Again, several appellate courts seem to say – yes.[51] In both *Smith* and *S.B.C.*, the obligors had elected to retire from the military, remain unemployed, and had skills to obtain employment. The appellate courts found that the obligor's were capable of obtaining employment and denied their requests for reduced child support obligations.

A brief review of the case law available on intentional unemployment and underemployment shows that courts often impute income base on intentional unemployment or underemployment, and that appellate courts rarely find such to be an abuse of discretion. Most often, evidence of intentional unemployment or underemployment can be shown by the obligor's earning in the past. Accountants are not limited to tracing – they can testify concerning earning capacity of an obligor within a specific field. The United States Department of Labor publishes average earning information for nearly every occupation in existence. The information can be found online at www.bls.gov/oes/current/oes_tx.htm.

Deemed Income

Deemed Income is a term defined in Texas Family Code Section 154.067:

> Deemed Income
>
> (a) When appropriate, in order to determine the net resources available for child support, the court may assign a reasonable amount of deemed income attributable to assets that do not currently produce income. The court shall also consider whether certain property that is not producing income can be liquidated without an unreasonable financial sacrifice because of cyclical or other market conditions. If there is no effective market for the property, the carrying costs of such an investment, including property taxes and note payments, shall be offset against the income attributed to the property.
>
> (b) The court may assign a reasonable amount of deemed income to income-producing assets that a party has voluntarily transferred or on which earnings have intentionally been reduced.

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[47] TEX. FAM. CODE §154.066.
[48] *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex. App.—Fort Worth 2000, no pet.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).
[49] *Iliff v. Iliff*, -- S.W.3d --, 2009 WL 2195559 (Tex. App.—Austin 2009, pet. granted) (memo op.) (finding that such a requirement ignored the plain language of TEX. FAM. CODE §154.066).
[50] *Slaughter v. Slaughter*, No. 13-99-497-CV, 2001 Tex. App. LEXIS 2783, at 6-8 (Tex. App.—Corpus Christi 2001, pet. denied) (mem. op.); *Reyes v. Reyes*, 946 S.W.2d 627, 628-30 (Tex. App.—Waco 1997, no writ); *Hollifield v. Hollifield*, 925 S.W.2d 153, 156 (Tex. App.—Austin 1996, no writ).
[51] *Smith v. Detrich*, 2010 WL 143287 (Tex. App.—Austin 2010, no pet.) (mem. op.); *In re S.B.C.*, 952 S.W.2d 15 (Tex. App.—San Antonio 1996, no writ).

We have all found ourselves at one time or another saying, "He has more damned income than that – I mean deemed income, Your Honor." Appellate Courts that have upheld child support awards which were alleged to exceed guideline support by recognizing countless sources from which income can be deemed. The cases below barely scratch the surface.

Family Partnership – In Houston, the First Court of Appeals recently addressed the inclusion of a father's phantom income from a family partnership in determining his child support.[52] Although the father and his mother testified that the partnership would not distribute any profits until her death or year 2052, the courts of appeals affirmed the trial court's court inclusion of this phantom income, finding that the partnership agreement provides that "[a]llocations to the partner or partnership income and gain" increase a partner's capital account. Essentially, the court treated the father's partnership interest like a retirement account that has value, but that value is not yet accessible (an asset that does not currently produce income).

Real Estate Partnership – Although the obligor claimed he did not physically receive cash distributions from these partnerships, the trial court appears to have deemed an undetermined amount of income from both the real estate partnerships as well as oil and gas partnerships. The Fourteenth Court of Appeals upheld the ruling stating that a trial court is allowed to "assign a reasonable amount of income attributable to assets that do not currently produce income."[53]

Employment Expenses – The Dallas Court of Appeals imputed income from employment-related expenses being paid by the obligor, including vehicles, oil, gas, insurance, and maintenance, travel expenses, entertainment expenses, housekeeping, and care for the obligor's livestock and pets.[54] The obligor did a good job of detailing these expenses and removing them from his gross income, but the trial court did a better job of adding them all back in when determining his net resources.

Employee Benefits – Use of car, paid car insurance, and expense accounts were all determined to be non-cash employment benefits from which income can be deemed by the trial court and court of appeals affirmed.[55] Although the Beaumont Court of Appeals elected not to directly address the inclusion of the business expenses in the obligor's net resources, they definitely left it on the table to be argued in future cases.

Gifts / Scholarships – The First Court of Appeals addressed whether monthly net resources of an obligor (college student) included support from his family and athletic scholarships.[56] The trial court assigned a cash value to the gifts and scholarships being received by the obligor, determining his net resources to be $2,000.00 per month. The court of appeals affirmed. Could you apply these facts to a case where the obligor is in high school?

Conclusion

Buzz says – "When you find it impossible to fly, you can always fall with style - and you might get lucky." When preparing to increase net resources in your support calculation, re-read the code and then think outside the book. The more evidence presented on the obligor's abilities to support, resources of the obligor, assets available for support, assets that could produce income, and the proven needs of the children – the better chance you have at getting the deviation your client needs. To Infinity, and Beyond!

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[52] *Matthews v. Northrup*, 2010 WL 2133910 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (mem. op.).
[53] *Roosth v. Roosth*, 889 S.W.2d 445, 455 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
[54] *Anderson v. Anderson*, 770 S.W.2d 92, 96 (Tex. App.—Dallas 1989, no writ).
[55] *Golias v. Golias*, 861 S.W.2d 401, 404 (Tex. App.—Beaumont 1993, no writ).
[56] *In re L.R.P.*, 98 S.W.3d 312, 313-15 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd); *But see Ikard v. Ikard*, 819 S.W.2d 644 (Tex. App.-El Paso 1991, no writ), and *Tucker v. Tucker*, 908 S.W.2d 530 (Tex. App.-San Antonio 1995, no writ) (both finding that "gifts" should not be included in determining resources).

WHEN SOON-TO-BE SAME-SEX EXES LIVE IN TEXAS

By Jason Cordova[57]

INTRODUCTION AND OVERVIEW OF SAME-SEX MARRIAGE IN THE UNITED STATES

In his hit 1987 song, "All My Exes Live in Texas," country singer George Strait sang about how he *longed* to return to Texas—and would have done so if not for the unhappy ladies who divorced him in the Lone Star State, and who were still residing there (and whose names each rhymed with a city in Texas, which must have been quite fortuitous for song-writing purposes).[58] Now, if gay people were allowed to get divorced in Texas—and if Mr. Strait were not, well, *straight*—then the famous song might have turned out differently, and we might have learned how Bill in Lewisville, Ron in San Juan, and Alan in McAllen were preventing the country legend from swimming again in the Frio River of his youth.

But gay people *are* prevented from getting divorced in Texas. Given the increasing number of jurisdictions that allow gay people to get married,[59] and given the nature of our federal system—which allows U.S. citizens to move freely between the states and establish residency in new states as their job and other aspects of interstate commerce might require—the question of whether Texas' refusal to acknowledge same-sex marriage for the limited purpose of granting a divorce makes any practical sense is not only a fair one, but also quite prudent.

Before beginning an in-depth discussion of gay divorce, a little context regarding the state of gay marriage in the United States might be helpful. There is a case challenging the 2008 California ballot initiative that took away the right of gay people to get married in that state moving through the federal court system at this very moment.[60] If it makes it to the U.S. Supreme Court, the arguments in this paper would be moot *if* the Court determined gay people have a fundamental right to be married to one another. But given the Court's current conservative make-up, it is highly unlikely the Court would issue a decision in a case involving a social issue as contentious as same-sex marriage that would have the same sweeping, nationwide impact of, say, *Roe v. Wade*[61] or *Brown v. Board of Education*[62] (or, for that matter, *Lawrence v. Texas*,[63] which would almost certainly be the springboard for any such decision). If the Court chose to review the case at all, it would likely issue a decision that would set the cause of same-sex marriage back for years.

In the absence of federal action, we will be stuck with a system in which some states grant marriage licenses to same-sex couples, some states grant civil unions (or otherwise provide state benefits to partnered same-sex couples), some states recognize same-sex unions for limited purposes (such as divorce), and some states do not recognize such unions at all.

In the states in which they are allowed to do so, how many gay couples are actually taking advantage of the ability to get married? In 2004, when a county in Oregon began issuing marriage licenses to gay people, nearly 3,000 same-sex couples showed up to claim one.[64] During the first three months in which California issued same-sex marriage licenses (before the Proposition 8 ballot initiative put a stop to the effort), nearly 11,000 same-sex couples tied the knot.[65] During the first year in which same-sex marriage was available in Iowa, over 2,000 same-sex couples were wed, accounting for 10 percent of all marriages performed in the

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[58] Of course, this is just a song—none of it, to my knowledge, is actually true.

[59] At the time of this writing, the following jurisdictions issue marriage licenses to gay couples: Massachusetts, Connecticut, Vermont, New Hampshire, Iowa and the District of Columbia. While this is only 6 out of 54 jurisdictions, the majority of these have been added to the list in only the last few years—a pretty remarkable pace given it was only six years ago exactly *zero* jurisdictions allowed gay marriage.

[60] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010)

[61] 410 U.S. 113 (1973).

[62] 347 U.S. 483 (1954).

[63] 539 U.S. 558 (2003) (invalidating state anti-sodomy laws by noting sexual conduct is part of the liberty interest protected by the substantive due process portion of the 14th Amendment).

[64] *Same Sex Marriage-Preliminary Statistics*, OREGON.GOV (2005), http://www.oregon.gov/DHS/ph/chs/order/ssmarry.shtml.

[65] Jessica Garrison and Dan Morain, *Same-Sex Marriage Total at 11,000*, LOS ANGELES TIMES (2008), http://articles.latimes.com/2008/oct/07/local/me-gaymarriage7.

state.[66] And in Massachussets, over 8,000 same-sex couples took advantage of that state's marriage laws in the first two years they were allowed to do so.[67] These numbers, with a little scrutiny, seem somewhat modest, especially given that figures coming out of the first months of marriage availability in any jurisdiction are almost certainly inflated due to a pent-up demand finally being served. But it would be perfectly reasonable to predict that, as the *idea* of marriage takes hold within the gay and lesbian community, the number of marriages taking place, in both absolute terms and as a proportion of all partnered gay couples, will steadily increase.

Given the likely lack of federal action on the marriage question, and given that Texas is one of the most politically conservative states in the union, I predict it will be many years—if not *decades*—before same-sex marriage reaches the Lone Star State. In the meantime, as more and more same-sex couples begin to warm to the idea of marriage, many thousands of such couples are going to find a way to be blissfully wed, and among those many thousands, a good number will end up in Texas. And although advocates of same-sex marriage rarely mention it, a good portion of those marriages are going to sour and a divorce action will be needed. The question becomes, *in practical terms*, does it make any sense for Texas to close its family courts to gay couples married in other jurisdictions?

This article will highlight the reasons why the State of Texas should, at the very least, recognize same-sex marriages for the limited purpose of granting a divorce and, if necessary, a suit affecting the parent-child relationship (hereafter, SAPCR). It will provide draft language for a statute and constitutional provision that would do just that, while simultaneously preserving the definition of marriage as between one man and one woman.

Part I of the paper will focus on the recent case of *In re Marriage of J.B. and H.B*, a decision from the Texas Court of Appeals in Dallas, which is a useful tool for working through the arguments on both sides of the issue as well as the relevant Texas law. Part I will also include a note about *Texas v. A.S.N. and S.D.*, the most recent decision in Texas regarding gay divorce.

Part II will address the need for same-sex couples to be able to obtain a divorce in the jurisdiction in which they reside.

Part III will address the specific advantages to the state of Texas in granting divorces to same-sex couples.

Part IV acknowledges that simply granting gay divorces is not a solution to some of the problems addressed and that, indeed, there will be a number of complicating factors that will be difficult for the state to avoid.

Part V examines the case of New York, which is the only state that, despite not allowing gay marriage, allows gay couples married in other jurisdictions to get divorces in its family courts.

Finally, Part VI will provide the draft language previously mentioned.

PART I: *IN RE MARRIAGE OF J.B. AND H.B.* AND PROTECTING THE SANCTITY OF DIVORCE

A. Overview

In 2006 J.B. and H.B., two gay males, were lawfully married in Massachusetts.[68] The couple moved to Texas in 2008, shortly after which their relationship fell apart.[69] J.B. filed for divorce in Dallas, and several days later, the Office of the Attorney General, on behalf of the State of Texas, attempted to intervene, arguing the court did not have the authority to grant such a divorce.[70] The trial court ruled that Tex. Const. art. 1, § 32 and Tex. Fam. Code § 6.204 violated the Equal Protection Clause of the Fourteenth Amendment. That being so, the court found it had the authority to hear a divorce action between persons meeting the durational resi-

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[66] Katherine Mangu Ward, *Iowa Gay Marriage Stats, One Year Out*, REASON (2010), http://reason.com/blog/2010/05/20/iowa-gay-marriage-stats-one-ye.

[67] Kathy Belge, *Gay Marriages in Massachusetts: One Year Later, May 2005*, ABOUT.COM (2005), http://lesbianlife.about.com/od/wedding/a/MassOneYear.htm.

[68] In re Marriage of J.B. and H.B., 326 S.W.3d 654, 659 (Tex. App.—Dallas 2010, original proceeding).

[69] *Id.*; also note the opinion does not dwell much on the facts surrounding J.B. and H.B.'s marriage, except to say the two men ceased living together "as husband and husband" in November of 2008 and that their were no children involved in the union.

[70] *Id.*

dency requirements of Dallas County and the domiciliary requirement of Texas. Finally, it ruled that the State did not have a judiciable interest in the case, and therefore could not intervene.[71]

On appeal, the Dallas Court of Appeals reversed the trial court and declared the relevant Texas law did *not* violate the 14th Amendment, and the trial court lacked the subject-matter jurisdiction necessary to rule on the case.[72] This part of the article will focus on the appellate decision and the arguments on both sides of the case. The focus will be on the arguments and analysis for the subject-matter jurisdiction question, as well as those dealing with the issue of comity between the states. Because this article takes no position on the constitutionality of the relevant Texas laws, there will be no discussion of the Equal Protection arguments.

This part of the article will also highlight the case of *State of Texas v. Naylor*, an extremely recent decision from the Texas Court of Appeals in Austin regarding gay divorce. Because the case was decided on procedural grounds, its usefulness in discussing the merits of gay divorce in Texas is fairly limited. Nevertheless, it bears mentioning because its outcome differed from *J.B. and H.B.* and, in that regard, represents a judicial split that may need to be reconciled by the Supreme Court of Texas.

B. In re Marriage of J.B. and H.B.

1. Subject-Matter Jurisdiction Analysis

In 2005, the Texas Constitution was amended to provide the following: "[m]arriage in [Texas] shall consist only of the union of one man and one woman" and "[t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage."[73] The Texas Family Code echoes the principle that same-sex marriage and civil unions are contrary to public policy in Texas and therefore are not recognized.[74] The Code further states that an agency or political subdivision of the state may not "give effect to a public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex," nor may it give right or claim to "any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction.[75]

The Attorney General argued these provisions of the law stripped the courts of Texas of any power to adjudicate a divorce between persons of the same sex, since to do so would "give effect" to or "recognize" same sex marriage.[76] J.B.'s response to this argument was two-fold. First, that a trial court does not adjudicate or establish the validity of a marriage in a divorce case, and therefore does not recognize or validate a same-sex marriage performed in another jurisdiction. Second, the court should apply the "place of celebration test" and conclude he is married to H.B. for the limited purpose of granting a divorce.[77]

The court's analysis of the subject-matter jurisdiction issue turns on whether a divorce qualifies as a "right," as the term is used in Family Code Section 6.204.[78] Relying on Webster's Dictionary, the court arrives at the conclusion that a divorce is, in fact, a "right or demand of a right."[79] In the court's own words:

> 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 section 6.204(c)(2). In order to comply with this statutory provision and accord appellee's same-sex divorce petition no legal effect at all, the trial court must not address the merits. In other words, the court must dismiss for lack of subject-matter jurisdiction.[80]

2. The Comity Issue

Having decided the lower court did not have jurisdiction over the divorce petition, the appellate court moved on to J.B.'s comity-based "place-of-celebration" argument.[81] Comity, as defined by the court, is when

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[71] *Id.* at 659-60.
[72] In re Marriage of J.B. and H.B. at 659.
[73] TEX. CONST. art. I, § 32.
[74] Tex. Family Code Ann. § 6.204(b) (2009).
[75] Tex. Family Code Ann. § 6.204 (c) (2009).
[76] In re Marriage of J.B. and H.B., 326 S.W.3d at 664 (Tex. App.—Dallas 2010).
[77] *Id.*
[78] *Id.* at 665.
[79] *Id.*
[80] *Id.*
[81] In re Marriage of J.B. and H.B at 667-68.

the courts of one state give deference to the laws and enactments of a sister state not as a rule of law, but out of deference or respect to that state.[82] J.B. argued , in line with this idea, Texas courts had traditionally applied the "place-of-celebration" rule, which looks to the law of where the couple actually held their nuptials in determining if a foreign marriage is valid for purposes of hearing a divorce.[83]

The court rejected this argument out-of-hand.[84] It noted J.B. misunderstood Texas' lack of commitment to the "place of celebration" test.[85] It found that Texas Constitution art. 1, § 32(a) and Family Code Section 6.204(b) plainly express a public policy in favor of not recognizing same-sex unions, that this public policy concern extended to recognition of same-sex unions performed in other jurisdictions. Further, where there is a public policy against what was being "celebrated" in the foreign jurisdiction, the "place of celebration" test does not apply.[86]

3. The Voidness Issue

It might strike a casual reader of this article as somewhat amusing that the court, in its efforts to combat the public policy danger of allowing two men to wed, tried awfully hard to keep J.B. and H.B. married. But, of course, this is not what was happening at all. In fact, the court suggested J.B. could simply sue to have his marriage declared void, and that Tex. Fam. Code § 6.307(a) authorized a party to do just that when the marriage is one that is not recognizable under Texas law.[87] J.B.'s initial response to this proposition was that allowing a voidness proceeding to go forward would be the same as allowing a divorce proceeding to go forward (insofar as recognition of a same-sex marriage is concerned), and so what would prevent the Attorney General from intervening in that case as well?[88] The court rejected J.B.'s contention, noting the language of § 6.307 was quite clear in allowing just such an action to go forward.[89]

More interesting were J.B.'s arguments for why a voidness suit was an inadequate alternative to divorce. While it is not clear these arguments were the best ones J.B. could have made on the facts of his case,[90] they are worth mentioning because they serve as a good segue for Part II of this article. J.B. argued that certain forms of relief, such as spousal maintenance, were unavailable to him in a voidness action.[91] Also, more significantly, he argued Texas community property laws would be unavailable to him, and that he would be unable to take advantage of spousal communication privileges.[92] He also argued having his marriage declared void involved a degree of stigmatization by being placed in a category with criminals (such as those who practice bigamy and incest).[93] Finally, J.B. expressed concern that if his marriage were simply declared void, what guarantee would he have that every other jurisdiction would recognize the voidness action?[94]

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[82] *Id.at 668.*
[83] *Id.*
[84] *Id.*
[85] *Id.* (citing to Seth v. Seth, 694 S.W.2d 459, 462-464 (Tex. App.—Fort Worth, no writ), for the proposition that Texas courts apply the most-substantial-relationship test and, based largely on Texas public policy, use Texas law to ascertain the validity of marriages performed in other countries. The court also notes that the two cases J.B. cites, Braddock v. Taylor, 592 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.) and Durr v. Newman, 537 S.W.2d 323, 325 (Tex. Civ. App.—El Paso, writ ref'd n.r.e.), were misconstrued. In the former, the court enforced California's law refusing recognition of common law marriage to the extent it was based on conduct that took place in California. In the latter, the court simply made a presumption about the law in the sister state being the same as Texas law, and so the place of celebration test was not dispositive).
[86] In re Marriage of J.B. and H.B at 669.
[87] *Id.* at 679.
[88] *Id.*
[89] *Id.* (quoting TEX. FAM. CODE ANN. § 6.307: "[e]ither party to a marriage made void by this chapter may sue to have the marriage declared void").
[90] For example, J.B. argues he would not have access to spousal maintenance in a voidness suit, but it is unclear on the facts *he* is the dependent spouse (and, in any event, spousal maintenance is very difficult to obtain in Texas—even for straight married couples). Also, curiously, J.B. argues he will be denied the spousal communication privilege, which seems like it should be the least of his worries (unless, of course, he told H.B. about a bunch of crimes he planned on committing in the future). Finally, his stigma argument—that voidness puts him in the same category as criminals and deviants—seems slightly disingenuous, given the fact that no one even needs to know about his voided marriage, and that, in any event it is difficult, conceptually, to understand how he might suffer because of this "stigma."
[91] In re Marriage of J.B. and H.B., 326 S.W.3d at 679 (Tex. App.—Dallas 2010, orig. proceeding).
[92] *Id.*
[93] *Id.*
[94] *Id.*

As I mentioned, his arguments function here as simply a springboard for the discussion in Part II, but it should be noted that the court did, in fact, swat each of them away, often couching their conclusion with the observation that it is the job of the legislature to address any concerns rooted in public policy.[95]

C. *State of Texas v. Naylor*

Before moving on to Part II and the general argument for why married gay couples need the ability to obtain a divorce in Texas, it is important to mention the opinion recently handed down by the Texas Court of Appeals in Austin regarding gay divorce, *State of Texas v. Naylor*.[96]

Angelique Naylor and Sabrina Daly, residents of Texas, were married in Massachussetts in 2004.[97] Shortly thereafter, they returned to Texas, adopted a child, and began a real estate business together.[98] In 2010, the couple decided to get a divorce, and after several rounds of negotiations regarding the SAPCR and the division of the marital property, a trial court in Austin granted the couple a divorce on February 10, 2010.[99] The next day, the Attorney General, on behalf of the State of Texas, filed a petition of intervention, arguing the court lacked jurisdiction to grant the divorce because the married couple was of the same sex.[100] The trial court denied the petition for intervention on the basis it was not timely filed.[101]

The Attorney General appealed to the Texas Court of Appeals in Austin, but the action was dismissed for lack of standing.[102] Unlike the appeals court in *In re Marriage of J.B. and H.B.*, the Austin court did not engage in a subject-matter jurisdiction analysis, and so the helpfulness of the opinion with regard to the shortcomings of Tex. Const. art. 1, §32 and Tex. Fam. Code §6.204, if any, is fairly limited.

Despite its procedural focus, however, the Austin court did have a few interesting things to say regarding how a lower court might interpret its duties when a married same-sex couple shows up at the courthouse steps. For example, the court notes it would be a perfectly reasonable result for a lower court to view divorce as a benefit merely of state residency, rather than a benefit that flows directly from marriage.[103] Or, the court says, a lower court might interpret the plain language of §6.204 to mean it cannot create, recognize or give effect to same-sex marriages on a "going forward" basis, and so granting a divorce is permissible.[104] The court did not rule on the merit of these arguments, but mentioned them only to say there are ways of granting a same-sex divorce without the trial court having to get to the constitutionality of the relevant laws.[105] For our purposes, taken together, the analysis of the *J.B. and H.B.* court and these hypothetical arguments by the *Naylor* court stand as two distinct branches of thought with regard to gay divorce in Texas. At some point, these divergent views are going to have to be reconciled, either by the Supreme Court of Texas or (as this article prefers) by the state legislature.

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[95] *Id.* (noting Texas has the power to treat same-sex couples differently with regard to spousal maintenance, that the issue of the spousal communication privilege is for the Texas Legislature to resolve, and that a declaration of voidness would be valid in *all* jurisdictions, since the relevant section of the Family Code does not limit the action to Texas).

[96] State of Texas v. Naylor, 2011 WL 56060 (Tex. App.—Austin 2011, no pet. h.).

[97] *Id.* at 1.

[98] *Id.*

[99] *Id.* at 4.

[100] *Id.*

[101] State of Texas v. Naylor at 5.

[102] The State argued it had standing under the "virtual representation" doctrine, an exception to the rule that says only parties to the action have standing to appeal. The Appeals Court rejected this argument because the State did not meet the three requirements necessary to invoke the doctrine: that the appellant would be bound by the judgment; that the appellant's privity of estate, title or interest appears in the record; and that there is an identity of interest between the appellant and a named party to the judgment. The Court said the State was not "bound by the judgment" because the judgment involved a private matter that did not involve the State; that the State's only interest—defending portions of the Family Code from constitutional attack—was not implicated in the case, since neither party made any such argument, nor did the trial court rule on the constitutionality of any Texas statute; and no party to the divorce was attempting to stand-in for the State, and their actions, therefore, did not "virtually represent" the State. The Appeals Court went on to note that, even had the State proven its case under the "virtual representation" doctrine, it was not obliged to let the appeal move forward if doing so would be a hardship for the named parties or would result in judicial inefficiency. The parties had managed to work out what was a very complex set of matters involving multiple real properties, thousands of dollars of debt, and custody of an adopted child, the Appeals Court was unwilling to upend that by allowing the State to appeal the final divorce decree. See State of Texas v. Naylor at 8-16.

[103] State of Texas v. Naylor at 12.

[104] *Id.*

[105] *Id.*

PART II: WHAT'S IN IT FOR THE MARRIED COUPLE?

A. Overview

In *In Re Marriage of J.B. and H.B.*, the divorce petitioner, J.B., gave several reasons why simply having his marriage declared void was an unsuitable alternative to a divorce proceeding.[106] Indeed, there are a number of reasons that inform the idea that married gay couples, and their children, are uniquely vulnerable to harsh, inequitable results when they are barred from using the family courts of the state in which they live to dissolve their relationship. This section will highlight some of those reasons using a hypothetical lesbian couple,[107] Juliann and Annette, who were married in Massachusetts, had two children, and then moved to Texas. The details of their family will be provided, *infra.*

B. Division of Property and Child Custody

Texas is a community property state. Any property acquired during the course of a marriage not classified as separate property is, by Texas law, community property.[108] In a divorce proceeding, the family court judge can divide the community property in a manner the court deems just and right.[109] Regarding our hypothetical lesbians, suppose during the course of their marriage Juliann and Annette started a successful landscaping business, purchased a home and two automobiles, and opened a joint checking account. Down the road, Juliann grows frustrated with Annette and decides she can no longer stay married to her. Unfortunately, Juliann and Annette did not make contractual arrangements about the ownership of property, or even how the property was to be divided should the split occur. Like many married couples, they didn't give much thought to what would happen should they ever fall out of love.

If Juliann and Annette are unable to agree to a disposition of the property, what should they do? According to Tex. Fam. Code § 7.002, courts will only engage in a division of property proceeding if the marriage is dissolved through divorce or annulment.[110] Juliann and Annette cannot take advantage of an annulment any more than divorce.[111] As section 6.307 makes no provision for how the property acquired in a void marriage should be divided,[112] it is unclear what process they have available to them. In all likelihood, Juliann and Annette will have to engage in some very complex and costly litigation outside of a family court, the result from which will almost certainly take no account of the nature of their relationship or how such an award of the property will affect the children born to or adopted by the couple during their marriage.[113]

And speaking of the children, if the judge in Texas voids Juliann and Annette's marriage, does he then just tell the women "You guys figure out what to do with the kids on your own"? Probably not, since the procedure for an SAPCR in Texas is not conflated with the divorce proceeding.[114] The difficulty arises when attempting to determine who actually has standing to bring such a suit. Suppose the facts were changed such that Juliann was neither the biological nor adoptive mother of the children, but who nevertheless considered herself their mother. Would she have any way of getting custody of them? According to the Texas Family Code, "a person, other than a foster parent, who has had actual care, control, and possession of the child for at

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[106] In re Marriage of J.B. and H.B. at 679.

[107] As I write this, it occurs to me I've actually known *several* hypothetical lesbians in my time.

[108] TEX. FAM. CODE ANN. § 7.002 (West 2009).

[109] TEX. FAM. CODE ANN. § 7.001 (West 2009).

[110] TEX. FAM. CODE ANN. § 7.002 (West 2009).

[111] The following are grounds for annulment of marriage according to the Texas Family Code, none of which are available to Juliann and Annette: underage marriage (TFC § 6.102-6.104); under the influence of alcohol or narcotics (TFC § 6.105); impotency (TFC § 6.106); fraud, duress or force (TFC § 6.107); mental incapacity (TFC § 6.108); concealed divorce (TFC § 6.109); marriage less than 72 hours after issuance of license (TFC § 6.110); and death of party to voidable marriage (TFC § 6.111).

[112] TEX. FAM. CODE ANN. § 6.307 (West 2009).

[113] It is almost impossible to overstate the complexity of resolving the property and business issues in the absence of a divorce proceeding or an agreement between Juliann and Annette. For example, Juliann's name alone might appear on the house and car titles, and in the event their marriage is simply voided *a la* the suggestion of the *J.B. and H.B.* court, the property would be hers. But this is certainly not a fair result for Annette. Additional complicating factors: the form of Juliann and Annette's landscaping business and how such a business should be divided; the possible intermingling between business and personal checking accounts; how outstanding debt between them should be apportioned (again, further complicated by the fact that only one of the partner's names might be on the note); and how small pieces of personal property, such as furniture and household goods, should be split.

[114] In other words, even if Juliann and Annette are not able to access the family courts for divorce purposes, they may still be able to do so for an SAPCR. See, generally, Chapter 102 of the Texas Family Code.

least six months ending not more than 90 days preceding the date of the filing of the petition" may bring an SAPCR action.[115] This "non-parent" standing provision in the code may be the only way for Juliann to seek custody of the children. But what if she has not had physical control of them for six months? The situation is certainly complicated, and one which a judge might be able to handle with a bit more nuance if there was a record of a divorce proceeding he could rely on when making determinations about the nature and extent of the relationship between the two women. When it comes to division of property and child custody issues, as one researcher put it:

> When settled in family courts—which have the tools to navigate the emotional and financial consequences of a breakup—a clean divorce can often provide the best-case scenario for couples and children who must navigate a divided future . . . When couples are not allowed to dissolve their union in family court, they have to resolve financial and personal matters 'in civil court, as if the divorce was a business dispute'. . . but contract law can't handle such subtleties.[116]

C. An Onerous Burden

Juliann and Annette will soon discover that, in the absence of contractual arrangements to deal with the disposition of property—and in the absence of an amicable agreement—the decision to terminate their relationship will be fraught with costly litigation. One option for Juliann and Annette would be to pursue their divorce proceeding in a jurisdiction that would hear it. The obvious choice would be Massachusetts, since this is where they were legally married. Massachusetts law requires that, if the grounds for divorce occurred in another state, one or both parties must live in Massachusetts for at least a year after filing.[117] Since Juliann and Annette have a business and a home in Texas, and their children are enrolled in Texas schools, the question then becomes: is this too onerous a burden for either of them to meet—to require one or both of them to uproot their lives just to obtain a legal proceeding that is utterly routine for everyone else? There is a certain indignity in realizing you might have to go live in another state for a time just to get a divorce, when no one would dream of asking a straight couple to do such a thing in this age of no-fault divorce. To the extent this indignity exists—and to the extent gay couples and their children must suffer protracted and costly litigation to get a result that everyone else is able to get with a comparatively simple procedure—it would seem anything short of a formal divorce proceeding in the state in which a same-sex couple lives is wholly inadequate.

PART III: WHAT'S IN IT FOR TEXAS?

A. Overview

Simply showing how married same-sex couples are affected by the state's refusal to grant them a divorce might not be persuasive enough to those who have the power to change the situation. It may be helpful to explore the ways in which the state of Texas might benefit from granting gay divorce, in terms grounded both in economics and established public policy.

B. Texas Has an Interest in the Well-Being of Children

Texas has a public policy favoring adjudicative procedures that protect the best interests of children.[118] In their influential book from 1973, Professors Joseph Goldstein, Anna Freud and Albert J. Solnit argued because children experience the passage of time in ways very different from adults, protracted legal wrangling over who will have custody of them is extremely damaging to their psychological and emotional well-being.[119] Absent the clean breaks offered by divorce and an SAPCR proceeding, the only "options" for resolving custody matters are costly, protracted litigation, or one parent simply kidnapping the child (or otherwise preventing the child from having any contact with the non-possessory parent), both of which would be highly damaging to the child under the formulation of Goldstein, Freud and Solnit, and are also in clear contravention of Texas public policy goals.

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[115] TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2009).
[116] Eve Conant, *The Right to Love and Loss*, NEWSWEEK (2010), http://www.newsweek.com/2010/04/13/the-right-to-love-and-loss.html# (quoting Jenny Pizer, Director of the National Marriage Project for Lambda Legal).
[117] M.G.L.A. Ch. 208 § 5 (2010).
[118] TEX. FAM. CODE ANN. § 153.002 (West 2009).
[119] JOSEPH GOLDSTEIN, ET AL., BEYOND THE INTERESTS OF THE CHILD 40-44 (Free Press 1984) (1973).

In the context of child custody, granting gay divorce can also have economic benefits for the state. It is reasonable to assume without the clean break a divorce proceeding provides—and without a mechanism for ensuring that a custodial spouse gets the support she is entitled to for the children—resources are going to get drained and there is a real possibility that less money will be left over to care for the child. A situation could easily arise where the child becomes a public charge. The state can decrease the chance of such scenarios occurring by simply opening-up its family courts to gay couples.

C. Texas Has an Interest in Judicial Efficiency

It has already been mentioned several times in the context of being an advantage for married same-sex couples, but it is worth noting the "clean break" a divorce proceeding provides has very tangible benefits for Texas as well. Consider the following hypo: in 2008, Michael and Sean, a pair of gay men, were married in Massachusetts. Shortly thereafter, they moved to Texas. In 2010, Michael and Sean fell out of love, but because Texas does not recognize their marriage, they don't see the need to go through any kind of formal proceeding (even a suit for voidness) and simply drift apart from one another. Later that year, Michael gets involved in an amazing church-based gay-to-straight conversion program (run from Waco, no doubt). He falls in love with a woman named Sarah, and the two get married. Over the next few months, Michael uses seed money given to him by Sean when they were together to open up a fabulously successful hair styling salon (it is unclear whether the money was an investment or a gift).

The question is: what happens if Sean re-enters the picture, claims he is married to Michael, and then tries to come after a piece of the business? Even if the courts in Texas simply refuse to recognize the fact Sean and Michael were married, they would have to resolve the matter of the business that was started with money provided by Sean. No matter what the court ultimately holds, it is plain on these facts that months of litigation are about to occur.[120] For the sake of judicial efficiency, it would seem the more prudent approach would be to encourage the settlement of these issues before they get out of hand by providing an opportunity for a clean break between these couples, as opposed to trying to clean-up the mess after the facts have become more complicated. Simply saying, "Well, your marriage doesn't really exist, so don't worry about it" is only going to discourage people from moving through appropriate judicial channels when it is time to call it quits. As Andrew Koppelman put it:

> You have to have a way for people to get out of these things—otherwise you have multiple claims for the same property and no protections for people entering into new marriages. I think states that try to adopt these rules refusing to recognize the marriages just haven't thought it through.[121]

D. Texas Has an Interest in Keeping Resources in the State

It is something of a minor point, and is certainly more intuitive than anything else, but it is worth mentioning that Texas has an interest in making sure its residents have access to resources to which they are entitled. In the case of our hypothetical lesbians, suppose Juliann controls all the assets in the marriage. Without the protections of the family court system, there is nothing to prevent her from simply leaving the state and taking all the fungible assets with her. Annette, a Texas resident, could be left with nothing, which means she has less money to spend on goods, which, in turn, means less sales tax revenue is generated for the state and local government. She will have less opportunity to buy property within the state, less opportunity to begin entrepreneurial ventures, or otherwise participate fully in the Texas economy.

E. Divorce Has Value

"One of the greatest and most important aspects of marriage is the gift of divorce law[122]. . . Unlike palimony cases, divorce laws take into account the partner whose name isn't on the deed or bank account[123]. . . The single most important thing you get with marriage is divorce, a predictable process by which property is

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[120] This is to say nothing of what would happen should Michael decided to return to Massachusetts where he is still married to Sean, and therefore not married to Sarah (who will be nonplussed by this turn of events, to say the least)!

[121] ANDREW KOPPELMAN, SAME-SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES at 44 (Yale University Press 2006).

[122] Scott Stiffler, *After Gay Marriage Comes . . . Gay Divorce*, EDGE BOSTON (2008), http://www.edgeboston.com/index.php?ch=news&sc=glbt&sc2=news&sc3=&id=79263.

[123] *Id.*

provided, debt is apportioned, and arrangements are made for custody and visitation of children."[124] The preceding quotes do a nice job of highlighting what a lot of people do not like to think about: divorce has economic value. And Texas could certainly leverage that value to attract gay people (and their dollars) to the state.

A 2007 marketing survey revealed the median household income for gay males is $83,000, nearly 80 percent higher than the median U.S. household income, with nearly 40% of gay men reporting household income in excess of $100,000.[125] For lesbians, the median household income was $80,000—also significantly higher than general U.S. household income.[126] This greater income is likely the result of the fact gay couples are less likely to have children, and yet are equally likely to have two fully employed wage earners in the family.[127] Although there are no conclusive studies on the matter, the difference might also be explained by variances in overall education levels or entrepreneurial tendency. In any event, there is a strong case to be made for getting more of this enhanced spending power concentrated in Texas. Like the job market, real estate prices, and recreational opportunities, the ability to get a divorce might be a factor for a prudent gay couple to consider when deciding where they want to settle down. Suppose, for example, Juliann has a choice between taking a job in New York (where gay divorces are granted) and taking a job in Texas. And suppose Juliann and Annette's relationship has been heading south, and Juliann anticipates she might one day need to end it. The fact that she can get a divorce in New York, all other things being equal, might persuade her to move there instead of Texas.[128]

PART IV: BLIND SPOTS

A. Overview

This section of the paper will acknowledge that divorce is not a panacea when it comes to terminating a same-sex marriage. Indeed, there are a number of complicating factors, grounded in both the law and in the nature of gay relationships. I will make no attempt to offer solutions to these problems (although that would be a great topic for a future article), but rather highlight some of the things judges and lawmakers should be aware of when considering the issue of gay divorce. The first of these complicating factors, and one that looms in the background of the issues that will be discussed, is the simple fact that, because same-sex marriage is such a relatively novel concept, lawyers and judges are less likely to be experienced with many of the issues that will arise in the case of a same-sex divorce.

B. The Defense of Marriage Act (DOMA)

The federal Defense of Marriage Act (DOMA) amended Chapter 1, Title 1 of the U.S. Code by adding the following:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.[129]

Because of this, a number complications arise for married same-sex couples: gift taxes might apply to various assets, retirement accounts might be subject to certain forms of taxation, there would be no tax breaks for any alimony payments granted as a result of a divorce proceeding (itself an incentive to actually *pay* alimony), and issues regarding the transfer of Social Security and other pension benefits will arise.

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[124] *Id.*
[125] *Gays, Lesbians Earn Far More Than Median U.S. Household Income*, MEDIA BUYER PLANNER (2007), http://www.mediabuyerplanner.com/entry/36386/gays-lesbians-earn-far-more-than-media-us-household-income/.
[126] *Id.*
[127] A phenomenon commonly referred to as "DINK"—"Dual Income, No Kids."
[128] One might suggest Juliann choose Texas if there is a greater chance for her to keep *everything* in that state (rather than go through with a divorce in New York), but I would argue the advantages of having a clean break from Annette (and avoiding any messy, future litigation) outweigh that consideration, and so NY makes better economic *and* emotional sense.
[129] Defense of Marriage Act § 3, 1 U.S.C. § 7 (1996).

A family court judge presiding over a divorce proceeding between two gay people could not simply ignore the impact of DOMA. Indeed, in order to reach the most equitable result between the parties, a judge would have to seriously consider the financial complications imposed on the parties by the federal law. For example, in the past a judge might have routinely divided a retirement account between persons of a certain income level 50/50, having decided that such a division is adequate to support the more dependent of the two spouses. But for a gay couple of the same income level and in the same situation in terms of one spouse being more dependent than the other, a 50/50 split might not be adequate for the dependent spouse given the federal tax hit the retirement account will take, and so the judge might opt for something else, such as 55/45 or 60/40. But of course the judge could only reach this more just result by taking account of DOMA.

The issue of DOMA is quite complex—and this article is not an appropriate space to get bogged-down in the details—but it is important for lawmakers and judges to at least be aware of some of the issues involved, and how those issues may complicate the effort to grant same-sex divorces.

C. Unique Aspects of Gay Relationships

Let's return to our hypothetical lesbians: suppose Juliann and Annette decided early in their marriage to have two children, and that each of them would carry one child. The result: one child is Juliann's biological daughter and the other is Annette's biological son. But they are *both* Juliann and Annette's children through adoption. This is an entirely plausible situation and one that is distinctly unique to a married lesbian couple. How would a family court handle custody of the children should Juliann and Annette decide to get divorced and one of them files an SAPCR? In a jurisdiction where, all things being equal, custody is given to the mother, what do you do in a situation where there are two mothers? Do you default to simply giving custody of each child to his or her *biological* mother? If so, in the case of Juliann and Annette, how is this fair to each of the children, who will now be separated from their sibling?

Another problem unique to gay couples is determining the length of the partnership. Particularly in the early days of jurisdictions granting gay marriage, there is going to be a large number of couples who have been together for years (decades!) but who can only *now* turn their relationship into a marriage. To find the most just result, a court might have to determine *when* the relationship actually started. To begin marking time at when the actual marriage ceremony took place would be unfair in a situation where the partners had been acquiring property and assets for years beforehand, particularly in a community property state. In a case like that, a court might have to settle the matter in the way it might do so for a heterosexual couple that had been together for a long time and then decided to get married: looking for a contractual agreement between the couple regarding their property pre-marriage and, in the absence of a contract, seeing if there were any agreements by implication. It is an issue the courts in Texas would need to anticipate in the event gay couples are allowed to get divorced.

PART V: AN EMPIRE STATE OF MIND?

A. Overview

New York is a jurisdiction that simultaneously does not grant marriage licenses to same-sex couples while still allowing such couples married in other jurisdictions to utilize its family courts for the purpose of obtaining a divorce. Unfortunately, there is still very little case law on the matter, and so it is difficult to extrapolate a good working model for other states to emulate. Nevertheless, to the limited extent to which we are able to do so, it might be worth trying to discover if there is even a *suggestion* the New York experience can serve as a model for Texas.

B. *Beth R. v. Donna M.*: The New York Approach

The most significant case coming out of New York is from 2008, involving two lesbians married in Toronto but living in New York.[130] In 2003, before they were married, Donna M. was impregnated via artificial insemination.[131] The couple was married in 2004, and a year later, Donna M. carried a second child to term

[130] Beth R. v. Donna M., 853 N.Y.S.2d 501 (N.Y. Sup. 2008).
[131] *Id.* at 502.

for the couple.[132] When their relationship deteriorated, Beth R. filed for divorce from Donna M.[133] Donna M. resisted the divorce action, claiming their marriage was void under New York law, and since there was no marriage there could be no action for divorce.[134]

The court said recognition of out-of-state marriages are governed by the principles of comity, and it applied the "place of celebration test."[135] The court said there is no positive law in New York prohibiting recognition of a same-sex marriage for purposes of granting a divorce, nor is there a stated public policy to that effect.[136] While the court notes New York case law seems to provide an exception for "abhorrent" practices, such as incest and polygamy, it says same-sex marriage does not rise (sink?) to that level, and that, indeed, some New York courts had even recognized an out-of-state incestuous marriage.[137]

C. But Can This Work for Texas?

The short answer is "no." The divorce petitioner in *In Re Marriage of J.B. and H.B.* cited to the *Donna M.* case to support his argument for allowing his divorce to go forward.[138] The Court of Appeals in Dallas rightly rejected this argument, noting the New York case law was entirely irrelevant to the situation in Texas since Texas *does* have positive law (and a stated public policy) against recognition of same-sex marriage in Texas Constitution art. 1, sec. 32 and Family Code Section 6.204.[139] It would seem, then, that insofar as Texas finds the reasons for allowing gay divorce to proceed in the state compelling, the only way it can happen is if those two provisions of the law are changed.

PART VI: THE SUGGESTED RE-DRAFTS

A. Art. 1, § 32

In 2008, the satirical newspaper *The Onion* ran an article entitled "Typo In Proposition 8 Defines Marriage As Between 'One Man and One Wolfman.'"[140] In it, the author described how a typographical error had nullified every marriage in the state except for those comprised of "an adult male and his lycanthrope partner."[141] This little joke about careful drafting is pretty funny, but it makes you wonder if a legislature could ever be so sloppy in its law-writing as to let something like that through. As it turns out, the Texas legislature is totally capable of that. Art. 1, Sec. 32(b), which says "[t]his state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage,"[142] would nullify every marriage in the state if read literally. My re-drafting of article 1, section 32 attempts to avoid such silliness while limiting the prohibition of same-sex marriage to the creation of such unions as opposed to recognition of such unions:

(a) Marriage in this state shall consist only of the union of one man and woman.

(b) The state or a political subdivision of the state may not create a legal status between two individuals of the same sex that is identical or similar to marriage.

B. Section 6.204 of the Family Code

The re-drafted language preserves the public policy goal of defining marriage as between one man and one woman (while eliminating the voidness language), but makes an explicit exception for the recognition of

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[132] *Id.* at 503.
[133] *Id.* at 504.
[134] *Id.*
[135] Beth R. v. Donna M. at 504.
[136] *Id.*
[137] *Id.* at 504-505 (citing a case in which two New York residents, an uncle and a niece, were married in Rhode Island. The court notes while such a marriage would be illegal in New York, and would come with various criminal penalties, the statute in question does not expressly regulate a marriage performed in another state where the marriage would be legal in that state. See In re May, 114 N.E.2d 4 (1953)).
[138] In re Marriage of J.B. and H.B., 326 S.W.3d 654, 669 (Tex. App.—Dallas 2010, orig. proceeding).
[139] *Id.*
[140] *Typo in Proposition 8 Defines Marriage as Between 'One Man and One Wolfman'*, THE ONION (2008), http://www.theonion.com/articles/typo-in-proposition-8-defines-marriage-as-between,6506/.
[141] *Id.*
[142] TEX. CONST. art. I, § 32(b).

such unions performed in other states for the narrow purpose of granting dissolution of the union through divorce:

(b) A marriage between persons of the same sex or a civil union between persons of the same sex is contrary to the public policy of this state.

(c) The state or an agency or a political subdivision of the state may not give effect to a:
  (1) public act, record, or judicial proceeding that creates a marriage between persons of the same sex or a civil union between persons of the same sex in this state; or
  (2) right of claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union between persons of the same sex in this state.

(d) The state or an agency or a political subdivision of the state *may* give effect to a public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex in another jurisdiction, so long as such a marriage is legally performed in the foreign jurisdiction and the state or agency or political subdivision is only giving effect to such marriages for the narrow purpose of dissolving them through a divorce proceeding.

(e) Any divorce proceeding authorized by § 6.204 (d) must comply with all requirements of Title 1 of the Family Code.

CONCLUSION

When presenting this idea of gay divorce to my friends who are gay rights activists and feminists (and other assorted leftists), the reaction I get from them is always some variation of the following: "You want to *preserve* the definition of marriage as only between one man and one woman?" They simply could not understand why I would choose to do such a thing—why I would make a concession to the "other side" like that. But what they fail to realize is that my solutions—my re-drafted provisions—are grounded in practicality: short of affirmative action by the U.S. Supreme Court, gay marriage is not coming to Texas any time soon. In the meantime, gay couples married in other jurisdictions are going to make lives for themselves in the Lone Star State. And some of those lives are going to be upended, and some of those relationships are going to dissolve. Insofar as it is in the best interest of gay couples to be able to get a divorce in the state in which they live—and insofar as the State of Texas has an interest in making this process simpler for such couples—a solution is needed that both satisfies this need while simultaneously acknowledging political and social reality in the Lone Star State! The New York model of simply allowing gay couples married in other states to use their courts for divorce purposes will not work in Texas because of positive law preventing recognition of such marriages for *any* purpose. The only way to achieve gay divorce is to swallow hard and amend the law to allow recognition of gay marriages for the limited purpose of granting a divorce while preserving the State's right to define marriage as only between one man and one woman.

TRADITIONAL DEPICTIONS OF THE AMERICAN FAMILY AND THE LIBERALIZING TREND:

By Sally Hartman[143]

I. Introduction

Some say men and women arrived on Earth from different planets.[144] Since time immemorial societies around the world have recognized fundamental differences between the sexes. Division of labor, educational patterns and social norms in the United States over the course of the past centuries support this view. Be they hard-wired biological impulses, or the result of deeply ingrained social conditioning, modern standards of behavior reflect this long history of gender stereotypes. Unsurprisingly, the North American familial archetype has historically followed the conventional model; men were the primary or sole breadwinners, while women were charged with domestic duties, including childrearing and housekeeping. But thanks to a powerful wave

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[144] JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS: THE CLASSIC GUIDE TO UNDERSTANDING THE OPPOSITE SEX (Harper Collins 1992).

of feminist thought and advancements in technology, these traditional notions of familial gender roles changed dramatically with ever increasing speed, particularly in the last 50 years.

This article takes a brief look at media depictions of the American family in the 1950's and 60's, as represented by situation comedy on American television. This article will attempt to set the stage for dramatic social change. It will then address modern examples of similar sources, paying special attention to the contrast in portrayals of marriage and family life in recent years. Finally, it will conclude with an assessment of how Texas law has evolved in response to these changing social trends. As an exemplary of this change, it will assert that its long-standing recognition of the putative marriage doctrine and common law marriage reflect this change. Texas has historically provided substantial protection to unwitting spouses who would otherwise suffer from failed attempts at marriage. In addition, by refining the judicial test for common-law marriage, the state legislature has recognized the untidy nature of domestic partnership and its existence as a conscious choice in modern society. In short, these developments suggest a judicial and legislative sensitivity to non-traditional family structures, and mirror the liberalizing trend in social thought that has evolved over the course of the past fifty or sixty years.

II. Traditional views of marriage

A. Historical gender roles in the American Family

The power and prevalence of traditional gender roles in American society can scarcely be overstated.

For example, an article in *Look* magazine in 1962 compiled predictions of how American society might be organized in twenty-five years. A middle-class wife painted the following picture of future typical families: "[The wife] runs her home with extreme good taste and manages her children with serene authority. But she does not try to run or manage her husband."[145] This description suggests just how deeply engrained domestic gender roles were at the time. Apparently a pious, proper wife in the 1960's could not have imagined that, a quarter of a century later, a woman might interfere in her husband's affairs. Another description of daily life in the future envisioned the following calendar of daily duties:

> Clothes disposer repairman here. Shop: Buy baked ham pills, scotch and soda capsules. Pay radar bill. Have the Whites and Hammonds over for capsules. Take Bob's jet to hangar for grease job. Go to hypnotist for headache therapy.[146]

Conspicuously missing are any mention of this stereotypical wife's career or self-fulfillment. Most of the day is consumed by tasks that benefit and serve members of her family. The only reference to "self" is a visit to the hypnotist for her unexplained headaches. Perhaps by being lulled into a semi-conscious state in which reality is a distant concept, she might be able to escape the physical manifestation of her emotional discontent.

The aforementioned examples seemed to suggest that life on the outside might change as time went on, but within the sacred domestic sphere familiar roles would remain unaltered. *Look* magazine's random polling was no accident of fate. The stable, suburban, middle-class American family was seen as a symbol of happiness, security and success in the 1950's and 1960's. A brief look at popular, widely available media depictions will reveal just how venerated these standards were.

B. Popular Media Depictions in the 1950s and 1960's

Fifty and sixty years ago television situation comedies reinforced the notions of traditional gender roles within the American family. As a reflection of the then-current collective psyche, many of these sources portrayed an idealized image of domestic life, and set the standard to which men, women, boys and girls were to aspire.

1. Network television shows: What you see is what you want

a. Leave it to Beaver

Leave it to Beaver is still widely known as the quintessential portrait of the idealized middle-class suburban family in the 1950's.[147] Husband and wife June and Ward Cleaver were the moral epicenter of the series,

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[145] ARLENE S. SKOLNICK, EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY 1 (Basic Books 1991).
[146] *Id*. at 2.

and embodied the picture of domestic equanimity. As a dutiful housewife, June often appeared on camera in pearls and heels, engaged in some sort of domestic chore. Ward was either away from home working or relaxing after a hard day's work. Their two sons, Beaver and Wally, were curious, mischievous but ultimately reformed examples of typical American boyhood. Through the trials and tribulations of childrearing, the Cleavers struck the perfect balance between firm-handed discipline and abiding familial warmth. The series was peppered with lessons that supported the themes that education, marriage, occupation and family were prerequisites for a happy and productive life.[148]

Because the series was set in the time period in which it was filmed, it served as a wonderful backdrop for understanding the problems, concerns and aspirations of family life at the time. Characters were almost exclusively white middle-class, and the occasional departure was short-lived. The main thrust of the show emphasized that the Cleaver way of life was the best recipe for personal fulfillment. With a husband as a strong, centered breadwinner and a wife as a keeper of domestic harmony and tranquility, the Cleavers taught America that happiness was attainable as long as the social norms were followed.[149]

b. Ozzie and Harriet

Another example of television's reinforcement of the traditional nuclear family can be seen in another popular 1950's sitcom, *The Adventures of Ozzie and Harriet*.[150] Ozzie and Harriet Nelson and their two sons, David and Ricky, were a real-life family who starred in the television series that perhaps was a largely semi-accurate depiction of their domestic life. Like the Cleavers, the Nelsons and their two sons became synonymous with the idealized American family in the 1950's. Indeed, the prevailing power of the family brand was almost as strong four decades after the show's premiere. In 1997, an article in the New York Times observed that "[T]he phrase 'Ozzie and Harriet' has become shorthand for an idyllic America of the past where mothers, fathers and children lived happily together."[151] Throughout its run, the series followed the coming-of-age problems experienced by sons David and Ricky. Later, it incorporated their respective spouses into the plot line, and focused on the nature and quality of their marriages.

Although *Ozzie and Harriet* appealed to viewers as an accurate portrayal of the Nelsons themselves, an interesting omission from the plot is worth mentioning. There were very infrequent references to Ozzie's profession. In real life, however, many people knew him as a successful and prolific band-leader (Harriet had been the "girl singer" with the band). This omission suggests that the unconventional nature of the couple's work histories made an inappropriate subject for depiction. In most other respects, the Nelson family conformed to the conventional, gender divided norms that prevailed in the 1950's and 1960's. However, reality simply didn't fit the mold in the cse of Ozzie's professional endeavors. As a result, it was almost entirely omitted from depiction.

c. Father Knows Best

There was no limit to the extent to which the white, middle-class nuclear family of the 1950's was revered.[152] In *Father Knows Best*, the Midwestern Andersons appear as well-balanced, happy examples of domestic life. The Museum of Broadcast Communications sums up the cultural landscape in which the series was situated in the following way: "In essence, the series was one of a slew of middle-class family sitcoms in which moms were moms, kids were kids, and fathers knew best."[153] Husband and insurance agent Jim Anderson was typically out of touch and occasionally short-tempered. Predictably, his wife Margaret was "stuck in the drudgery of domestic servitude"[154] but also embodied solid reason and patience. Yet again it is clear that television in the 1950's and 1960's endorsed a familial prototype that reinforced long-accepted, traditional

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[147] The show ran from October 4, 1957 to June 20, 1963. (Wikipedia.com, Leave It to Beaver, http://en.wikipedia.org/wiki/Leave_It_To_Beaver (last visited December 16, 2010).
[148] *Id*.
[149] *Id*.
[150] The show ran from October 3, 1952 to September 3, 1966. (Wikipedia.com, The Adventures of Ozzie and Harriet, http://en.wikipedia.org/wiki/The_adventures_of_ozzie_and_harriet (last visited December 16, 2010).
[151] Gregory Curtis, "Leave Ozzie and Harriet Alone", *The New York Times*, January 19,1997, available at: http://query.nytimes.com/gst/fullpage.html?res=9B07E3DD1E38F93AA25752C0A961958260
[152] The television show ran from October 3, 1954 to September 17, 1960. (Wikipedia.com, Father Knows Best, http://en.wikipedia.org/wiki/Father_Knows_Best (last visited December 16, 2010).
[153] The Museum of Broadcast Communications, "Father Knows Best", available at: http://www.museum.tv/eotvsection.php?entrycode=fatherknows
[154] *Id.*

gender roles. Women were confined to the home and men to the workplace. Sealed by a bond of marriage and a crop of mischievous but lovable children, the recipe for a happy life was complete.

III. Changing notions of family structure

A. Postmodern Philosophy

Between 1950 and the present, American society has undergone an enormous shift in sociological perspective. This development was due, in great part, to the so-called "second wave" of the feminist movement. In contrast to the battle against legal impediments to gender equality that constituted the "first wave" of feminism, the second wave focused on addressing the more personal matters of gender, workplace and familial inequalities. The 1970's, in particular, was a powerful decade to this end. To many, "[i]t seemed as if the dream of equality in the workplace and equal partnership in the home might be coming true."[155] In *Roe v. Wade*, 410 U.S. 179 (1973), the Supreme Court made abortion legal under the theory that each woman had a fundamental right to privacy. And although it ultimately failed to be enacted, the United States Congress overwhelmingly passed the Equal Rights Amendment (ERA).[156] Had it become constitutional law, the ERA would have guaranteed that federal, local, and state governments could not deny a person equal rights based on his or her sex.[157]

In addition to legal battles fought and won across the nation, a moving current of intellectual thought helped usher in a the new social era. The philosophy that ultimately became known as Postmodernism took a closer look at many of the perceived societal ills as they related to objective truth.[158] Scholars and liberal thinkers began to analyze traditional power structures, the function and role of language, and societal motivations.[159] They criticized hard-lined classifications such as male and female, straight and gay, and white and black.[160] Truth, it seemed, lay somewhere in the middle. In reaction to the previous era's reliance on authority, certainty, unity and organization, Postmodern thinkers emphasized the notions of difference, plurality and skepticism.

Taken in conjunction, the social, intellectual and legal developments of the latter part of the 20th century help explain the liberal groundswell that had begun to develop across America. In contrast to the neat, orderly notions of typical family life that had prevailed in the post-war era, the new America wasn't quite so committed to convention.

B. Media depictions in the new America: what's old is old

In addition to changing social structures, the Postmodern era experienced a remarkable development in the nature and extent of technology. Channels of media morphed into the internet, and a new age of communication and information exchange was immediately born. But within the ranks of familiar outlets, it is worth noting that the themes with regard to familial structures had changed just as drastically as the times.

1. Situation comedies and dysfunction as a virtue

In contrast to the prim, proper and predictable sitcoms of the 1950's and 1960's, television in recent years might be described as unconventional, to say the least. The unabashed portrayal of single mothers and fathers, atypical family structures, homosexuality, and unapologetic cohabitation are encouraging signs that television today reflects the reality of much of modern life in all its untidiness.

The 1990's witnessed a triumphant moment in shedding the constricting skin of idyllic suburbia. *Full House*, a series contemporaneously set in San Francisco, chronicled the life of widower Danny Tanner.[161] Danny was a television host, a bumbling single and caring dad who felt his way blindly through parenting. Aided by his best friend Joey Gladstone and brother-in-law Jesse Katsopolis, Danny rises to the enormous task of raising three young daughters without the help of their mother. Throughout the series, the triumvirate

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[155] ARLENE SKOLNICK, EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY 117 (Basic Books 1991).
[156] Wikipedia.com, Equal Rights Amendment, http://en.wikipedia.org/wiki/Equal_Rights_Amendment (last visited February 6, 2011).
[157] Skolnick *at* 117.
[158] Wikipedia.com, Postmoderism, http://en.wikipedia.org/wiki/Postmodernism (last visited February 6, 2011).
[159] *Id*.
[160] *Id*.
[161] The show ran from September 22, 1987 to May 23, 1995. (Wikipedia.com, Full House, http://en.wikipedia.org/wiki/Full_House (last visited December 16, 2010).

of Danny, Joey and Jesse come to the girls' rescue in a variety of situations, each man contributing his own flavor of wisdom and virtue when the situation calls for it. The over-arching theme seems to suggest that, indeed, it takes a village to raise a child. More importantly, that village can be comprised of anyone, so long as each member has a pure heart and a genuine arsenal of wisdom to offer. The Tanner girls emerge appearing remarkably well-balanced, adjusted and happy, in spite of the fact that they are missing the historically indispensable television ingredient to domestic stability: a mother.

2. Race and class mixed together

In addition to pushing the limits of traditional family roles, the situation comedies of the 1990's also witnessed a revolution in the depiction of class as it related to ethnicity. *The Fresh Prince of Bel Air* combined wealth, professional prestige, and race in a rare portrait of upper-class family life.[162] Present-day movie star Will Smith played a fictional version of himself in the series. As a troubled inner-city youth in Philadelphia, he was sent to live with his wealthy aunt and uncle in Bel Air, Philip and Hilary Banks. Although he suffered a number of cultural gaffes in his new environment, Will managed to assimilate rather nicely into the prep-school, cardigan-wearing social setting into which he was thrust.

Many of the scenes took place in the Banks family living room, and often involved Will being reprimanded by his uncle or aunt. Philip Banks, a prominent African-American judge in Bel Air, was constantly concerned with the appearance of propriety. He expressed frequent dismay at the wayward behavior of his nephew, and hoped that the influence of his three Bel Air-bred children would reform Will.

In many respects, the Banks family was a perfect example of typical upper-middle class America in the 1990's. Both parents worked outside the home, and the virtual adoption of Will signified a shift toward recognition of a non-traditional nuclear family. The show's popularity is evidenced by the fact that it ran for six seasons, and continued into syndication thereafter.

3. All shapes and sizes

A random sampling across all major networks today will reveal an even more dramatic break with the notion of the traditional American family. One particularly striking example is *Brothers and Sisters*.[163] The weekly drama series follows the life of a large California family, the Walkers. Former patriarch and proverbial "founder of the feast" William Walker died early in the series, leaving his wife and crowned matriarch Nora Walker as the emotional lynchpin of the family. Her five adult children and their spouses add unconventional flair to the large, lively household.

Eldest daughter Sarah is divorced with two children, running the family business and living with her French lover. Daughter Kitty is the only conservative in the family, and makes her living on a political talk show, and serves as a mother to her adopted African-American son, Evan. Eldest son Tommy is conspicuously absent, allegedly on some sort of soul-searching mission in foreign lands. Kevin, the middle son and token attorney is married to his homosexual partner Scotty, who makes a living as an elite chef. And finally, the youngest boy Justin, who fought a vicious battle with drugs and alcohol, is a paramedic with an army unit deployed to Iraq. Coincidentally, Justin is married to Rebecca, the daughter of William Walker's former lifetime mistress. Some question remains as to whether William might be Rebecca's father.

As is evident from the tangled family structure, the Walkers defy almost all expectations set by the fuzzy sitcoms of the 1950's. However, the prevailing message of the series is that the Walker family sticks together, through thick and thin. Wisdom, support and inspiration flow horizontally among siblings, rather than vertically from one generation to the other.

The aforementioned examples, though certainly not comprehensive, signal a decisive shift from the idyllic, vanilla conception of the nuclear family in the 1950's to a more nuanced depiction of today's multi-faceted families in all their glory.

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[162] The show ran from September 10, 1990 to May 20, 1996. (Wikipedia.com, Fresh Prince of Bel-Air, http://en.wikipedia.org/wiki/Fresh_prince_of_bel_air (last visited December 16, 2010).

[163] The show premiered on ABC on September 24, 2006. It continues to air weekly on Sunday nights (Wikipedia.com, Brothers and Sisters, http://en.wikipedia.org/wiki/Brothers_%26_Sisters_(2006_TV_series) (last visited December 16, 2010).

4. Following the liberalizing trend: Reflections in Texas law

The dramatic social changes that took place from 1985 to 1995 and onward have had a profound affect on the law. The changing notion of what constituted the American family was beginning to break down as women entered the workforce, took charge of their own reproductive destiny, and pushed hard against boundaries of gender propriety. The television media was only one of many sectors that had begun to reformulate conceptions of reality and propriety when it came to the American family. Despite their conservative reputations, Texas courts and the state legislature underwent their own process of evolution in response to these developments. Through a preservation of protective measures for failed attempts at marriage, and an alteration to the long-standing judicial test for a common-law marriage, the courts and the legislature continued to publicly acknowledge the dynamic nature of the American familial landscape.

C. Legal recognition of property rights for failed attempts at marriage: good faith as a long-standing requirement in Texas

1. Putative spouses

One way in which Texas law recognizes the validity of atypical family arrangements is through the putative marriage doctrine. A putative marriage is:

> one that is invalid by reason of an existing impediment on the part of one or both spouses; but which was entered into in good faith by the parties, or one of them, good faith being essential.[164]

Putative marriages can be established through a showing of either a common-law or ceremonial union. Once a litigant has proven that such a purported union existed, he or she must then make a showing of good faith. The existence of good faith is a question of fact to be determined by the trier of fact, which may be a jury:[165]

> The good faith of the putative spouse is generally a fact question. When the spouse is unaware of a prior undissolved marriage, good faith is presumed. However, when the putative spouse is aware that a former marriage existed at one time, the question becomes one of the reasonableness of that party's belief that the former marriage has been dissolved. A putative spouse may believe in good faith that a prior marriage has been dissolved by divorce, even though in the eyes of the law it has not.[166]

The putative spouse doctrine has a long history in Texas, and its perseverance today is a testament to the ongoing importance of protecting the property rights of participants in unions built upon a mistake of fact. It was originally invoked under Spanish law, which governed the area until the adoption of the English common law in 1840.[167] Between 1840 and 1905, Texas courts struggled with whether or not to recognize the doctrine. Ultimately, however, the Texas Supreme Court nailed down the rule that a putative wife "so long as she acts innocently, has, as to the property acquired during that time, the rights of a lawful wife."[168]

In practice, however, the application of the doctrine has been less clear. The way in which Texas courts have dealt with putative spouse entitlement has varied over time. One line of cases has held that a putative spouse acting in good faith is entitled to all of the property rights of a lawful husband or wife with respect to which was acquired during the "marriage".[169] In community property states such as Texas, this rule has enormous implications for each spouse. Generally speaking, each spouse would thus be entitled to one half of the assets acquired during the life of the marriage, irrespective of the manner in which title was taken.

On the other hand, some decisions have asserted that property acquired during the existence of a putative marriage is jointly owned separate property.[170] This rule contemplates a closer scrutiny of which of the parties provided the capital to acquire the familial assets, who was the wage earner, and the manner in which title was taken. In typical familial arrangements, this theory of property division would tend to favor the spouse who

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[164] Dean v. Goldwire, 480 S.W.2d 494, 496 (Tex. App.—Waco 1972, reh'g denied).; *See also* TEX. FAM. CODE ANN. § 6.202(a) (Vernon 1998) (describing when a marriage is considered "void").
[165] John E. Carlson, "Putative Spouses in Texas Courts," 7 Texas Wesleyan Law Review 1, 7 (2000).
[166] Garduno v. Garduno, 760 S.W.2d 735, 740 (Tex. App.—Corpus Christi 1988, reh'g denied).
[167] Carlson at 2.
[168] Barkley v. Dumke, 87 S.W. 1147, 1146 (Tex. 1905).
[169] *See* Morgan v. Morgan, 21 S.W. 154 (Tex.Civ.App. 1892). *See also* Barkley v. Dumke, 87 S.W. 1147 (Tex. 1905).
[170] *See* Little v. Nicholson, 187 S.W. 506 (Tex.Civ.App 1916) (holding that property conveyed to parties was of a separate character because it was transferred to them in their individual capacities, rather than as husband and wife). *See also* Garduno, 760 S.W.2d 735.

generates the most income, since separate property is not on the table for "just and right" division in divorce proceedings.[171]

The former method of calculation more closely approximates the treatment a legal spouse would receive in the event of dissolution of a valid ceremonial marriage. All community property would be subject to the "just and right" principle of division.[172] It also reflects the original intent of the protective property rights as espoused in the Spanish colonial law. The Spanish code contemplated that where an impediment existed to a lawful marriage, the children resulting from that union would be considered legitimate in the eyes of the law. This rule was qualified by the requirement that at least one spouse had to have been unaware that the marriage was invalid. However, once both spouses were on notice that the marriage was void, all subsequent children would be considered illegitimate.[173] Although these provisions dealt specifically with the legitimacy of children, the rules had important implications regarding property rights. Lack of knowledge on the part of at least once spouse transformed an otherwise illegitimate, void union into a conventional marriage insofar as it concerned hereditary rules of succession. This is a significant, early development that likely influenced early judicial interpretations in Texas, and no doubt influenced modern jurisprudence.

One early Texas case that adopted this rule dealt with an alleged divorce obtained in a state where neither spouse was a resident.[174] The couple married in Missouri and subsequently moved to Texas. Years later when they no longer lived together, the husband allegedly procured a divorce in Utah and then married a second wife. Texas refused to recognize the Utah divorce, however, and so his second marriage was legally void. Upon his death, his second wife, who presumed the divorce to have been effective in all respects, claimed what she assumed to be her marital share in the property of the decedent. The trial court denied her claim and recognized the former wife as the legal spouse. The Texas Court of Appeals reversed and remanded, noting:

> We are of the opinion, therefore, if appellant in good faith believed that she was the lawful wife of John E. Morgan, she should not be deprived of her right to participate in the property acquired through their joint efforts, and that she should have been allowed to prove the fact, and that issue should have been submitted to the jury.[175]

According to the language of the opinion, legal recognition of the failed attempt at marriage turned on the second wife's good faith lack of knowledge. This suggests that the remedy was aimed at achieving the most equitable result possible for the unknowing spouse, who would otherwise be left out in the cold.

A more modern example of a similar judicial outcome can been seen in the case of *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1975). In *Davis*, a man married his first wife, Mary, and then went overseas on assignment with his employer, an offshore drilling company. While stationed in Singapore, a Buddhist wedding ceremony was performed between Davis and another woman, Nancy, and the couple subsequently lived together as man and wife until his tragic death two years later. Approximately two months after his death, both his first and second wives gave birth to daughters.[176] At issue in the case was the rightful property division of the assets in his estate.

The Texas Supreme Court reversed the appellate court's holding that Nancy, the second wife, was not the putative spouse of the decedent. By way of analysis, the court reasoned:

> Nancy and two other witnesses testified to the full formality of the ceremony, which was held in the home of her parents with all of her family participating and with twenty persons in attendance. For more than two years thereafter, and until the date of his death, Charles and Nancy lived together as man and wife. Nancy testified that Charles told her of his previous marriage but also assured her that

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[171] TEX.FAM. CODE ANN. § 7.001 (Vernon 1998).
[172] Carlson at 9.
[173] *Las Siete Partidas*, Partida IV, tit. XIII, law I, translated in Las Siete Partidas 948. The *Siete Partidas* was a Spanish statutory code established under King Alfonso X of Castille in the thirteenth century. The *Partidas* had an enormous influence on the laws of Latin America and Texas up until the nineteenth century. (Wikipedia.com, Siete Partidas, http://en.wikipedia.org/wiki/Siete_Partidas) (last visited February 6, 2010).

[174] Morgan v. Morgan, 1 Tex.Civ.App. 315, 21 S.W. 154 (Tex.Civ.App. 1892).
[175] *Id*. at 320.
[176] *Davis* is primarily cited for the fact that the child born to the first wife was not the child of the deceased, Charles.

> he was divorced and free to marry her. The evidence clearly warrants the finding that Nancy entered this relationship in good faith.[177]

As a result, the court held that Nancy was entitled to the same property rights as if she had been the lawful wife of the decedent.

Unlike *Morgan*, *Davis* dealt with the consequences of a failed attempt at marriage in which one spouse is aware of the invalidity of the union, but represents himself as available to be lawfully married to another. In contrast, *Morgan* was an early look at what happens when both spouses are under the impression that their marriage is legally valid. In spite of their factual differences, however, the result is the same. As long as at least one spouse has a good faith belief that the marriage is valid, notions of fairness require the law to treat it as if it were.

2. Meretricious Individuals

Although Texas courts have been generous with regard to their treatment of a putative spouse, they have not gone so far as to award property rights to cohabitants that both know they cannot be lawfully married. These relationships are known as "meretricious." Black's Law Dictionary defines a meretricious relationship as a "stable, marriage-like relationship in which the parties cohabit knowing that a lawful marriage between them does not exist."[178] Case law has characterized meretricious relationships as ones in which "neither one of the individuals has a good faith belief that they are entering into a marital relationship; therefore there is no innocent party in need of equitable protection under the law."[179] In light of the fairness rationale that prevailed in the putative marriage doctrine, it is understandable that when both parties to a relationship know that they cannot marry, they should not expect to receive property rights commensurate to that of a legal spouse.

In 1909 a Texas appellate court considered whether or not to confer property rights on individuals involved in meretricious relationships.[180] The court asserted that it would

> [r]efuse to award anything to a pretended wife, who, by reason of her knowledge of the illicit relation, occupies the position of an adulteress and a breaker of the laws. In such cases the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reasons of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy.[181]

The facts of the case arose out of the legitimacy of a slave marriage, as ratified by the spouses' conduct after their emancipation. The court determined that when both parties to the purported marriage moved on to other partners, those subsequent unions were legally invalid. The rationale was based on a now-familiar concept; lack of a good faith with respect to the validity of a marriage will render a spouse meretricious, and foreclose the possibility of receiving the measure of legal protection of a legitimate husband or wife.[182]

The rather scathing language quoted above seems to be a reflection of the moral disgust with which courts and society viewed meretricious relationships in the early part of the 20th century. When used in conjunction with words such as "adulteress" and "breaker of the laws," it is no wonder that the term took on a decidedly negative connotation in the ensuing years. Interestingly, from 1905 to 1989 the word "meretricious" was used in no less than seventy-five Texas opinions. A random sampling of these cases reveals the term used alongside strong, disapproving descriptions such as "illicit,"[183] and "wanton."[184] In contrast, however,

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[177] *Davis* at 605-06.

[178] BLACK'S LAW DICTIONARY 1009 (8th ed. 2004). *But see* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 901 (Michael Agnes ed., IDG 2001), defining "meretricious" as "of, like or characteristic of a prostitute…superficially plausible."

[179] *In re* Marriage of Sanger, No. 06-99-00039-CV, 1999 WL 742607 (Tex.App—Texarkana Sept. 24, 1999).

[180] Hayworth v. Williams, 102 Tex. 308, 116 S.W. 43 (Tex. 1909).

[181] Lawson v. Lawson, 30 Tex.Civ.App. 43, 46, 69 S.W. 246 (Tex.Civ.App. 1902).

[182] *See also* Hovious v. Hovious, No. 2-04-169-CV, 2005 WL 555219 (Tex.App.—Fort Worth March 10, 2005, reh'g denied) (denying wife's claim for economic contribution because she fraudulently procured and used a divorce certificate which she knew was invalid).

[183] Defferari v. Terry, 99 S.W.2d 290 (1936).

[184] Biggs v. Washington Nat. Ins. Co., 275 S.W.2d. 566, 569 (Tex.App.—Waco 1955) (asserting that "[i]t is a matter of common knowledge that the practice of such relations often results in a fertile field for the breeding of violence which too frequently ends in the wanton destruction of human life.")

language used in cases decided after 1960 merely acknowledges the doctrine in general, while conspicuously refraining from editorializing with respect to its moral implications. Even more remarkable is the fact that between 1989 and today, the word "meretricious" has been used in only fourteen cases. Amongst these, the term is qualified by words such as "putative"[185] and "live-in."[186] It appears that this shift signals our collective notion that meretricious relationships, though once morally reprehensible and marginalizing, are now a rather common social reality. To the extent that the term is used in judicial opinions at all, it is now merely a question of legal status rather than an opportunity for social commentary.

Although the nature and extent of judicial discussions of meretricious relationships has been more tolerant in recent years, Texas law has never extended property rights to individuals who know they cannot be lawfully married. Notions of fairness have been the driving force behind many judicial decisions that require good faith as a prerequisite for saving an unwitting spouse from a failed attempt at marriage. Without legal protection, an innocent party might be totally devastated (both financially and emotionally) by the revelation that his or her marriage was a sham. This result must be avoided, and Texas courts have demonstrated a firm commitment to ensure just that. Yet the individuals who know they cannot be legally married have consistently been found to be undeserving of any legal remedy. In short, it seems that Texas law has not gone so far as to recognize the legitimacy of extramarital unions. However, as discussed below, the changing ideals of the typical American family have influenced the extent to which Texas law recognizes the legal rights of good-faith, unwed cohabitants.

D. Legal recognition of commitment pursuant to informal family structures

1. Evolving standard for recognition of common law marriage

In addition to acknowledging unions in which at least one spouse believes she is legally married, Texas law has been increasingly sensitive to more informal domestic arrangements that rise to the level of a committed partnership. Common-law marriage has been recognized by the state of Texas since 1847.[187] In spite of its long-standing existence, some scholars have noted that Texas courts disfavor the doctrine of common-law marriage.[188] Begrudging language pervades opinions, which use words such as "tolerate" and which encourage courts to "review with care a common-law marriage claim."[189]

As it stands today, section 2.401(a)(2) of the Texas Family Code sets out the judicial test for an informal marriage in the following way:

> (a) In a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that:
>
> (1) a declaration of their marriage has been signed as provided by this subchapter; or
>
> (2) the man and woman agreed to be married and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.[190]

The law treats a relationship that meets all three elements of the test as in Subsection (a)(2) a de facto legal marriage. However, this modern version of the statute is a departure from the standards of the past.

Prior to 1989, the statutory test permitted courts to infer that the "agreement" between man and woman was present based on an existence of the latter two elements. Explicit proof was not required; rather the agreement was understood to be based on either direct or circumstantial evidence.[191] The old version of the statute provided:

> In any proceeding in which a marriage is to be proved under [this section], the agreement of the parties to marry may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married.[192]

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[185] Chandler v. Chandler, 991 S.W.2d 367, 376 (Tex. App.—El Paso, 1999).
[186] Ayala v. Valderas, 2008 WL 4661846 *5 (Tex.App.—Fort Worth 2008).
[187] Tarpley v. Poage's Adm'r, 2 Tex. 139 (Tex. 1847).
[188] Kathryn S. Vaughn, "The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?" 28 HOU LR 1131, 1150 (1991).
[189] *Id*. at 1151.
[190] TEX.FAM. CODE ANN. § 2.401(a)(2) (Vernon 1998).
[191] *See* Humphreys v. Humphreys, 364 S.W.2d 177, (Tex.1963); *see also* Shelton v. Belknap, 282 S.W.2d 682 (Tex. 1955).
[192] Act of May 14, 1969, 61st Leg., R.S., ch. 888, § 1, 1969 Tex. Gen. Laws 2707, 2717 (amended 1989).

Essentially the historical test was in fact basically two-pronged. Proof of cohabitation and holding out to the public was sufficient to prove the existence of the marriage.[193]

In 1970 a jury found sufficient evidence of an agreement to be married between the decedent and the claimant in an action to collect on the death benefits due under a Worker's Compensation Insurance claim. The appellate court affirmed the trial court's ruling, noting that "the testimony clearly establishes an intention on the part of [the man and woman] to change the nature of their relationships from an illicit one to the [*sic*] of lawful marriage."[194] The "clear" proof to which the court was referring, however, was exactly the sort of inference that would not pass muster today. By way of support, the court merely noted that the couple continued to cohabit both before and after the husband's former marriage was officially dissolved. In addition, the couple consistently represented to others that they were husband and wife.[195] Indeed, once the "cohabitation" and "holding out" requirements were established, the purported agreement was merely a presumed afterthought.

A year later, another Texas trial court used its powers of inference to dissolve a disputed union between a man and woman. The appellant asserted that the trial court erred in finding the existence of a common-law marriage because the appellee offered neither explicit nor implied evidence of an agreement between the parties.[196] The appellate court disagreed, however. It reasoned that the testimony of the wife, asserting that she and the appellant had agreed to be married, was sufficient to prove that such an agreement was in fact made. Though not necessary, this assertion was helpful to the court in reaching its decision. More importantly, the court found circumstantial evidence in a number of documents that allegedly portray the couple as husband and wife. Those documents included "a deed, an earnest money contract, and insurance policy, joint federal income tax returns, and correspondence from the immediate family of the appellant."[197] Yet again, the court took the "agreement" as a given based on presumption established by additional evidence that constituted "holding out" to the public. Nowhere in the opinion was there any justification based on an explicit conversation, contract or resolution between the spouses to be married as husband and wife. To the contrary, the court gave only cursory attention to the matter, and accepted the circumstantial evidence of holding-out as dispositive proof.

After the legislative amendment in 1989, however, parties were required to prove all three elements of the test independently.[198] That is, courts would be required to undertake an independent analysis of whether or not the parties agreed to be married.

In 1991, an appellate court in Houston used pre-amendment cases to fashion a rule for establishing the new agreement requirement. In *Winfield v. Renfro*, 821 S.W.2d 640 (Tex. App.—Houston 1991), the court considered whether the appellee's testimony was sufficient to prove that the parties had arrived at a mutual agreement to be married. Renfro asserted that after she learned that she was pregnant she and Winfield agreed that they would live as husband and wife beginning on April 11, 1982.[199] She claimed that she chose to forego a ceremonial marriage in light of the potentially negative effects it might have on her partner's public image. The court found that this testimony was sufficient to establish the required agreement under Texas law. The opinion cited two pre-amendment cases in support of its rather cursory conclusion. In 1978, the court in *Collora v. Navarro*, 574 S.W.2d 65 (Tex. 1978), acknowledged that the existence of an agreement between the parties could be inferred, but that

> [i]n this case there is no need to resort to inferences, inasmuch as there is direct evidence of an express agreement. We find persuasive Mrs. Collora's argument that the proof of cohabitation and holding out to the public was corroborative evidence of her direct testimony.[200]

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[193] *See* Act of May 14, 1969, 61st Leg., R.S. ch. 888, § 1, 1969 Tex. Gen. Laws 2707, 2717, *amended by* Act of June 14, 1989, 71st Leg., R.S., ch. 369, § 9, 1989 Tex. Gen. Laws 1458, 1461.
[194] Howard v. Howard, 459 S.W.2d 901, 904 (Tex.Civ.App.— Houston 1970).
[195] *Id.*
[196] Morris v. Morris, 463 S.W.2d 295 (Tex.Civ.App. —Houston 1971).
[197] *Id.* at 296.
[198] *Supra*, n. 49.
[199] *Winfield* at 645.
[200] *Collorra* at 70.

The *Winfield* court went on to bolster its analysis of the sufficiency of proof of an agreement by citing *Matter of Estate of Giessel*, 734 S.W.2d 27 (Tex. App.—Houston, 1987). Although still decided before the 1989 amendment, *Giessel* found that one party's testimony that the couple was married "in God's eyes"[201] was sufficient to establish a rebuttable presumption that an agreement was made. The court went on to note that "if more evidence of an agreement is necessary, it may be inferred from cohabitation and representations."[202] Obviously, these two pre-amendment cases merely touched on the presence of agreement because it simply wasn't an independent requirement of the judicial test when those cases were decided. However, *Winfield's* reliance on their discussion of what constitutes sufficient proof is illuminating. Clearly, older cases such as *Collora* and *Giessel* impacted post-amendment cases as they grappled with how to deal with new requirements under recent legislative changes. While those cases were still relevant, however, the change lay in the fact that what used to be a mere factor in the court's analysis was now a required element in proving the existence of a common-law marriage.

In 1993, the Texas Supreme Court considered two consolidated cases in which the existence of the agreement to be married was disputed.[203] In each case, the trial court found that the facts met all three elements of the revised judicial test. The Court of Appeals, however, had reversed both findings either in whole or in part. On appeal in the Supreme Court, the opinion observed that

> [t]he 1989 amendment defines the burden of proof for informal marriages and eliminates the ability of courts to simply infer an agreement to marry from evidence that they lived together as husband and wife and represented to others that they were married.[204]

The new standards articulated in *Russell v. Russell* contemplate either "direct" or "circumstantial" evidence of an agreement.[205] Although the court pointed out that the amendment's allowance for "circumstantial" evidence did not foreclose the legislature from inferring a tacit agreement, it noted that "in making such a finding…it seems that the evidence of holding-out must be more convincing than before…"[206]

In 2005, a Texas appellate court undertook a careful review of the record to determine whether the litigants were common-law married under the new standards as articulated in the 1989 amendment, and as discussed *Russell*. In *Lewis v. Anderson*, 173 S.W.3d 556 (Tex. App.—Dallas 2005), the parties were formally married in December 1974. After becoming concerned about the connection between his wife's precarious emotional state and his financial situation, Dr. Anderson secured a divorce in May 1977.[207] Both Anderson and Lewis acknowledged the validity of the divorce, but continued to cohabit and represent themselves as married to their community. They adopted two children, joined a church as "Hal and Mindy Lewis," and celebrated annual wedding anniversaries.[208] In spite of these facts, Lewis contended that after the divorce and leading up to their separation in 1998, his relationship with Anderson did not rise to the level of a common-law marriage.

The court cited *Russell's* observation that, after the 1989 amendment, the evidence of holding-out would need to be more convincing than before in order to support the existence of a tacit agreement.[209] As a result, it placed significant emphasis on the extent to which Anderson and Lewis encouraged the perception that they were married. The couple filed a joint tax return "under penalty of perjury" in 1997[210] and consistently attended family functions together. Of particular importance was the fact that they told both their adoption attorney and social worker that they were married.[211] Moreover, Dr. Lewis testified under oath that he was married to Anderson in their adoption hearing in 1983.[212] In spite of all these factors, however, the court asserted that the independent requirement of an agreement between the parties must still be met:

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[201] *Giessel* at 32.
[202] *Id*.
[203] Russell v. Russell, 865 S.W.2d 929 (Tex. 1993).
[204] *Id*. at 932.
[205] *Id*. at 930.
[206] *Id*. at 932.
[207] *Lewis* at 558.
[208] *Id*.
[209] *Id*. at 562.
[210] *Id.* at 558.
[211] *Id*. at 559.
[212] *Id*.

> The issue here of course is not whether Anderson agreed to be married…The issue is whether there is some evidence that after the divorce, Lewis also agreed to be married to Anderson. Anderson's testimony is that in the years after the divorce, she and Lewis agreed they were married and that Lewis told her they were married is at least some evidence that Lewis did agree to be married to Anderson after the divorce.[213]

This independent inquiry into the existence of an agreement between the parties is exactly the sort of analysis that would not have mattered before the 1989 amendments. In a case such as *Lewis*, the extraordinarily strong facts supporting holding-out would have disposed with the agreement prong altogether. However, *Lewis* is an example of the extent to which the 1989 amendment altered the judicial analysis of a familiar question. Before, agreement was a convenient but unnecessary element of the test. After 1989, it became an essential ingredient in its own right[214].

The intent behind the 1989 amendment is unclear. One scholar has suggested that by making it harder to prove the existence of a common-law marriage, legislators who disliked the institution were hoping to encourage ceremonial marriages by making them the only viable option.[215] This theory is based on the premise that the majority of couples consciously chose common-law marriage over ceremonial marriage. However, for those who did, the amendment to the statute had no real effect. Presumably couples who preferred common-law marriage for whatever reason would simply ensure that their unions met all the new statutory requirements by memorializing some sort of explicit agreement.

On the other hand, those unwitting couples that fell into a common-law marriage because of cohabitation and "holding out" under the old test were the ones who received additional protection under the new regime. Apparently, they never wanted to be married and now they never would be. So it seems that under the new standards the legislature was loathe to impose a marriage on a man and woman simply because they lived together and appeared to be husband and wife. A showing of something more was required to rise to the level of a state-recognized union. As a result, the new provision operated to keep out those who wanted out, and allow in those who wanted in.

As a part of the 1989 amendment that changed the standards of proof under the common-law marriage test, the legislature also enacted a timing provision that provided claimants only one year after the termination of their relationship to establish the existence of a common-law marriage. Although now recodified as section 2.401(b) of the Texas Family Code, the older version of the statute provided that:

> (b) A proceeding in which a marriage is to be proved under this section must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later.[216]

In contrast, the current version of the statute reads as follows:

> If a proceeding in which a marriage is to be proved as provided by Subsection (a)(2) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.[217]

This reformulation simultaneously established a new judicial standard and disposed of the language that permitted courts to infer the agreement based on additional evidentiary factors. In his commentary on this change and the larger policy debate at the time, one scholar conceded the legislative disapproval of common-law marriage, but cast the enactment of the timing provision as a compromise meant to pacify both proponents and opponents of the institution.[218] The ability of a claimant to establish the existence of a common-law marriage

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[213] *Id*. at 560.
[214] The Court of Appeals ultimately decided that there was sufficient evidence to support the finding that a common-law marriage existed between the parties.
[215] Vaughn at 1152.
[216] TEX.FAM. CODE ANN. § 1.91(b) (1989).
[217] TEX.FAM. CODE ANN. § 2.401(b) (Vernon 1998).
[218] John J. Sampson, Commentary, *Cliché That "There is No Such Thing as a Common Law Divorce" Loses its Truth*, 89-1 TEX. B. A. SEC. FAM. L. REP. 7 (1989).

would remain, but he or she must act fast or otherwise lose the case to the important interest of allowing both parties to move on with their lives.

The commentator went on to assert that although common-law marriage was historically preserved in order to legitimate children in an era when Texas did not recognize paternity suits, its continued existence was important for the benefit individuals of low socio-economic status who unwittingly "drift into a marital relationship."[219] He recognized, however, that then-current social convention acknowledged that cohabitation may be a conscious choice, rather than an accident of convenience or necessity:

> This lifestyle does not lead to the social opprobrium that once was the natural result of such behavior…Such folks, who typically are at or near the top rung of the socio-economic ladder, have no intention of forming a marriage. In fact, while cohabiting, both parties will often be quick to admit that between themselves they have a specific agreement to that effect.[220]

Thus under the new three-pronged test, it is exactly these individuals who were to benefit from not having an agreement thrust upon them by the finder of fact. The law would respect their private agreement to live together, but remain single. To assert that the legislative changes were an attempt to make ceremonial marriages "the only viable option[221]" is to ignore the nuanced considerations that were the impetus behind the 1989 amendment. There is no doubt that some members of the legislature preferred to dispose of common-law marriage altogether. But in the interest of legislative compromise, those individuals were forced to accept the prevailing position that there was still some justice to be served by the institution. By establishing the temporal requirement and restoring agreement between the parties to its rightful place as an independent element of the judicial test, the legislature extended protection to conscious cohabitants who never wanted to be married in the first place.

It seems safe to say that the amendment and the attendant policy concerns reflected the liberalizing trend that had taken hold of society at large. By 1989, the second wave of feminism was in full swing, and the archetype of the traditional American family had begun to dramatically break down. Indeed, the court's language in *Russell* supports the assertion that these considerations were at least one factor in its decision:

> In a society in which non-marital cohabitation for extended periods of time is far more common than it once was, the fact-finder will have to weigh the evidence of a tacit agreement more carefully than in the past. As the statute now stands, an occasional uncontradicted reference to a cohabitant as 'my wife' or 'my husband' or 'mine' will not prove a tacit agreement to be married without corroboration.[222]

In other words, the court would no longer presume that the cohabitants intended to be married based on the weak circumstantial evidence of the past. The reality both then and now suggests that cohabitation and holding-out may be simply conscious, deliberate, independent decisions separate from the decision to marry at common law by agreement. The former are no longer considered public indicators of a private choice of the latter.

2. Conclusion

The sociological changes of the past sixty years have been nothing short of revolutionary. America transformed itself from a post-war, conservative haven to a society in which traditional notions of gender, equality and family have dramatically changed. This is not to say, or even imply, that all Americans agree with these changes in the media or society at large. But the contrast between popular media depictions then and now inform the extent to which reality imitates theory. In comparison to the prim, proper, domestically blissful television households of the past, more recent situation comedies portray dysfunctional life at its messiest. However, prevailing themes of familial unity still abound, which suggests that the happy-ending isn't dead. Instead, it is the means to the end that has evolved. The intellectual developments that spurred monumental social change enabled America to see that the notion of "family" was an inclusive, rather than exclusive concept.

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[219] *Id*. at 8.
[220] *Id*.
[221] Vaughn, *supra* note 62.
[222] *Russell* at 932.

Developments in Texas law affirm this collective realization. Through a preservation of protective rights for failed attempts at marriage, as well as the recognition that cohabitation and life-partnership outside of marriage is a reality, Texas law has followed the liberalizing trend set by society. In doing so, the legislature and courts have sent a resounding signal to Texas citizens: When it comes to the new concept of the American family, one size simply doesn't fit all.[223]

[223] To be sure, at present the size does not fit same-sex couples in Texas and the substantial majority of sister states.

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Jimmy A. Vaught (*J.A.V.)*, Christopher Nickelson (*C.N.)*, Rebecca Tillery (*R.T.*), Ashley Bowline Russell (*A.B.R.)*

DIVORCE

GROUNDS AND PROCEDURE

TRIAL COURT ERRED IN GRANTING HUSBAND A DEFAULT DIVORCE DECREE BECAUSE THE MANDATORY SIXTY-DAY WAITING PERIOD HAD NOT EXPIRED FOLLOWING HUSBAND'S AMENDED PETITION ESTABLISHING HIS RESIDENCY.

¶11-2-01. ***Gutierrez v. Davila***, 2010 WL 4882762 (Tex. App.—San Antonio 2010, no pet. h.) (mem. op.) (12/01/10).

Facts: Husband moved to Bexar County and filed for divorce the following month, November 2008. Husband's original petition alleged he had been a domiciliary of Texas for the preceding sixth-month period and that he was a resident of Bexar County. In May 2009, husband obtained a default divorce decree. Wife filed a motion to set aside the decree asserting that husband failed to meet the ninety-day statutory residency requirements before filing his divorce petition. On July 14, 2009, husband filed a supplemental petition stating that he was a resident of Bexar County for 90 days as of January 7, 2009. On September 1, 2009 trial court granted husband a default divorce decree. Wife appealed, arguing trial court erred in granting the decree because the mandatory sixty-day waiting period for granting a divorce had not expired.

Holding: Reversed and remanded

Opinion: TFC 6.702 provides "the court may not grant a divorce before the 60th day after the date the suit was filed." When the original petition is filed before the party has resided in the county for ninety days, in contravention of TFC 6.301, a trial court cannot grant the divorce until the petitioner files an amended petition after meeting the ninety-day residency requirement. After the amended petition is filed, the sixty-day waiting period required by TFC 6.702 begins to run, and the parties must wait sixty days before the divorce may be properly granted.

Husband argued his supplemental pleading, as contrasted to an amended divorce petition, did not have the effect of waiving or withdrawing his previous pleading, and the filing of the supplemental petition did not restart the sixty-day waiting period. The Texas Supreme Court recently explained the proper function of original, supplemental, and amended pleadings as follows:

> [T]he supplemental pleadings constitute separate and distinct parts of the pleading of each party, the former being for the purpose of stating or defending against the cause of action, and the latter for the purpose of replying to the allegations of the opposing party immediately preceding them; whereas an amendment to either, 'as contradistinguished from a supplemental petition or answer,' is designed to 'add something to, or withdraw something from the amending party's own pleading, so as to cure its deficiencies.

Furthermore, though a party may denominate a pleading as a supplement, it may actually constitute an amendment.

Here, husband's July 14, 2009 supplemental petition specifically ratified the original petition, and added something to the original; therefore, it operated to cure the residential defect in his original petition and thus serves as an amended petition. To have the right to maintain the divorce action and obtain a divorce, husband

had to file an amended petition after meeting the residency requirements. Husband's supplemental petition constitutes an amended petition and the filing of a new suit. Consequently, when the trial court signed the final divorce decree, the mandatory sixty-day waiting period had not expired. Thus, trial court erred in granting husband a divorce on September 1, 2009.

Editor's comment: *Procedures for default judgments in family law cases continue to be a trap for the unwary whether it is the failure to present evidence to the Court to prove the allegations in the divorce petition because the allegations are not taken as proven or confessed by the failure to answer, filing an amended petition for divorce and not serving the respondent with the amended petition before taking the default judgment, or as in this case, filing a supplemental (amended) petition and not waiting 60 days before taking the default. (J.A.V.)*

Editor's comment: *In civil cases, courts apply the relation back doctrine when determining whether a claim is barred by the applicable statute of limitations. That doctrine holds that an amended pleading relates back to the date the original petition was filed if the claim asserted relates to one filed in the original petition. In family law case, the Dallas and San Antonio Courts of Appeals have impliedly held that no such doctrine applies when determining whether a divorce has been on file for 60 days or not. The amended pleading is deemed a new lawsuit. Litigators beware. (C.N.)*

TRIAL COURT ERRED BY DISQUALIFYING MOTHER'S ATTORNEY-WITNESS BECAUSE FATHER FAILED TO PROVE THE ATTORNEY'S TESTIMONY WOULD BE NECESSARY TO ESTABLISH AN "ESSENTIAL FACT" ON MOTHER'S BEHALF OR THAT THE ATTORNEY-WITNESS'S DUAL ROLE WOULD CAUSE FATHER ACTUAL PREJUDICE.

¶11-2-02. ***In re Tips,*** -- S.W.3d --, 2010 WL 5386315 (Tex. App.—San Antonio 2010, orig. proceeding) (12/29/10).

Facts: During a hearing pursuant to a divorce proceeding, a discussion ensued regarding gifts mother's counsel (attorney) allegedly gave to the children. Afterward, father filed a motion to disqualify mother's attorney based on Disciplinary Rule 3.08. Trial court held a hearing on father's motion. Following the hearing, trial court granted father's motion to disqualify mother's attorney. Mother filed this petition for writ of mandamus arguing trial court abused its discretion by disqualifying her attorney.

Holding: Petition for writ of mandamus granted

Opinion: The party moving for disqualification must establish with specificity a violation of one or more of the disciplinary rules. Mere allegations of unethical conduct or evidence showing only a remote possibility of a violation of the disciplinary rules are not sufficient to merit disqualification.

TRDP 3.08 was promulgated as a disciplinary standard rather than one of procedural disqualification, but courts have recognized that the rule provides guidelines relevant to a disqualification determination. The rule states that "A lawyer shall not . . . continue employment as an advocate before a tribunal in a . . . pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client, …"

The fact that a lawyer serves as both an advocate and a witness does not, standing alone, compel disqualification. Texas Disciplinary Rule 3.08(a) provides that disqualification is appropriate only if the lawyer's testimony is "necessary to establish an essential fact on behalf of the lawyer's client." Therefore, disqualification is inappropriate under Rule 3.08 when opposing counsel merely announces their intention to call the attorney as a fact witness without establishing both a genuine need for the attorney's testimony and that the testimony goes to an essential fact. Also, the party moving for disqualification must show the opposing lawyer's dual roles as attorney and witness will cause the moving party actual prejudice.

Here, in his motion to disqualify, father claimed attorney *may* be called as a fact witness regarding the gifts given to the children and whether or not the gifts influenced the children with regard to the case, but father never discussed whether attorney's testimony was going to be necessary to establish an essential fact on mother's behalf. Likewise, in response to mother's petition for writ of mandamus, father asserted attorney has personal knowledge of essential facts such as: (1) alleged conflict between father and child; (2) communications between father and child; and (3) information regarding gifts and alleged promises made by attorney to the children. Father concludes that if attorney remains on the case, the children's testimony will be influenced and attorney will be called to testify. However, at no point in the proceedings did father establish attorney's testimony will be necessary to establish an "essential fact" on mother's behalf.

Finally, father failed to show attorney's dual roles as attorney and witness would cause father actual prejudice. In the motion to disqualify and at the hearing, father concluded that, as a matter of law, attorney's dual roles will cause father actual prejudice. However, this statement is conclusory in nature and does not provide any evidence of actual prejudice. In sum, father failed to meet his burden, and, therefore trial court abused its discretion in disqualifying mother's attorney.

Editor's comment: *Among other things, father claimed mother's attorney had knowledge of conflict between father and son and of communications between father and daughter. If these are not "essential facts" in a SAPCR, could mother call her attorney to testify about them? (J.V.)*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING HUSBAND'S MOTION TO ABATE TEXAS DIVORCE BECAUSE FLORIDA DIVORCE FILED FIRST SINCE TEXAS DIVORCE WAS READY FOR TRIAL AND FLORIDA DIVORCE ONLY AT TEMPORARY ORDER STAGE.

¶11-2-03. ***Griffith v. Griffith,*** -- S.W.3d --, 2011 WL 17382 (Tex. App.—San Antonio 2011, no pet. h.) (01/05/11).

Facts: Husband and wife married in Texas in 1984 and lived in Texas until 1998 when they moved to Florida. As part of her separate property, wife has a trust, which, in turn, has an ownership interest in a large ranch in Texas. Wife left Florida in September 2008 and began living permanently at her ranch in Texas. In December 2008, husband filed a divorce petition in Florida. Afterward, in January 2009, wife filed a separate divorce petition in Texas. In response to wife's petition, husband filed a special appearance, claiming that Texas could not exercise personal jurisdiction over him. After a hearing, trial court denied husband's special appearance. Additionally, husband filed a motion to stay the proceedings under the doctrine of forum non conveniens and a plea in abatement. Trial court denied both of husband's requests. Following trial, trial court granted divorce and divided property between the parties including property located in Florida. Husband appealed.

Holding: Affirmed

Opinion: Husband argued that trial court erred in denying his special appearance because Texas lacked personal jurisdiction over him. Here, husband testified at his special appearance that he had lived in Texas for twenty years, from 1978-1998 until he and wife moved to Florida. Husband testified to his contacts with Texas that occurred after 1998 including: he contracted with a ranch hand to work on wife's ranch; he entered into an installment payment plan for heavy equipment with a Texas company; he stored and insured a vehicle in Texas; he and wife purchased a condominium in Austin; etc. Husband contends he is not subject to personal jurisdiction based on wife's unilateral actions. However, the above contacts with Texas are not a result of wife's unilateral actions, but the result of husband's actions taken intentionally and purposefully. Husband's contacts with Texas are sufficient to confer general jurisdiction.

Husband argued that Texas exercising personal jurisdiction over him offends notions of fair play and substantial justice. Once minimum contacts have been established, however, the exercise of jurisdiction will rarely fail to comport with fair play and substantial justice. When minimum contacts are present, a nonresident must present a compelling case to show that a court exercising jurisdiction is unreasonable. In considering whether a defendant has met such a case, a court looks to the following factors: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies.

Here, with regard to the first factor, husband argues that it has been a burden to travel from Florida to Texas to attend court proceedings. However, in light of modern transportation and communication, distance alone is ordinarily insufficient to defeat jurisdiction. With regard to the second factor, husband argues that Florida is the proper forum because there are no issues in the Texas case that cannot be addressed in the Florida case. However, Texas does have a valid state interest in litigating ownership rights of Texas trusts; settling title to Texas mineral interests; and litigating marital rights in Texas realty. Finally, with regard the third and fourth factors, every witness but husband was from Texas. Accordingly, Texas exercising personal jurisdiction over husband did not offend notions of fair play and substantial justice.

Regarding trial court's denial of husband's plea in abatement, husband argued that because he filed his divorce proceeding in Florida before wife filed her divorce in Texas, Texas trial court was required to stay the Texas proceeding. However, the mere pendency of a prior suit in one state cannot be pleaded in abatement or in bar to a subsequent suit in another, even though both suits are between the same parties and involve the same subject matter.

In determining whether a trial court abused its discretion, an appellate court looks to the two pending actions. To obtain a stay of the later action, it is generally necessary for the petitioner to show that the two suits involve the same cause of action, concern the same subject matter, involve the same issues, and seek the same relief. However, while the pendency of a prior suit involving the same parties and subject matter strongly urges the court of a local forum to stay the proceedings pending determination of the prior suit, the rule is not mandatory upon the court nor is it a matter of right to the litigant. Here, although the Texas and Florida divorce proceedings involved the same parties and subject matter, the matter rested within trial court's sound discretion.

Additionally, the trial court can consider uncertainty as to the amount of time that might pass before the other proceeding concludes, or what effects an abated trial would have on the parties before the court or to the orderly control of the court's docket. Here, before trial, trial court had a telephone conversation with the judge presiding over the Florida action. Trial court stated the discussion concerned filing and procedural timelines. During this discussion, it became apparent that the Florida proceedings had progressed only to the point that the Florida court had scheduled a preliminary hearing on temporary spousal support. Thus, while the Texas case was ready to proceed to trial, the Florida case was still merely proceeding with preliminary hearings. Accordingly, trial court did not abuse its discretion by denying husband's plea in abatement.

Husband argued trial court abused its discretion by denying his motion to stay the Texas proceeding under the doctrine of forum non conveniens. To dismiss a case based on forum non conveniens, the trial court must determine that, for the convenience of the litigants and witnesses and in the interest of justice, the action should be pursued in another forum. Here, every witness except husband was from Texas. Further, husband's own testimony revealed that trips he had to make to Texas for the proceedings cost about $1000. Accordingly, trial court did not abuse its discretion by denying husband's plea in abatement under the doctrine of forum non conveniens.

Husband argued trial court erred in dividing community property located in Florida and that trial court should have just exercised partial jurisdiction over the property located in Texas. However, it is settled law in

Texas that a trial court may require parties over whom it has in personam jurisdiction to execute a conveyance of real estate located in another state. Furthermore, TFC 7.002 requires the trial court to order a division of real and personal property "wherever situated" in a manner that the court deems just and right, including "property that was acquired by either spouse while domiciled in another state and that would have been community property if the spouse who acquired the property had been domiciled in this state at the time of the acquisition." Accordingly, trial court did not err in dividing community property located in Florida.

Editor's comment: *Husband complained that it was a burden to travel from Florida to Texas. The court responded that "in light of modern transportation and communication, distance alone is ordinarily insufficient to defeat jurisdiction." Will we see this observation in another context, such as in relocation cases? (J.V.)*

Editor's comment: *Put a star by this case. Parties often assert that the first filed suit should go first, but that is not a mandatory rule by any means. Furthermore, when the facts show that the second filed case is much further along procedurally (as it was in this case), then there are solid reasons why the first filed suit should not take precedence. (C.N.)*

TRIAL COURT ERRED BY FINDING THE NONEXISTENCE OF AN INFORMAL MARRIAGE DUE TO THE IMPEDIMENT OF A PRIOR MARRIAGE BECAUSE HUSBAND FAILED TO PROVE THE EXISTENCE OF A PRIOR MARRIAGE.

¶11-2-04. ***Nguyen v. Nguyen,*** -- S.W.3d --, 01-09-00421-CV, 2011WLxxx (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (02/24/11).

Facts: Lan and Dinh began dating in Texas in 1995. In 2000, Dinh traveled to Vietnam where he allegedly married Pham. Dinh returned from Vietnam and then allegedly married Lan in a Texas ceremony. In 2007, Lan filed for divorce. At deposition, Dinh disputed the characterization of the Texas ceremony as a wedding between him and Lan. Lan, however, testified that after the ceremony, she believed that she and Dinh were married and that Dinh often introduced her to others as his wife. Dinh moved trial court for a declaratory judgment that no marriage existed between Lan and Dinh.

At trial, trial court heard evidence of the alleged marriage in Vietnam between Dinh and Pham. Trial court concluded that Lan and Dinh were never informally married due to the impediment of Dinh's prior marriage to Pham and thus, a marriage never existed between Lan and Dinh. Lan appealed arguing that the evidence was insufficient to support trial court's finding that Dinh and Lan were never informally married due to the impediment of Dinh's prior marriage to Pham.

Holding: Reversed and remanded

Opinion: A person may not be a party to an informal marriage if the person is presently married to a person who is not the other party to the informal marriage. When two or more marriages of a person to different spouses are alleged, there is a strong presumption that the most recent marriage is valid against each marriage that precedes it. This presumption that the most recent marriage is valid continues until a party proves the impediment of a previous marriage and its continuing validity. Traditionally, courts have used the law of the place a marriage purportedly occurred to determine the validity of the ceremony.

Here, although Dinh, challenged the validity of his marriage to Lan by asserting a continuing prior marriage to Pham, he failed to establish the validity of the alleged marriage to Pham. Dinh made no effort to plead and prove the law of Vietnam concerning the requirements for a valid marriage in that country. Dinh and Pham testified that they had a formal wedding ceremony in Saigon in 2000. However, neither party testified regarding the details of the ceremony, nor did Dinh present evidence that the alleged wedding ceremony was performed by one authorized under Vietnamese law. Dinh presented no evidence that either Vietnamese or Texas law would recognize his and Pham's actions as constituting a valid ceremonial marriage.

Further, Dinh testified inconsistently at trial regarding whether he and Pham obtained a marriage license. The only document Dinh provided as evidence of marriage to Pham was an "Application for Certification" of the wedding ceremony, applied for by Pham in Vietnam. However, the official who certified the document was a family friend of Pham's who testified she certified the document as a favor to Pham and that she never knew Dinh. Trial court stated on the record that it did not admit this document as proof of the existence of a marriage, but only to establish the date of the purported marriage.

In light of the evidence, Dinh failed to carry his burden of proving either his valid prior marriage to Pham under Vietnamese law or the continuing validity of such a prior valid marriage. Thus, trial court's finding that no informal marriage existed between Dinh and Lan due to the impediment of Dinh's prior marriage to Pham is not supported by factually sufficient evidence.

[Remanded for determination of an informal marriage between Dinh and Lan.]

Editor's comment: *The court notes that foreign law is regarded as an issue of fact in Texas. The court cites to Tex. R. Evid. 203, which contains procedural requirements for determining foreign law. (J.V.)*

Editor's comment: *Going to trial? Always know whether there is a presumption that works for or against you. If there is a presumption that works against you, figure out how to overcome it. (C.N.)*

DIVORCE

DIVISION OF PROPERTY

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING REAL PROPERTY CONVEYED TO HUSBAND DURING MARRIAGE TO BE HUSBAND'S SEPARATE PROPERTY BECAUSE WIFE DID NOT OVERCOME THE PRESUMPTION THAT THE CONVEYANCE WAS A GIFT TO HUSBAND

¶11-2-05. ***Hallum v. Hallum***, 2010 WL 4910232 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (12/02/10).

Facts: Husband and wife separated and filed for divorce in 2004. In 2003, while husband and wife were still together, husband's stepfather executed three deeds conveying fractional interests in "Heights Properties" real property to husband. The deeds stated that the conveyance to husband was in consideration for ten dollars and other good and valuable consideration. Nowhere in the three deeds does it expressly state that the conveyance was a gift or that the stated consideration was to be paid out of husband's separate property.

Evidence at trial showed that husband's stepfather continued to be a father figure to husband after the death of husband's mother. In April 2004, stepfather was in the hospital dying when he delivered the three deeds to husband. Husband testified that stepfather was aware husband and wife had marital trouble and that stepfather did not intend wife to have any interest in the Heights Properties. Stepfather's wife at the time of the conveyance, testified that stepfather loved husband "very, very much" and that he first introduced husband to her "as his son." Stepfather's wife testified that she was present when stepfather instructed his lawyer to prepare the deeds and that stepfather said to his lawyer, "I want my son … to have these lots as separate property."

Following two separate trials, trial court found that the Heights Properties were husband's separate property. Wife appealed.

Holding: Affirmed
Opinion: Wife argued trial court erred in determining that the Heights Properties were husband's separate property because the evidence at trial was insufficient to demonstrate that the conveyance from stepfather to husband was a gift instead of a sale. TFC 3.003(a) provides that property possessed by either spouse in the course of marriage is presumed to be community property. To overcome the community property presumption, TFC 3.003(b) provides that a party claiming marital property as separate property must prove the claim with clear and convincing evidence. TFC 3.001 defines separate property among other things, as property acquired during marriage by gift. A gift is a transfer of property from one person to another made gratuitously and without consideration. Property transferred from a grantor to a grantee is presumed to be a gift, and thus separate property, if the grantee is the natural object of the grantor's bounty. In turn, this presumption may be rebutted by clear and convincing evidence.

Here, stepfather conveyed the Heights Properties to husband during husband and wife's marriage. Accordingly, the Heights Properties are initially presumed to be community property. Thus, husband had to prove by clear and convincing evidence that stepfather conveyed those properties to husband as a gift. Trial court found that stepfather considered husband "part of his bounty," thus giving rise to the presumption that stepfather conveyed the Heights Properties to husband as a gift.

To overcome the presumption that the Heights Properties conveyance was a gift, wife argued that the plain language of the deeds constituted clear and convincing evidence rebutting the gift presumption. Standing alone, that the deeds recite the receipt of ten dollars and other valuable consideration and lack a recital that the consideration was paid out of separate property tend to show that the conveyance was a sale, not a gift. However, the fact that a deed purports to be a sale for a nominal consideration, paid or unpaid, does not constitute clear and convincing evidence that rebuts the direct evidence from step-father's wife that the properties were a gift. Trial court did not abuse its discretion in finding the Heights Properties to be husband's separate property.

Editor's comment: *This case really turned on the fact that the appellant failed to dispute at trial that her husband was the "natural bounty" of his ex-stepfather, thus giving rising to a presumption that the deed conveyance from ex-stepfather to husband was a gift. Instead of husband bearing the burden of proving the real property was his separate property, the tables were turned, and wife had to overcome the presumption that the conveyance was a gift. Notably, the case that is cited for the proposition that ex-stepchildren are still "natural bounty" (In re Group Life Ins. Proceeds of Mallory at 872 S.W.2d 800) really seemed to deal with an analysis under the Texas Insurance Code - not exactly persuasive precedential authority... (R.T.)*

Editor's comment: *Very interesting case. The Houston Courts of Appeals are possibly split about whether recitals in a deed constitute clear and convincing evidence to rebut the separate property presumption that arises once the party claiming separate property has established a prima facie case that the deed was conveyed as a gift. At stake is whether you can impeach a recital in a deed or whether it is conclusive. (C.N.)*

★★★ TEXAS SUPREME COURT ★★★

TRIAL COURT IMPERMISSIBLY RECLASSIFIED MINERAL DEEDS AS SEPERATE PROPERTY TWENTY-FIVE YEARS AFTER IT ORIGINALLY INCLUDED THE MINERAL DEEDS IN THE DIVORCE DECREE'S COMMUNITY PROPERTY RESIDUARY.

¶11-2-06. ***Pearson v. Fillingim,*** -- S.W.3d --, 2011 WL 117664 (Tex. 2011) (01/14/2011) (per curiam).

Facts: Husband and wife married in 1970. During marriage, husband's parents conveyed to him four deeds for mineral rights, which husband and wife jointly leased to third parties. Husband and wife divorced in 1981. Husband did not appear during the divorce proceedings, therefore, trial court rendered a default divorce de-

cree. The decree stated that "the estate of the parties be divided as follows" and then divided the community assets of the parties. The decree also included residuary clauses awarding both parties a "one-half interest in all other property or assets not otherwise disposed of or divided herein." Importantly, the decree made no mention of the mineral deeds. After the divorce, both husband and wife received royalties from the mineral rights.

In 2006, petitioned trial court to clarify the decree with respect to the mineral rights alleging they were his separate property. Trial court determined that the deeds were separate property, and that the divorce decree did not partition the separate property of the parties. On appeal, the intermediate COA held that trial court's judgment was a clarification of the divorce decree, rather than a substantive change, and thus trial court had jurisdiction. Wife appealed arguing trial court impermissibly reclassified the mineral rights originally divided in the divorce decree.

Holding: Reversed and rendered

Opinion: Trial courts can only divide community property, and the phrase "estate of the parties" encompasses the community property of a marriage, but does not reach separate property. Parties claiming certain property as their separate property have the burden of rebutting the presumption of community property. To do so, they must trace and clearly identify the property in question as separate by clear and convincing evidence. Ultimately, a trial court has jurisdiction to characterize community property-even if it does so incorrectly.

Here, husband did not attend the final hearing, much less offer proof that the deeds were his separate property. The divorce decree did not specifically divide the mineral deeds, but included a residuary clause that effectively divided property not explicitly mentioned in the decree. Thus, trial court properly characterized the mineral deeds as community property, even if the characterization was mistaken in 1981. Because husband did not provide any evidence that the deeds were his separate property, they were encompassed in the "estate of the parties" and were divided by the divorce decree's residuary clauses. Therefore, the deeds were divided by the original decree, and trial court had no jurisdiction to modify that division.

Editor's comment: *This case reminds us of two important points: First, a divorce decree should confirm any separate property as such rather than let it be divided as part of the community estate. Second, watch out for "Mother Hubbard" clauses. (J.V.)*

Editor's comment: *Practitioners need to be very cautious when including a residuary clause in a decree or in a mediated settlement agreement because there can be significant unintended consequences as in this case and others. There are two general types of residuary clauses used in decrees and mediated settlement agreements. One category is the "possession and/or control residuary clause, generally treated as the more narrow of the two types. This case included the other general category, referred to as the broadly worded clauses, which uses language intended to cover a wider range of property. Either one must be used with extreme caution. (J.A.V.)*

Editor's comment: *This case shows us the consequences of failing to confirm your separate property when there is an undivided assets provision in the decree. Here, husband's failure to confirm his separate property coupled with the community presumption came back to bite him long after the decree was entered with the application of the undivided assets clause. The 50/50 division of all undivided assets in this decree did not leave much wiggle room for husband to confirm his separate property twenty-five years later. He might have had a better shot at getting more than half of the interest in the mineral deeds, or at least more room to make his argument, had the decree provided for a just and right division of all assets not otherwise listed. (A.B.R.)*

Editor's comment: *There are many good reasons why a party should show up for trial, including having the party's separate property confirmed as such. "Nice try" to the creative attorneys who were almost successful in disguising an almost naked collateral attack on a judgment as a mere attempt to "clarify" the decree. An-*

yone who can convince not only the emperor, but also his entourage, that the emperor is wearing clothes (when he is obviously not) is a genius. (C.N.)

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CHARACTERIZING LIABILITIES AS COMMUNITY DEBT RATHER THAN HUSBAND'S SEPARATE DEBT BECAUSE WIFE FAILED TO PRESENT ANY EVIDENCE AS TO WHO INCURRED THE DEBT OR WHEN THE DEBT WAS INCURRED.

¶11-2-07. ***Viera v. Viera,*** -- S.W.3d --, 2011 WL 95150 (Tex. App.—El Paso 2011, no pet. h.) (01/12/11).

Facts: Following two-and-one-half years of marriage, husband and wife filed for divorce. In his inventory, husband stated that he and wife were both named on eleven accounts for which they owed creditors a total of $38,112. Wife did not file an inventory of assets or liabilities with trial court. In the divorce decree, trial court awarded wife her separate property and awarded husband all of the community estate including most of the parties' debt, which it characterized as community debt. Wife appealed arguing trial court abused its discretion by characterizing husband's separate debt as community-property debt in its attempt to make a fair and just division of the marital estate.

Holding: Affirmed

Opinion: Wife based her contention on husband's testimony that much of the disputed debt arose from husband's efforts to relocate wife from Puerto Rico to Texas prior to the parties' marriage. Additionally husband testified that he and the couple continued to acquire debt during the marriage "trying to give her the lifestyle that she always required."

The COA began its analysis by noting that community property presumption applies not only to assets but to liabilities, as well. Thus, a debt, which arises before marriage, should be treated as the incurring spouse's separate debt and cannot be assigned to the non-incurring spouse. However, the court stated that a spouse attempting to rebut this "community debt" presumption bears the burden of proof with clear and convincing evidence.

Accordingly, the COA rejected wife's argument stating that wife did not present any evidence to trial court, through documentation, through her own testimony, or through cross-examination of husband, which would aid it in knowing when and by whom any of the debts at issue were incurred. As a result, the COA overruled wife's argument on appeal.

Editor's comment: *Stating that the community property presumption "applies not only to assets but to liabilities, as well," misstates the law because Tex. Fam. Code §3.003 speaks only of property and not of debt. The court clears up this misstatement when it says that an asset purchased during marriage "on borrowed funds is presumptively community in character." (J.V.)*

Editor's comment: *The community presumption doesn't just apply to the fun stuff (assets), it also applies to the not-so-fun-stuff (debts). (C.N.)*

DIVORCE

POST-DECREE ENFORCEMENT

TRIAL COURT ABUSED ITS DISCRETION IN ORDERING WIFE TO SIGN COMPANY VOTING AGREEMENTS THAT IMPERMISSIBLY MODIFIED PROVISIONS OF AN AGREEMENT INCIDENT TO DIVORCE.

¶11-2-08. ***Henderson v. Henderson***, 2010 WL 4924955 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (12/02/10).

Facts: Husband and wife entered into an agreement incident to divorce (AID) in which they divided their marital estate. Under the AID, wife received, among other assets, one-half of the couple's ownership in nine closely held companies. The AID was incorporated into the parties' March 2005 divorce decree. No appeal was taken from that decree. In July 2005, husband sent to wife proposed voting agreements for her shares of stock and units. Wife refused to sign the proposed voting agreements, so husband filed a petition for enforcement. After several hearings, trial court issued an order requiring wife to sign the voting agreements. Wife signed the agreements to avoid contempt and then appealed trial court's order.
Holding: Affirmed as modified

Opinion: Husband and wife stipulated that their AID is enforceable as a contract, thus the AID's construction is governed by contract law. Accordingly, the chief objective of this court is to determine the parties' true intent as expressed in the document. Additionally, the AID provides that a court may not modify the division of property and that any court order modifying the division of property is unenforceable.

Wife argued that the voting agreements modify the AID by giving husband a fully transferable right of first refusal that could be exercised piecemeal. A person with a right of first refusal, also called a preemptive or preferential right, has the right to purchase property, shares of corporate stock and units of a limited liability company in this case, on the same terms as a bona fide purchaser. Exercise of the right must be positive, unconditional, and unequivocal. Generally, a purported acceptance containing a new demand, proposal, condition, or modification of the terms of the offer is not an acceptance but a rejection.

Here, the AID provides that husband is awarded a right of first refusal to purchase the stock or units awarded to wife, and that wife agrees to execute all documents necessary to confirm the right of first refusal. The voting agreements that trial court required wife to sign, however, define husband's right of first refusal as the right "of [husband] to purchase some or all of the [stock]." The voting agreements also provided that wife "grants to husband a Right of First Refusal to purchase all or any portion" of the stock wife proposes to transfer. Thus, the voting agreements allow husband to accept or reject the right of first refusal piecemeal, in essence, giving husband the ability to destroy any deal wife may have to sell her shares. The AID gave him no such authority. Accordingly, trial court abused its discretion by ordering wife to sign the original voting agreements, those provisions modifying husband's right of first refusal are void. [Appellate court modified the voting agreement to reflect the AID provisions related to husband's right of first refusal.]

Wife argued that the voting agreements modify the AID by giving husband the irrevocable, fully transferable right to vote her stock shares and units even after she sells them, binding subsequent purchasers. The voting agreements contain provisions revoking previously executed proxies and appointing husband as wife's proxy to attend shareholders' meetings and to vote. The voting agreements additionally state that "this proxy is irrevocable and is coupled with an interest."

However, construing the AID to give effect to the parties' expressed intent, the plain language of the AID does not expressly limit husband's rights to vote wife's shares and units to her period of ownership, nor does the AID provide that husband's rights to vote the shares and units terminate upon wife's transfer of them. Rather, the AID expressly gives husband the right "to exercise voting rights relating to the shares of stock or units" awarded wife and provides that wife's ownership of the shares or units does not include the right to vote. Further, the AID expressly provides that its terms and conditions "shall inure to the benefit of and be binding upon the respective successors and assigns of the Parties." Thus, the AID does not provide that husband's rights to vote the shares and units awarded to wife somehow revest in wife so that she can transfer unencumbered shares or units to her respective successors and assigns. Accordingly, the voting agreements and trial court's order compelling wife to sign them do not impermissibly modify the AID regarding the voting rights.

Editor's comment: *We all know that the decree must be in "strict compliance" with the terms of the MSA or settlement agreement, but so do the closing documents that execute the settlement agreement's terms.(C.N.)*

TRIAL COURT PROPERLY DENIED WIFE'S REQUEST TO REPOSSESS RESIDENCE BECAUSE THE REQUESTED RELIEF WOULD IMPROPERLY MODIFY THE DIVORCE DECREE, WHICH AWARDED RESIDENCE AS HUSBAND'S SEPARATE PROPERTY.

¶11-2-09. ***Watson v. Heaton***, 2010 WL 5132565 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (mem. op.) (12/14/10).

Facts: Divorce decree incorporated a property settlement agreement. The property settlement agreement awarded husband the parties' former residence. Additionally, the settlement agreement awarded wife a one-half equity interest in the residence and ordered husband to pay wife her one-half equity interest in monthly installments. The settlement agreement also provided that wife "may take the remedy of repossession to protect her credit" in the event husband failed to make timely payments. Husband failed to pay wife according to the payment schedule. Wife filed an enforcement action requesting immediate possession of the residence. Trial court denied wife's requested relief. Wife appealed, arguing that husband's default triggered her "remedy of repossession" and entitled her to immediately retake physical possession of the residence.

Holding: Affirmed

Opinion: Under TFC 9.006(a), a trial court "may render further orders to enforce the division of property made in the decree of divorce or annulment to assist in the implementation of or to clarify the prior order." A trial court's power to enforce a property division is limited by TFC 9.007(a), which states that a trial court "may not amend, modify, alter, or change the division of property made or approved in the decree of divorce or annulment."

Here, according to the divorce decree, wife retained a one-half equity interest in the residence but was "divested of all right, title, interest and claim in and to that property." Additionally, husband received the residence as his "sole and separate property" subject only to wife's one-half equity interest. An enforcement order granting wife a possessory interest in the house and ordering husband to vacate would alter the divorce decree's division of property; such an order would burden husband's undivided ownership of the residence and grant wife more than her one-half equity interest in the residence. Accordingly, trial court properly denied wife's requested relief because it had no authority to issue an order altering the division of property under the divorce decree.

Additionally, trial court's judgment was not erroneous because it could properly conclude that wife's interpretation of "repossession" fails under contract interpretation rules. Courts interpret marital property agreements incorporated into divorce decrees under contract law. In construing such an agreement, the prima-

ry concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. Courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract.

Here, if trial court had adopted wife's interpretation of "repossession," it would have additionally needed to decide (1) whether and how wife should pay husband for his remaining one-half equity interest; and (2) which party should continue making mortgage payments. The settlement agreement provides no details to govern such a situation. Further, the parties agreed that the remedy of "repossession" would be available to protect wife's credit. Wife's request to retake possession of the residence does nothing to "protect her credit" in the event of husband's default. Wife's interpretation would render the phrase "to protect her credit" meaningless. Accordingly, trial court could have concluded that wife's proposed interpretation of the word "repossession" was not reasonable, based on the plain meaning of the word, the intent of the parties, and the operation of the agreement as a whole.

Editor's comment: *Another case to further muddy the already-muddy waters of what constitutes permissible "clarification" and impermissible "modification" under sections 9.006 and 9.007 of the TFC. Although the court attempts to justify its decision by turning to principles of contract law, it seems to me like they ignored the basic tenet that the more specific provision controls over the more general. While the provision in question certainly is a bit ambiguous, the court's interpretation of the provision renders the phrase "wife make take the remedy of repossession" meaningless. But, in the end, as per usual, that (sometimes) pesky "abuse of discretion" standard renders the trial court's interpretation bullet-proof. (R.T.)*

Editor's comment: *The property settlement agreement awarded the residence to husband as husband's separate property. It also granted wife a community property equity interest in the residence. How could enforcing wife's equity interest "alter the divorce decree's division of property?" Enforcement would affect husband's separate property, but husband's separate property was not part of the community estate. (J.V.)*

Editor's comment: *Hind sight is twenty-twenty, especially with property settlement agreements. Here, Wife tried to protect herself with her "right of repossession" – unfortunately, her protection looked better on paper than it worked in actual practice. This case shows how important it is to consider practical details and potential problems when thinking outside the box in settlement agreements. (A.B.R.)*

TRIAL COURT ERRED BY ORDERING HUSBAND TO EXECUTE INSURANCE DOCUMENTS BECAUSE THE DIVORCE DECREE CONTAINED NO REQUIREMENT FOR HUSBAND TO EXECUTE INSURANCE DOCUMENTS.

¶11-2-10. ***Hawkins v. Hawkins***, 2010 WL5514344 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (mem. op.) (12/28/10).

Facts: A final divorce decree ordered that after a certain date, wife was to have exclusive possession of the real property. The decree further ordered wife to "promptly take any and all measures reasonably necessary to contract for the sale of the property." To facilitate wife's efforts, the decree ordered husband "[w]ithout limitation" to "execute any and all documents reasonably required to close the sale of the [property]." The net proceeds from the sale were to be distributed evenly amongst the parties.

Following several disputes over the administration of the decree, wife requested a clarification order from trial court. Husband did not answer wife's pleading nor did husband appear at a hearing on wife's motion. At the hearing, wife requested that the court clarify the decree by ordering appellant to appear at her counsel's office to execute the deed. Further, wife requested husband be ordered to execute any and all documents necessary regarding insurance claims related to the property. Following the hearing trial court issued a default order pursuant to wife's requests. Husband filed a restricted appeal.

Holding: Affirmed as modified

Opinion: Husband argued trial court erred by ordering him to execute a warranty deed in favor of wife. TFC 9.006(a) authorizes trial courts to issue orders "to enforce the division of property made in the decree … to assist in the implementation of or to clarify the prior order." However, TFC 9.007 emphasizes that courts may not "amend, modify, alter, or change the division of property" as established in the final decree. TFC 9.008 provides that if a court determines that the division of property is not specific enough to be enforceable by contempt, the court can issue a clarifying order "setting forth specific terms to enforce compliance." A party's request for an order altering or modifying a property division in a final decree constitutes an impermissible collateral attack. To be valid, a clarification order must remain consistent with the divorce decree and merely enforce its provisions by appropriate means.

Here, in the divorce decree, trial court expressly mandated that after certain reimbursements, net proceeds were to be split evenly between the parties. Husband insists that by ordering him to sign a deed, trial court gave all interest in the property to wife, thus improperly effecting a substantial change in the property division contained in the final decree. However, trial court's clarification order must be read in conjunction with the decree. Trial court's directive in the clarification order for appellant to sign the deed should be viewed as a method of enforcing or implementing the decree's division of property by specifying more precisely the manner of effecting the division. In other words, the court ordered appellant to sign the deed in order to facilitate the sale of and closing on the property and not to award the property to appellee. This was a proper use of a clarification order under TFC 9.006 and did not affect the substantive division of the property, as prohibited by TFC 9.007.

Husband argued that trial erred in ordering him to appear at appellee's counsel's office and execute insurance documents favoring appellee. Although the order itself does not mention insurance proceeds, wife's counsel represented to the court that the reason for his request regarding insurance documents was the receipt or expected receipt of insurance proceeds. The final decree, however, made no mention of any insurance documents, claims, or proceeds. Consequently, trial court was not authorized to issue a clarification order regarding insurance documents, claims, or proceeds. Such order impermissibly effected a change in the substantive division of the property. Thus, trial court erred by ordering husband to execute insurance documents.

Editor's comment: *Same song, different verse. Apparently awarding a house to one of the parties when the decree was silent as to the award because the house is to be sold is NOT impermissible modification under TFC 9.007, but ordering husband to execute some documents regarding expected insurance proceeds on the house IS impermissible modification under TFC 9.007. Go figure. If the insurance proceeds were not mentioned at all in the decree, as the opinion states, than wife would have been better off bringing a request for the court to award an undivided asset per section 9.201 of the TFC. (R.T.)*

Editor's comment: *The court says the divorce decree made no mention of insurance documents, claims or proceeds. The insurance claim resulted from damage to the house from Hurricane Ike. The trial court signed the divorce decree on May 28, 2008. Hurricane Ike struck the Texas coast in September 2008. How could the divorce decree have addressed insurance proceeds resulting from Ike's destruction before Ike ever existed? Shouldn't the insurance proceeds be considered part of the house? If so, how would requiring ex-husband to sign the insurance documents amend, modify, alter, or change the division of property? (J.V.)*

Editor's comment: *This appears to be a very narrow holding. Although I can understand how ordering husband "[w]ithout limitation" to "execute any and all documents reasonably required to close the sale of the [property]" would not necessarily include signing documents regarding insurance claims and proceeds related to the property. Obviously the insurance claims and proceeds should have been addressed in the decree. However, this case appears to indicate that even if the insurance claims and proceeds were addressed, the decree had to include specific language ordering husband to sign the insurance documents and that general requirements that each party execute any and all other deeds, deeds of trust, bills of sale, assignments, consents to change of beneficiaries of insurance policies, tax returns, and other documents to effect the provisions and purposes of this decree might not be sufficient. (J.A.V.)*

Editor's comment: *Chapter 9 done right – unlike Watson above. (A.B.R.)*

Editor's comment: *If you want possession of property that is not mentioned in the divorce decree, ask for a division of undivided property, not a clarification. (C.N.)*

DIVORCE

SPOUSAL MAINTENANCE AND ALIMONY

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING WIFE SPOUSAL MAINTENANCE WHEN, AFTER DEDUCTING EXPENSES RELATED TO HOME MORTGAGE AND PROPERTY TAXES, MOTHER HAD ONLY $500 PER MONTH LEFT TO COVER HOUSEHOLD EXPENSES.

¶11-2-11. ***Diaz v. Diaz,*** -- S.W.3d --, 2011 WL 16463 (Tex. App.—San Antonio 2011, no pet. h.) (01/05/11).

Facts: Father filed for divorce. During divorce proceedings, mother established a janitorial business and provided janitorial services for seven clients. Following divorce proceedings, trial court awarded mother spousal maintenance. Father appealed.

Holding: Affirmed as reformed

Opinion: Father argued trial court abused its discretion because the evidence was insufficient to establish that mother lacked sufficient property to provide for her minimum reasonable needs. TFC 8.053(a) establishes a statutory presumption that spousal maintenance is not warranted unless the spouse seeking maintenance has exercised diligence in: (1) seeking suitable employment; or (2) developing the necessary skills to become self-supporting during a period of separation and during the time the suit for dissolution of the marriage is pending.

Here, trial court granted mother the right to designate the primary residence of the couple's three children. Additionally, the record indicates that mother ran a janitorial business. During 2008, the business had a net income of $19,460. The evidence further shows that mother provided janitorial services for at least seven clients in 2008. Trial court found mother was developing the necessary skills to become self-supporting during the period of separation and during the time the divorce was pending. Accordingly, trial court did not abuse its discretion in concluding that mother had overcome the presumption against spousal maintenance.

Pursuant to TFC 8.051(2)(C), a trial court may award spousal maintenance where the duration of a marriage was 10 years or longer and the spouse seeking maintenance: (1) lacks sufficient property, including property awarded to the spouse in the divorce proceedings, to provide for the spouse's minimum reasonable needs; and (2) clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs. The term "minimum reasonable needs" is not defined in the Family Code. Therefore, determining what the "minimum reasonable needs" are for a particular individual is a fact-specific determination which must be made by the trial court on a case-by-case basis.

Here, the only significant assets trial court awarded mother was the house and two cars; however, mother was also ordered to pay the mortgage on the home and the balance due on the notes payable on the cars. Just considering these expenses, mother would be required to pay $13,300 annually. As previously noted, the evidence established that mother's annual net income at the time of the divorce was $19,460. Deducting just the annual expenses for mortgage interest, homeowner's insurance, and property taxes, mother would have ap-

proximately only $6,000 a year or approximately $500 per month to pay all other household expenses. Thus, trial court did not abuse its discretion in determining that mother lacked sufficient property to provide for her minimum reasonable needs.

Editor's comment: *This case takes an interesting approach to proving the need for maintenance under the minimum reasonable need standard. Keep the methodology of this case in mind when you think about evidence to prove maintenance next time. (M.M.O).*

SAPCR

STANDING AND PROCEDURE

TRIAL COURT ABUSED ITS DISCRETION BY DENYING MOTHER'S DEMAND FOR A JURY TRIAL IN HER SAPCR REQUESTING SOLE CONSERVATORSHIP OF CHILD.

¶11-2-12. ***In re Reiter,*** -- S.W.3d --, 2010 WL 5060622 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (12/09/10).

Facts: Mother filed a SAPCR and specifically requested trial court to appoint her as child's sole managing conservator and father as possessory conservator. During a pre-trial conference, father stipulated that mother would have "primary custody" over child and the right to designate child's primary residence. Trial court concluded that father's stipulation resolved any issues on conservatorship that properly could be submitted to a jury and removed the case from the jury docket. Afterward, mother filed this petition for writ of mandamus arguing that trial court abused its discretion by denying her a jury trial.

Holding: Writ of mandamus granted

Opinion: Under TFC 153.132, a sole managing conservator has among other rights, the right to: designate the child's primary residence, consent to the child's medical and psychiatric treatment, make decisions concerning the child's education-all subject to the trial court's limitation. In contrast, a possessory conservator, under TFC 153.006 and 153.191-92, has limited rights and duties, such as possession of and access to the child under terms and conditions specified by the court. Thus, mother's request to be appointed as child's sole managing conservator carries with it significant substantive meaning beyond father's stipulation that mother may have the right to designate the child's primary residence and "primary custody."

TFC 105.002 provides that a party requesting sole conservatorship may demand a jury trial. Moreover, TFC 105.002(c)(1)(A)(C) specifically provides that a party is entitled to a jury verdict and the court may not contravene a jury verdict on the issues of appointment of a sole managing conservator, joint managing conservators, or a possessory conservator. However, TFC 105.002(c)(2)(C), prohibits the court from submitting to the jury questions on the issues of any right or duty of a conservator, other than the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child.

Here, trial court's interpretation of TFC 105.002 so as not to require a jury trial in this case is contrary to the plain language of the statute, which specifically empowers a party to "demand a jury trial" and thereby be "entitled to a verdict by the jury ... on the issues of ... the appointment of a sole managing conservator." It is true that TFC 105.002(c)(2)(C) prohibits trial court from delegating to a jury the task of modifying the statutory default allocation of the rights and duties of conservators. However, to interpret that provision to deprive a party of its right to a jury determination of the appointment of conservators, including the appointment of a sole managing conservator, would render TFC 105.002(c)(1) meaningless. Accordingly,

mother was entitled to a jury trial on her request to be appointed sole managing conservator. Trial court abused its discretion in ruling otherwise.

Editor's comment: *That part in the Family Code that says "a party is entitled to a verdict by the jury and the court may not contravene a jury verdict on the issue of . . . the appointment of a sole managing conservator . . ." really does mean what it says. (C.N.)*

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING STEPFATHER STANDING TO PETITION FOR ADOPTION BECAUSE STEPFATHER DID NOT HAVE SUFFICIENT CONTROL OF CHILD TO WARRANT STANDING UNDER TFC 162.001(B)(4).

¶11-2-13. ***In re D.G.,*** -- S.W.3d --, 2010 WL 5014381 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (12/09/10).

Facts: Mother gave birth to child in 2001. Mother married child's stepfather 2003, when child was sixteen months old. Mother and stepfather divorced in 2009. Afterward, stepfather filed a petition to adopt child in 2009. Trial court found stepfather had sufficient contact and control of child to warrant standing under TFC 102.005(5) and TFC 162.001(b)(4). Maternal grandparents then petitioned appellate court for writ of mandamus.

Holding: Petition for writ of mandamus granted

Opinion: Grandparents argued that stepfather failed to demonstrate that he had standing under TFC 102.005(5). TFC 102.005(5) provides that a petition 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." What constitutes "substantial past contact" is not statutorily defined. "Substantial" is generally defined as "of ample or considerable amount quantity, size, etc." Grandparents contend that substantial past contact should be limited to "recent" contact. However, this court need not address grandparent's assertion because stepfather must meet requirements as a person who may petition to adopt under TFC 162.001(b)(4).

Under TFC 162.001(b)(4), a person may adopt a child if "the person seeking the adoption is the child's former stepparent and … has had actual care, possession, and control of the child for a period of one-year preceding the adoption." While "actual care, possession, and control" has not been addressed with regard to TFC 162.001(b)(4), this phrase has been addressed with regard to standing to file an original suit affecting the parent-child relationship under TFC 102.003(a)(9). Under the TFC 102.003(a)(9) standard, "control" means more than the control implicit in having care and possession of the child.

Here, stepfather testified that he interacted with child more than 30 times between the time of the separation in 2007 until the end of 2009. Stepfather continuously picked up child from daycare in 2008 and took child to church without mother being present. However, the last time stepfather had possession of child without mother's presence was during the summer of 2008. Child has not stayed overnight with stepfather since the separation. This is not sufficient to establish that stepfather had actual care, possession, and control of child for a period of one-year preceding the adoption. Accordingly, trial court abused its discretion in finding that stepfather had actual care, possession, and control over child for a period of one year preceding the adoption under TFC 162.001(b)(4).

Editor's comment: *This case like many in non-parent standing, comes down to control – how much control did the nonparent exercise over the child? Here, the court found lack of control even where the stepfather had the child for periods of time by himself after school and at church. However, because the child had not stayed overnight with the stepfather since separation from the mother, the court found lack of control. These cases are very fact-intensive, but most of them come down to some relinquishment by the parent of parental deci-*

sion-making to the nonparent in order to establish control. The stepfather, here, didn't have that kind of evidence. (M.M.O.)

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING GRANDMOTHER ACCESS TO CHILD WHEN SHE FAILED TO MEET THE STATUTORY BURDEN REQUIRED TO PROVE THAT SHE WAS ENTITLED TO GRANDPARENT ACCESS RIGHTS.

¶11-2-14. ***In re Nickelberry***, 2010 WL 5019270 (Tex. App.—Fort Worth 2010, orig. proceeding) (mem. op.) (12/09/10).

Facts: Maternal grandmother filed a SAPCR requesting trial court to name her as the temporary conservator of three-year-old grandchild, with the right to designate child's primary residence. During a hearing on grandmother's motion for temporary orders, grandmother's counsel initially stated that she had evidence demonstrating some "concerns" about father's health and father's ability to care for child. However, grandmother's lawyer then acknowledged that she had "no evidence that [father was] an unfit father." Grandmother's counsel stated she was seeking discovery and a social study to obtain that evidence. Thus, grandmother presented no evidence to trial court on that date.

Afterward, trial court granted grandmother's motion for a social study and advised the parties that it would hear evidence on standing after the social study had been completed. Additionally, trial court entered an oral temporary order granting grandmother access and possession to child. Father filed this petition for writ of mandamus, arguing that trial court abused its discretion by awarding grandmother access to child without a showing that she had standing to file suit and without a showing that the denial of access would significantly impair the child's physical health or emotional well-being.

Holding: Petition for writ of mandamus granted.

Opinion: TFC 153.433 sets forth the requirements that a grandparent must satisfy before a court may grant a grandparent access to a grandchild. The legislature has set a high threshold for a grandparent to overcome the presumption that a parent acts in his or her child''s best interest: the grandparent must prove that denial of access would "significantly impair" the child's physical health or emotional well-being. A trial court abuses its discretion if it grants temporary access to a grandchild when a grandparent fails to overcome the presumption that a parent acts in the child's best interest by proving with a preponderance of the evidence that "denial ... of access to the child would significantly impair the child's physical health or emotional well-being."

Here, grandmother failed to present any evidence to meet the statutory burden required to prove that she is entitled to grandparent access rights. Accordingly, trial court abused its discretion by granting a temporary order for grandmother to have access to and possession of child.

Editor's comment: *Amazingly, in this case, the trial court granted grandparents access to the child after hearing limited statements from the attorneys, and without receiving ANY testimony or evidence. Attorney for father had filed a Plea in Abatement, and a Motion to Dismiss for Lack of Standing, and presented these arguments at the (very brief) hearing. After the trial court granted grandparents access, and before filing his petition for writ of mandamus, attorney for father also filed an emergency ex parte motion to reconsider, which the trial court denied. (R.T.)*

Editor's Comment: *In the last Section Report, the editors criticized In re: Scheller, 325 S.W.3d 640 (Tex. 2010, orig. proceeding) (per curiam). The Scheller court ordered a trial court to vacate a temporary order allowing a grandparent access to and possession of children over the widower father's objection because there was no evidence that the father was an unfit parent. But the Scheller court left undisturbed the trial court's appointment of a psychologist to serve as both guardian ad litem to the children and the court's expert. Nickelberry is an example of Scheller's unfortunate consequences: The Nickelberry grandparent expressed "concerns" about her grandchildren but conceded she had no evidence that the father was unfit.*

Grandmother's counsel "stated she was seeking discovery and a social study to obtain that evidence." The trial court ordered a social study. The father did not challenge the social study order in his mandamus proceeding, no doubt because of Scheller. It appears that a non-parent now can file a SAPCR in Texas without evidence that a parent is unfit, then obtain court orders allowing the non-parent to attempt to develop evidence to prove unfitness. Nickelberry, like Scheller, exemplifies the injection of the state "into the private realm of the family," a result forbidden by Troxel. (J.V.)

Editor's comment: *The moral of the story in this case, and so many like it, is that you cannot hope to prosecute a grandparent access case by obtaining the evidence you need to win through discovery or through court ordered social studies. You must already have evidence rebutting the parental presumption and showing that denying grandparent access would "significantly impair" the child's physical health or emotional well-being. (C.N.)*

Editor's comment: *The parental presumption is alive and well in the Fort Worth Court of Appeals! Even at temporary hearing, a nonparent/Grandparent must show that the parent's parenting actions will cause significant harm to the child's physical health or emotional development before access may be granted. A parent has a constitutional right to make parenting decisions, even if the trial court disagrees with them, absent significant harm. (M.M.O.)*

APPELLATE COURT DENIED MOTHER'S MANDAMUS CHALLENGE TO TRIAL COURT'S TEMPORARY EMERGENCY JURISDICTION OVER OUT-OF-STATE CHILDREN.

¶11-2-15. ***In re Workman***, 2010 WL 5071485 (Tex. App.—Waco 2010, orig. proceeding) (mem. op.) (12/08/10).

Facts: Mother and father divorced in Ohio where mother was granted the right to designate children's primary residence. Mother eventually moved to Colorado. In June 2010, father moved the children and all their belongings from Colorado to Texas. At the time father moved the children, Colorado was the children's "home state." Four weeks later, father initiated an emergency proceeding in Texas and trial court asserted temporary emergency jurisdiction. Mother petitioned this court for writ of mandamus arguing the evidence did not support trial court's temporary emergency jurisdiction.

Holding: Petition for writ of mandamus denied

Opinion: [No majority opinion issued]

Dissent: TFC 152.204 provides a trial court temporary emergency jurisdiction "if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse."

Here, although father testified at the hearing that mother left the parties' twelve-year-old and fourteen-year-old sons unattended for up to twelve hours per day, father presented no evidence of the existence of an emergency, that the children were abandoned, or that the children were subjected to or threatened with mistreatment or abuse. Moreover, trial court was improperly influenced by testimony that the parties may have agreed to a permanent change of homes for the children. Evidence of such an agreement may be compelling evidence for a Colorado court to consider when deciding whether to grant a custodian the authority to designate the children's primary residence, but it has no place in a hearing to determine whether a Texas court has temporary emergency jurisdiction. Consequently, this court should conditionally grant the writ of mandamus requiring trial court to dismiss the emergency proceeding initiated in Texas.

Editor's comment: *I agree with the dissent. This looks like the type of forum shopping the UCCJEA is intended to avoid. (A.B.R.)*

Editor's comment: *Without a majority opinion it is hard to tell what's going on, but it sounds like the dissent is on to something. (C.N.)*

TRIAL COURT ERRED BY ASSERTING JURISDICTION OVER CHILD THAT HAD NOT LIVED IN TEXAS FOR SIX MONTH PRIOR TO FATHER'S CUSTODY PETITION.

¶11-2-16. ***In re Zavala,*** 2010 WL 5407349 (Tex. App.—San Antonio 2010, orig. proceeding) (12/22/10).

Facts: On April 3, 2009, father filed for divorce and sought custody of child. In his petition, father asserted that child had lived in Texas for more than six months prior to his filing of the divorce petition. Mother answered and asserted trial court did not have jurisdiction over child because child had not resided in Texas for more than six months and because child had resided in Ohio since August of 2005. Afterward, trial court entered a post-answer default judgment against mother, which awarded husband custody of child. In October 2010, mother requested trial court to set aside the portions of the divorce decree affecting the visitation with or custody of child. Trial court denied mother's request. Mother filed writ of mandamus arguing trial court lacked jurisdiction over child.

Holding: Petition for writ of mandamus granted

Opinion: TFC 152.102(7) declares that a child's home state is "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." TFC 152.201(a)(1) provides a Texas court can make an initial custody determination only if Texas is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

Here, father does not dispute that child has resided with mother in Ohio since August 2005. Additionally, father did not file his child custody proceeding in Texas until April 3, 2009. Therefore, Texas is not child's home state because child did not live in Texas with a parent or person acting as a parent for at least six consecutive months immediately before commencement of father's custody proceeding.

Alternatively, under TFC 152.201(a)(2), a Texas court could have asserted jurisdiction only if a court of another state did not have home state jurisdiction or a court of the home state of the child had declined to exercise jurisdiction on the ground that Texas was the more appropriate forum under TFC 152.207 or 152.208, and the child and at least one of the child's parents has significant connections to Texas. However, this "significant connection" jurisdiction should only be employed when Texas is not the home state and it appears that no other state could assert home state jurisdiction.

Here, father failed to establish that Ohio did not have home state jurisdiction or that Ohio declined to exercise jurisdiction on the ground that Texas was the more appropriate forum. Accordingly, trial court did not have subject matter jurisdiction over the visitation or custody of child. Consequently, trial court erred in asserting jurisdiction over child.

Editor's comment: *Father's short-cut probably seemed like a good idea at the time, avoiding the expense and inconvenience of litigating custody issues in Ohio with one simple statement - the children have lived in Texas for more than six months prior to his filing of the divorce petition. Instead, his detour through the appellate court left him at a jurisdictional dead end on his child custody suit. He should have asked for directions; someone could have told him that without subject matter jurisdiction, including the jurisdiction to make an initial child custody determination under the UCCJEA, an order is void. (A.B.R.)*

Editor's comment: *This opinion is way too short to do the issue presented justice. Mother brought a collateral attack on the default judgment asserting the trial court did not have jurisdiction to enter the child custody order that it did because the child's home state was Ohio, not Texas. As a general rule, a collateral attack must be based upon the record that existed at the time of judgment, and extrinsic evidence is not allowed to prove lack of jurisdiction. There are exceptions to this general rule. It is unclear how mother was able to prove that child's home state was in Ohio since she made default. The court of appeals merely states that it is "undisputed" that Ohio was the child's home state. Put a star by this one, and keep watching for more cases addressing this issue. (C.N.)*

Editor's comment: *Home state is home state is home state – there is no short cut. (M.M.O.)*

THE HAGUE CONVENTION AND ICARA (IMPLEMENTED BY TEXAS UCCJEA) DO NOT PERMIT A PARTY TO ABDICATE SERVICE OF CITATION REQUIREMENTS UNDER TRCP 107; TRIAL COURT'S DEFAULT JUDGMENT AGAINST MOTHER VOID BECAUSE FATHER DID NOT STRICTLY COMPLY WITH TRCP 107.

¶11-2-17. ***Livanos v. Livanos,*** -- S.W.3d --, 2010 WL 5395702 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (12/30/10).

Facts: Mother and father, who are both dual citizens of Greece and the U.S., married in Greece and had two children together. The parties divorced in Greece in 2007. The Greek court ultimately awarded custody of the children to father. In July 2008, while mother had temporary custody of child, she went on vacation and disappeared. Father later learned from the U.S. Department of State that mother and child had entered the United States and mother was residing in Katy, Texas.

On February 9, 2009, father petitioned Texas trial court for the return of child, pursuant to the Hague Convention and the federal International Child Abduction Remedies Act (ICARA). In his petition, father requested a writ of attachment entitling law enforcement officials to take possession of child and return him to father. Trial court issued the writ and also ordered a hearing on father's Hague Convention petition for February 12, 2009.

Father hired a private process server who attempted to personally serve mother at her Katy residence three times on February 10 and 11. After the third unsuccessful attempt, father moved for alternative service under TRCP 106. On February 11, 2009, trial court granted father's motion permitting service of citation on any person older than sixteen years of age at mother's residence or by affixing citation to the front door. The private process server served citation later that day on February 11 and returned the service of citation the following day on February 12.

Trial court held a hearing on father's petition on the morning of February 12, 2009. Mother was not present, nor did counsel appear on her behalf. Later that day, trial court entered a default judgment ordering mother to deliver child into father's possession. Following mother's special appearance and trial court's denial of her motion for a new trial, mother appealed.

Holding: Reversed and remanded

Opinion: Mother argued that trial court never acquired personal jurisdiction over her due to father's failure to properly serve her, and therefore the default judgment against her is void. A claim of a defect in service of process challenges the trial court's personal jurisdiction over the defendant. A default judgment cannot withstand a direct attack by a defendant who demonstrates that she was not served in strict compliance with the TRCPs. If the record does not affirmatively show strict compliance with the rules regarding service of citation, then service was invalid and the judgment is void.

TRCP 107 provides the standard method a plaintiff must follow in order to serve process on defendant. TRCP 106 provides alternative methods for service of process as authorized by the court. If service of process is carried out under TRCP 106, TRCP 107 provides that "[n]o default judgment shall be granted in any cause until the citation, or process . . . with proof of service . . . as ordered by the court in the event citation is executed under Rule 106, shall have been on file with the clerk of the court ten days, exclusive of the day of filing and the day of judgment." Although TRCP 107 allows for deviations in the form and content of the proof of service if the trial court has ordered an alternate method of service under TRCP 106, the rule still requires that the proof of service be on file with the clerk for ten days before rendition of a default judgment. The return or proof of service must affirmatively reveal that it has been in the district clerk's office for the required ten days, and, if not, the default judgment rendered is void.

Here, it is undisputed that the private process server who served mother, filed the return of service with the clerk on February 12, 2009, the same day that the trial court rendered a default judgment against mother. This defect alone demonstrates that father did not strictly comply with the rules for service and return of citation. Because of this failure, trial court did not acquire personal jurisdiction over mother, and trial court's subsequent default judgment rendered against her is void.

Father argued that the UCCJEA, which provides the notice requirements applicable to Hague Convention proceedings, does not require strict compliance with TRCP 107. Various nations, including the United States and Greece, have agreed to the Hague Convention on the Civil Aspects of International Child Abduction HCCAICA to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. The International Child Abduction Remedies Act (ICARA) establishes procedures for the implementation of the HCCAICA in the U.S.

To commence judicial proceedings under ICARA, the petitioner may petition for the return of a child who has been wrongfully removed from the child's habitual residence in "any court which has jurisdiction …and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." 42 U.S.C. § 11603(b). When a petitioner files such a Hague Convention petition, notice shall be given in accordance with the applicable law governing notice in interstate child custody proceedings. In Texas, the UCCJEA controls interstate child custody proceedings.

Under the UCCJEA at TFC 152.205(a), before a trial court can make a child custody determination, "notice and an opportunity to be heard in accordance with the standards of TFC 152.108 must be given to…any person having physical custody of the child." Under TFC 152.108(a)-(b), a petitioner may serve the respondent in accordance with either the Texas requirements for service of process or the requirements of the state in which the respondent is actually served. Regardless of which option the petitioner chooses, the petitioner must give notice "in a manner reasonably calculated to give actual notice of the suit."

Father argues that, under the UCCJEA, notice may be strictly in accordance with Texas law prescribing the manner of service, but strict compliance is not mandated. Thus, father contends, "it is sufficient to serve a person with process in any manner reasonably calculated to give actual notice." Father's interpretation misconstrues TFC 152.108. The legislative history of TFC 152.108 shows the statute is intended to give petitioners the option to follow either Texas notice requirements or the requirements of the jurisdiction in which the petitioner actually serves the respondent. TFC 152.108 does not allow a petitioner to forego strict compliance with Texas notice requirements as long as the method used is reasonably calculated to give actual notice to the respondent. Instead, the petitioner must follow either Texas's notice requirements or the requirements of the jurisdiction in which the respondent is served, *and* the petitioner must ensure that the respondent is served in a manner reasonably calculated to give actual notice.

In Texas, proof of service is governed by TRCP 107, which requires, among other things, that the proof of service be on file with the clerk's office for at least ten days before rendition of a default judgment. Contrary to father's contentions, therefore, the UCCJEA requires compliance with TRCP 107.

Father further contends that applying the "rigid time frame of [TRCP 107's] ten-day requirement would work at cross-purposes with the object of the Hague Convention by giving parents a guaranteed opportunity to flee the court's jurisdiction." Father cites several federal cases and cases from other states for the proposition that when a respondent parent is a flight risk, the court may hold a hearing on the petition and order the return of the child as soon as possible. Each of the cases father cites provides for an expedited hearing on the merits of the Hague Convention petition, instead of following the slower timelines of the federal and state rules of civil procedure.

However, none of the cases father cites involved a default judgment. In each case, despite either the shortened time period before the hearing or the relaxed notice requirements, the respondent appeared and participated in the hearing on the merits of the petition. Because the respondents appeared in these cases, personal jurisdiction concerns arising out of improper service were not implicated. Father has not cited to any case elevating the "prompt return" and expeditious action requirements of the Hague Convention and ICARA over state procedural rules that must be followed when rendering a default judgment.

In conclusion, the UCCJEA, which governs the notice and service requirements for Hague Convention proceedings pursuant to ICARA, requires the petitioner to strictly comply with the proof of service requirements of either Texas or the jurisdiction in which the respondent is served. Father needed to strictly comply with the TRCP 107, which mandates that the proof of service be on file with the clerk's office for ten days before rendition of a default judgment. Neither the Hague Convention nor ICARA, with their emphasis on expedited procedures and prompt return of the child, abdicates this requirement. Because father did not strictly comply with TRCP 107, trial court lacked personal jurisdiction to render a default judgment against mother. As a result, trial court's default judgment against mother is void.

TRIAL COURT ERRED BY RENDERING A DEFAULT JUDGMENT AGAINST MOTHER BECAUSE FATHER FAILED TO COMPLY WITH SERVICE OF PROCESS RULES UNDER TRCP 106 AND TRCP 109.

¶11-2-18. ***Dean v. Hall***, 2010 WL 5463933 (Tex. App.—Austin 2010, no pet. h.) (mem. op.) (12/31/10).

Facts: Mother and father divorced in 2006. In 2009, father petitioned trial court to modify the parent-child relationship along with a motion for substituted service. In his motion, father asserted that mother refused to tell him her current address and that he did not otherwise know mother's current address. Father's motion also stated that "[a] method of service as likely as publication to give [mother actual notice is by serving her [parents at their address]." Trial court granted father's motion for substituted service. Mother did not file an answer timely, and trial court rendered a default judgment against her. Mother then filed this restricted appeal arguing that service on her parents was improper and ineffective to give her notice.

Holding: Reversed and remanded

Opinion: Defective service of process constitutes error on the face of the record. The Texas Supreme Court has long demanded strict compliance with applicable service requirements when a defendant attacks a default judgment. TFC 156.003 requires that the respondent be served with process in a suit to modify the parent-child relationship and specifies that the TRCPs apply to such suits. For a court to allow alternative service under TRCP 106, the movant's motion and affidavit must state "the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found" and recite facts showing that service has been attempted unsuccessfully at "the location named in such affidavit."

Here, although father's affidavit stated that he did not know the location of mother's residence, it said nothing about her place of business or any other place where she could probably be found. Nor did it recite

facts showing that service was attempted unsuccessfully at such location. Accordingly, it did not comply with TRCP 106.

TRCP 109(a) permits "other substituted service" if the prescribed method "would be as likely as publication to give defendant actual notice," but such substituted service may be used only where "citation by publication is authorized." For citation by publication to be authorized, TRCP requires the movant's supporting affidavit to set forth facts showing the movant's due diligence in attempting to ascertain the defendant's whereabouts.

Here, although father averred that he did not know of mother's whereabouts, he did not request service by publication. Further, father's affidavit states that he used diligence in attempting to locate mother, but it does not describe any steps that he actually took to do so. Thus, father's statement that he "exercised due diligence" is a mere conclusion and does not constitute a sufficient showing of facts demonstrating diligence to allow citation by publication. Because citation by publication was not authorized under TRCP 109, "other substituted service" under the rule was also not authorized. As the record does not show that mother was otherwise personally served prior to the rendition of judgment, error appears on the face of the record. Consequently, trial court erred in granting default judgment against her.

TEXAS TRIAL COURT PROPERLY REGISTERED CALIFORNIA COURT'S PRE-BIRTH ADJUDICATION OF SAME-SEX COUPLE'S PARENTAGE AS A "CHILD CUSTODY DETERMINATION" FOR PURPOSES OF THE UCCJEA.

¶11-2-19. ***Berwick v. Wagner,*** -- S.W.3d --, 01-09-00834-CV, 2011WLxxx (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (02/10/11).

Facts: Berwick and Wagoner, both men, were legally married in Canada in 2003 and registered as domestic partners in California in 2005. In 2005, the couple entered into a gestational surrogacy agreement with a married woman in California. The gestational agreement provided that Berwick would donate the sperm and an anonymous woman would donate the egg.

In September 2005, before the child's birth, Berwick and Wagner filed a petition to establish parentage in a California court. The petition included a proposed judgment adjudicating Berwick and Wagoner as child's parents. The California court signed the proposed order in September 2005, two months before child's birth. Following child's birth, Berwick and Wagoner took custody without issue and moved to Houston shortly thereafter.

In 2008, Berwick ended his relationship with Wagner. In response, Wagner filed a SAPCR in Texas seeking joint managing conservatorship of child. Berwick counter-claimed asserting that because Wagner was not child's biological parent, Wagner did not have standing to seek custody of child. To bolster his standing, Wagner requested trial court to register the California court's judgment establishing the parent-child relationship between Wagner and child. Following a hearing, trial court determined the California judgment to be a "child custody determination" pursuant to the UCCJEA and ordered it registered. Berwick appealed.

Holding: Affirmed

Opinion: Berwick argued that, because the California judgment only addressed parentage, and did not expressly address custody, it could not be considered a "child custody determination" and therefore could not be properly registered by Texas trial court. Under the Texas codification of the UCCJEA, Texas courts must recognize and register child custody determinations by courts of other states that meet the statutory requirements.

Applying the plain language of the UCCJEA, the California judgment was a child custody determination because it resulted from proceedings in which legal custody or physical custody of child was an issue between

the presumptive parents. While custody was not disputed between Berwick and Wagner in that proceeding, it was very much at issue with relation to child's surrogate mother and her husband vis a vis Berwick as the child's biological father and Wagoner as domestic partner. Although not all proceedings related to parentage involve custody, many do, either expressly or by implication. Because the California order both terminated child's presumptive parent's parental rights and granted exclusive parental rights and—by implication—custody to Berwick and Wagner, trial court correctly concluded it qualifies as a "child custody determination" for purposes of the UCCJEA.

Berwick argued trial court should not have registered the California judgment because the California court lacked jurisdiction to enter an order containing a custody determination before child was born. To support his argument, Berwick relied on *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App.—Dallas 2008, no pet.). In that case, a child was conceived in Arizona and later born in Texas. The Texas trial court dismissed mother's divorce action in deference to father's pending action in Arizona, which included a custody request. The Dallas COA reversed, holding that the trial court erred in dismissing the Texas suit because the "text of the UCCJEA" precludes its application to unborn children. However, *Waltenburg* is distinguishable on its facts and does not stand for the blanket proposition that a judgment signed before the birth of a child cannot be recognized under the UCCJEA as a valid child custody determination.

In cases such as the case at bar, where the pre-birth suit and the "home state" of the child are one and the same, courts have recognized that UCCJEA petitions can be filed pre-birth with the jurisdictional analysis reserved for post-birth. Here, the California court entered judgment before child was born, but under California law, that order was stayed until his birth. Jurisdiction attached upon child's birth in California. Accordingly, the California court's judgment was a proper exercise of its jurisdiction under California law.

SAPCR

CONSERVATORSHIP

TRIAL COURT DID NOT ERR GIVING FATHER RIGHT TO DESIGNATE CHILD'S RESIDENCE BECAUSE MOTHER'S PROPOSED MOVE OUTSIDE OF THE RESIDENCY RESTRICTION CONSTITUTED A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCE; ALTHOUGH MOTHER DID NOT EXPRESSLY REQUEST A MODIFICATION OF THE RESIDENCY RESTRICTION, HER CHALLENGE TO FATHER'S PETITION AMOUNTED TO AN IMPLIED REQUEST.

¶11-2-20. ***In re A.N.O.,*** -- S.W.3d --, 2010 WL 4997552 (Tex. App.—Eastland 2010, no pet. h.) (12/09/10).

Facts: In 2002, trial court designated mother and father as joint managing conservators, gave mother the right to designate child's residence, and restricted child's residence to Dawson County. Several years later, mother informed father that she and child were relocating to Midland. Father filed a petition to modify and asked for the right to designate child's residence. Trial court conducted a hearing and then modified the parent-child relationship to give father the right to designate child's residence within Dawson County. Mother appealed, arguing trial court erred when it modified conservatorship because there was insufficient evidence of a material and substantial change of circumstance.

Holding: Affirmed

Opinion: In custody modification suits, the relocation of a parent holding the right to designate the child's primary residence is not, as a matter of law, a material and substantial change in circumstance, although moving a significant distance could support a finding of changed circumstance. However, an irreconcilable con-

flict is created when the suit involves a residency restriction, and the parent who holds the right to designate the child's primary residence relocates to a place outside of the restricted area.

Here, trial court could not simultaneously maintain the residency restriction and mother's right to designate child's residence. Because of the irreconcilable conflict between mother's right to designate child's residence and the residency restriction, the trial court did not err by finding that a material and substantial change in circumstance had occurred.

Father argued that, because mother did not specifically request the elimination of the residency restriction at trial, she could contest that restriction on appeal. Indeed, mother did not ask trial court to lift the residency restriction, and she has not addressed that restriction on appeal. However, it was clear that, by opposing father's petition to modify, mother was implicitly asking trial court to either eliminate the residency restriction or to at least modify it by adding Midland County as an acceptable location. But even under the assumption of mother's implicit request, it is insufficient to fully challenge trial court's failure to grant her affirmative relief. Because mother was seeking a modification of the custody order, she also had the burden of proving that there was a material and substantial change of circumstance and that her requested modification was in child's best interest. However, mother failed to address why trial court erred by not finding that she had carried her burden of proof. Consequently, this court cannot conclude that trial court abused its discretion by not granting her implicit request.

Furthermore, assuming that mother's opposition to father's petition and her issue are sufficient to preserve a challenge to the modification order, she has not shown an abuse of discretion. TFC 156.101 provides four grounds for modifying a custody order: (1) by agreement of the parties, (2) the child's preference, (3) a voluntary relinquishment, or (4) a material and substantial change of circumstance. The first three grounds are not implicated in this case. Thus, contrary to mother's primary argument that no material and substantial change of circumstance had occurred, her implicit request to modify necessarily concedes that a material and substantial change of circumstance had occurred. Thus, trial court did not abused its discretion by not granting her implicit request.

Editor's comment: *Where both parties ask the court to modify the prior orders, even if one party does so implicitly, the parties concede that a material and substantial change of circumstances has occurred. Think carefully before filing counterpetitions to modify, as you concede the higher burden of proof on modification, returning the burden to a simple best interest test. (M.M.O.)*

TRIAL COURT PROPERLY NAMED STEPFATHER AS SOLE MANAGING CONSERVATOR BECAUSE HE HAD STANDING TO PETITION FOR CUSTODY; STEPFATHER'S PETITION WAS A MODIFICATION WHERE THE PARENTAL PRESUMPTION DOES NOT APPLY.

¶11-2-21. ***In re Guardianship of C.E.M.-K,*** -- S.W.3d --, 2011 WL 534389 (Tex. App.—San Antonio 2011, no pet. h.) (02/16/11).

Facts: Mother and father married in 1995. Mother gave birth to child in 1999. Mother and father divorced in 2000 and the divorce decree named mother as sole managing conservator and father as possessory conservator. Father and mother maintained reasonable visitation schedule until 2003. Afterward, a dispute arose and mother denied father any further access to child.

Mother married stepfather in 2005. Afterward, mother and child began living with stepfather and his children. The relationship between mother and stepfather deteriorated due to mother's alcohol addiction. Mother and stepfather divorced in September 2008. In December 2008, due to reports of neglect, TDFPS removed child from mother's home and placed child with stepfather. Child remained in stepfather's exclusive care until April 2009 when TDFPS returned child to mother. In May 2009, mother died from a drug overdose. After mother's death, child remained in stepfather's sole care until September 2009 when father filed a habeas

petition seeking possession. Trial court denied father's petition but granted visitation rights. Afterward, stepfather petitioned trial court to determine custody. Trial court named stepfather as sole managing conservator and father as possessory conservator. Father appealed.

Holding: Affirmed

Opinion: Father agued trial court erred in awarding conservatorship to stepfather because stepfather did not have standing to file suite. The COA began its analysis by citing TFC 102.003(a)(9), which provides that, "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months, ending not more than 90 days preceding the date of the filing of the petition has standing." The COA also noted that the time of possession need not be continuous and uninterrupted.

Here, the evidence clearly indicated stepfather had possession of child from December 2008, when the TDFPS removed child from mother and placed her with stepfather, to April 2009 when child returned to mother. This gave stepfather sole possession of child for approximately four months. Then, after mother's death in May, 2009, and until father obtained visitation in September 2009, stepfather had sole possession of child. This second period adds another four months to the previous time period, for a total of at least eight months. Father's filing of his habeas petition and whether father was entitled to possession at that time does not affect the result that stepfather had possession of child for at least eight months prior to filing his petition. Accordingly, stepfather had standing under TFC 102.003(a)(9).

Father argued that because stepfather was not a party to the original custody determination in the divorce, stepfather's suit must be considered an original suit. Thus, father contended that application of the parental presumption depended upon the identity of the parties. However, the Texas Supreme Court has rejected this argument, holding that a determination on the applicability of the parental presumption does not depend upon the parties' identities, but the circumstances and the relief is sought.

Here, trial court made an original custody determination of child under the 2002 divorce decree. Afterward, stepfather filed for termination of father's parental rights and conservatorship of child, asking "to modify the prior orders" and award him "sole custody" on the basis of mother's death. Thus, stepfather was clearly seeking a modification. Accordingly, the COA held stepfather's suit was modification as opposed to an original suit, thereby precluding application of the statutory parental presumption.

Editor's comment: *Where the mother and father were divorced and had court orders for conservatorship, etc, the parents sought outside intervention into their lives, abrogating the constitutionally protected right of a parent to resist intervention from outside parties. Thus, when a nonparent seeks to modify those prior orders, and has standing to do so, the parental presumption no longer applies. Moral of the story, if you want to maintain your constitutional right to parent without intervention from third parties, don't get divorced. (M.M.O.)*

SAPCR

POSSESSION AND ACCESS

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING MOTHER THE SOLE DISCRETION TO DETERMINE FATHER'S VISITATION WITH CHILD.

¶11-2-22. ***In re Marriage of Collier,*** -- S.W.3d --, 2011 WL 13504 (Tex. App.—Amarillo 2011, no pet. h.) (01/04/11).

Facts: Following divorce proceedings, trial court appointed mother as sole managing conservator of child and father as possessory conservator. Trial court ordered that because father had engaged in family violence, father's visitation with child was to be "solely at the discretion" of mother. Father appealed arguing trial court abused its discretion by entering a possession order that permits father's visitation with child only at the sole discretion of mother.

Holding: Reversed and remanded

Opinion: Under TFC 153.006(c), when a trial court appoints a parent as possessory conservator, it must specifically state the times and conditions for possession of or access to the child. The judgment must state in clear and unambiguous terms what the parties must do to comply with the possession order in a manner that is specific enough to allow an aggrieved party to obtain enforcement of the judgment by contempt.

Here the effect of the trial court's possession order is that mother is afforded complete discretion over father's possession, and as such, is unenforceable by contempt. The possession order could effectively deny father any access to child while also denying father the remedy of contempt against mother. Thus, trial court may have concluded that a complete denial of access to father was in the child's best interest. Indeed, trial court had sufficient evidence to conclude that father would pose some danger to child if he were given unrestricted possession; however, a complete denial of access was not warranted, and is inconsistent with the trial court's naming of father as possessory conservator.

Mother cites In re R.D.Y., 51 S.W.3d 314 (Tex. App.—Houston [1st Dist.] 2001, pet. denied), to establish that trial court's custody order was sufficient. There, the Houston court upheld trial court's order giving grandmother "sole discretion" over mother's visitation with the child. However, neither of the cases relied on by the Houston court upheld an order allowing one conservator complete discretion over another conservator's visitation. This court disagrees with the Houston court's assessment that giving total discretion to one conservator constitutes a mere restriction on the conditions of visitation. Accordingly, trial court abused its discretion by giving mother sole discretion over father's visitation.

Editor's comment: *This opinion, and particularly the appellate briefing that was done, goes through a fairly detailed discussion of the cases that have dealt with findings of family violence, and whether the evidence supported such findings. In this case, for example, there was only one incident of physical contact between the parties, and the testimony regarding it was extremely conflicted. Yet the trial court found family violence, and the appellate court had really no choice but to affirm it under abuse of discretion.*

The point to take away from this case regarding the possession schedule is that if you want a parent to only have access to the child at the discretion of the other parent (or other third party), don't make him a possessory conservator! (granted, you'll probably still run into problems regarding enforceability on appeal). With the split in appellate authority on whether a parent's possession can be at the sole discretion of someone else (see R.D.Y. case), this case seems ripe to take up to the Texas Supreme Court. In fact, recognizing the split in appellate authority, three justices on the Texas Supreme Court authored an opinion dissenting from the denial of the petition for review in the R.D.Y. case. In re R.D.Y., 92 S.W.3d 433 (Tex. 2002). (R.T.)

Editor's comment: *The Amarillo Court of Appeals and Houston First District Court of Appeals disagree over whether a trial court can make the possessory conservator's possession and access with a child subject to the sole discretion of the sole managing conservator. We have a direct conflict among the courts of appeals. Perhaps the Supremes will enlighten us as to what is correct. Will someone please file a petition for review? (C.N.)*

Editor's comment: *A court cannot condition one parent's access to a child upon another parent's sole discretion. So, don't do it… ever. If a parent is so bad that he or she shouldn't ever have court-ordered access of any kind, then he or she should not be appointed a conservator. By appointing as a conservator, it is presumed that the parent will have some specific court-ordered access. (M.M.O.)*

TRIAL COURT PROPERLY ORDERED SUPERVISED VISITATION BETWEEN FATHER AND CHILD BECAUSE FATHER EXPRESSLY STIPULATED TO SUPERVISED VISITS AT TRIAL.

¶11-2-23. ***Pena v. Stoddard,*** 2011WL704324 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (mem. op.) (02/10/11).

Facts: Following child's birth, trial court named mother and father as joint managing conservators per an agreement between the parties. Because the parties were attempting reconciliation, trial court did not address periods of possession and access for either party. After the relationship deteriorated, father filed a SAPCR requesting a standard possession and visitation with child. At a hearing, the parties reached certain stipulations that were read into the record. First, the parties stipulated that trial court may consider father's proximity of greater than 150 miles from Houston as material and substantial change and a basis for modification. Afterward, mother's counsel requested that visitation to be supervised through Angel House. In response, father's counsel expressly stipulated to mother's request. Following the hearing, trial court named mother as sole managing conservator and ordered father's visitations to be supervised. After trial court denied father's request for a new trial, father appealed.

Holding: Affirmed

Opinion: Father argued that trial court erred in ordering supervised periods of possession based on the parties' stipulations. To begin its analysis, the COA noted that the parties reached certain stipulations that were read into the record and that mother's attorney clearly stated that mother was seeking supervised visitation. The record also clearly indicated that father's attorney expressly stipulated to mother's request. The COA reasoned that because father failed to object at any point during the proceeding to contest the supervised visitation; he waived any challenge to limited and supervised visitation.

Dissent: Although trial court stated that there was a stipulation on the supervised visitation matter (and father's counsel neither objected nor corrected trial court), when trial court made its findings of facts and conclusions of law, it omitted any mention of a stipulation on this matter. The only stipulation mentioned in trial court's findings is that should father ever be stationed within 150 miles of Houston, the court may consider that fact a material and substantial change and a basis for modification. This was the stipulation read into the record. That the trial court would take pains to set out a finding of fact as to a stipulation regarding residential proximity and yet not to similarly memorialize a stipulation on an issue as crucial as supervised visitation is not merely incongruent, but unlikely.

Absent a stipulation, trial court needed a factual basis to mandate supervised visitation. Father did not waive his challenge to supervised visitation because it was not clear that the stipulation given was meant to apply to the visitation issue. Further, trial court was effectively put on notice that there was no stipulation by way of father's motion for new trial.

SAPCR

CHILD SUPPORT

TRIAL COURT ERRED BY FAILING TO SUBMIT STATUTORILY REQUIRED FINDINGS AND CONCLUSIONS RELATED TO ITS CHILD SUPPORT ORDER.

¶11-2-24. ***In re Marriage of Collier,*** -- S.W.3d --, 2011 WL 13504 (Tex. App.—Amarillo 2011, no pet. h.) (01/04/11).

Facts: Following divorce proceedings, trial court appointed mother as sole managing conservator of child and father as possessory conservator, and ordered father to pay child support. Father timely requested trial court to issue its statutorily required findings of fact and conclusions of law relating to its child support orders. After trial court issued its findings and conclusions, father appealed.

Holding: Reversed and remanded

Opinion: Father argued trial court abused its discretion by failing to make statutorily required findings related to its child support order. TFC 154.130 requires a trial court to make certain findings when a party files a written request for findings, makes an oral request for findings in open court, or when the amount of child support ordered varies from the amount that would result by application of the guidelines. In such situations, among other things, the trial court must make findings of the net resources of the obligor and obligee, the percentage applied by the court to the obligor's net resources that yields the child support obligation set by the court, and, if applicable, the specific reasons that the amount of child support ordered by the court varies from the amount resulting from application of the guidelines. These findings are mandatory and the failure to make them when required constitutes reversible error.

Here, trial court did not make the requisite findings regarding mother's net resources, even though there was substantial evidence presented at trial regarding her income throughout the marriage. Additionally, trial court did not identify the percentage applied by the court to father's net resources that yields the child support obligation set by the court. Trial court's failure to make the requisite findings makes an assessment of its reasoning impossible and constitutes reversible error.

Editor's comment: *This case shows the importance of getting your judge to make those child support findings if properly requested by the other side. Otherwise, your win is going to be reversed on appeal. In this case, the trial court stated on the record that he had "no idea" how to figure father's income, and indeed, father did not present very clear evidence of his income. Regardless, if properly requested under TFC 154.130, the court is required to make those findings, and if you're the winner in the case, make sure they get done. (R.T.)*

Editor's comment: *The attorney in this case did a good job requesting the special child support findings, and this case is a good reminder that in family law, there's more to requesting findings of fact after a court's decision than just a simple request under the rules of civil procedure. To challenge child support calculations, a special request for findings must be made within 10 days of the decision (not the order). Similar requests are available for possession scheduled and property awards. The moral of the story… if you don't know what you are doing after you lose a decision, call your friendly family law appellate attorney! (M.M.O.)*

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING FATHER TO PAY CHILD SUPPORT OF $1500/MONTH DESPITE FATHER'S CLAIM THAT HE EARNED LESS THAN THE MINIMUM WAGE PLAYING PROFESSIONAL BASKETBALL OVERSEAS.

¶11-2-25. ***In re N.T.,*** -- S.W.3d --, 2011 WL 263728 (Tex. App.—El Paso 2011, no pet. h.) (01/26/11).

Facts: Mother and father met while father was a basketball player at UT El Paso. Although the couple never married the couple had a child in 2005. In 2006, father began earning income by playing professional basketball in overseas leagues. Mother filed a petition to adjudicate paternity and assess child support. During proceedings, father claimed he earned less than the minimum wage while mother alleged father earned approximately $90,000. Trial court determined that the application of the guidelines would be inappropriate, imputed income to father in the amount of $7,000 per month, and ordered him to pay $1,500 per month. Father appealed.

Holding: Affirmed

Opinion: Father complained that the evidence was legally and factually insufficient to support trial court's determination of father's imputable income. The COA began its analysis by noting that a trial court may properly determine that an obligor has higher net resources than alleged based on testimony by the obligee and other evidence in the record. The COA also noted that father failed to file any tax returns following the child's birth and failed to provide the court with any documents regarding his income.

At trial, father testified that he earned less than minimum wage playing basketball overseas. In contrast, mother testified that father was provided housing while playing basketball in the Philippines and that father told her that he was making at least $10,000 each month. Mother further stated that father told her that he made between $80,000 and $90,000 while playing basketball in Italy. Other evidence indicated that father's sister gave him $20,000 in 2007 and that father used this money to purchase a home in El Paso. Given the evidence presented, the COA concluded that trial court did not abuse its discretion by imputing $7,000 per month as father's monthly income.

TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DEDUCT FATHER'S BUSINESS OPERATING EXPENSES AND RENTAL PROPERTY MORTGAGE IN ITS CALCULATION OF FATHER'S NET RESOURCES.

¶11-2-26. ***In re S.R.S.,*** 2011 WL 240752 (Tex. App.—Waco 2011, no pet. h.) (mem. op.) (01/26/11).

Facts: Following divorce in 1998, trial court ordered father to pay child support. By 2008, father earned income as a self-employed investment advisor and real estate broker. Father also earned income from rental properties he purchased after the divorce. In 2008, mother petitioned for a modification seeking an increase in father's child support obligation. At a 2009 hearing, father provided his 2008 income tax return and documentation of his 2009 earnings. Following the hearing, trial court increased father's child support obligation from $456 per month to $1,200 per month. Father appealed, arguing that trial court failed to include any deductions for his ordinary and necessary business expenses and failed to deduct his rental property operating expenses and mortgage payments from his net resources.

Holding: Reversed and remanded

Opinion: The COA began its analysis by observing that mother presented no evidence that father's business expenses listed on his 2008 income tax return were unreasonable or unnecessary. Further, the court noted that

father was entitled to a deduction for his mortgage payments on his rental property as well as any operating expenses and the trial court did not account for father's business expenses.

TRIAL COURT ABUSED ITS DISCRETION BY ORDERING FATHER TO PAY CHILD SUPORT ABOVE THAT REQUIRED BY A PERSON EARNING MINIMUM WAGE BECAUSE MOTHER PROVIDED NO EVIDENCE REGARDING FATHER'S INCOME.

¶11-2-27. ***Gonzalez v. Gonzalez,*** -- S.W.3d --, 2011 WL 259149 (Tex. App.—Dallas 2011, no pet. h.) (01/27/11).

Facts: Mother filed for divorce and sought to be named sole managing conservator. Father did not answer and did not appear at the prove-up hearing. At the hearing, mother responded affirmatively when asked if she was married to father and if the two children were born during the marriage. Trial court granted the divorce, appointed mother as sole managing conservator and ordered father to pay $750 per month in child support. Father filed a restricted appeal.

Holding: Affirmed in part, reversed and remanded in part

Opinion: Father argued that there was no evidence to support trial court's child support order. Trial courts are required to calculate the obligor's net resources for the purpose of determining child support liability. Absent evidence of wage and salary income, a trial court is required to presume the obligor has wages and salary equal to the federal minimum wage for a forty-hour week.

Because mother offered no evidence regarding father's employment status or income, the COA determined trial court was required to presume that father earned a federal minimum wage equivalent. The COA reasoned that if the federal minimum wage produced a net monthly income of $1,112.79, then twenty-five percent of those resources would be substantially less than the $750 trial court ordered. The COA concluded therefore, that the evidence did not support trial court's $750 child support order.

Editor's comment: *If there's no evidence of income, the presumption is minimum wage child support. The trial court messes up by finding anything else in absence of evidence supporting the finding. (M.M.O.)*

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO APPLY FATHER'S EXCESS CHILD SUPPORT PAYMENTS TO HIS FUTURE OBLIGATION BECAUSE FATHER CLEARLY INTENDED TO MAKE THE EXCESS PAYMENTS ACCORDING TO AGREED STIPULATIONS.

¶11-2-28. ***Bolton v. Bolton,*** 2011 WL 286166 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (mem. op.) (01/27/11).

Facts: Following divorce in 1999, mother and father filed "Agreed Stipulations" with trial court. The stipulations provided that when father's salary increased to a series of specific amounts, father's child support obligation would also increase by a specified amount. In 2000, mother learned that father's salary had increased and informed him that according to the terms of the agreed stipulations, he was now required to pay an increased amount of child support. Believing he was obligated to do so, father began paying the increased child support. A similar set of events occurred in 2004. Through 2008, trial court never modified father's child support obligation, and father never contacted trial court to determine if mother had filed a motion for modification.

Following a dispute between the parties, father began withholding his child support payments. Finally, in 2009, mother filed, for the first time, a petition requesting the court to increase father's child support obliga-

tion and alleged father was in contempt for failing to pay monthly child support payments. Following trial, trial court refused to credit father's excess payments as prepayments of future child support because father "did not intend to prepay child support but was under the understanding that he was complying with" the agreed stipulations. Father appealed.

Holding: Reversed and remanded

Opinion: Father argued trial court abused its discretion by finding that he was in arrears on his child support obligation and refusing to apply his excess payments as an offset against his child support obligation. Father argued that he agreed to pay the increased amounts only on the condition precedent that mother would first file a motion to modify. Thus, father contended that he mistakenly made each excess payment because he incorrectly believed that mother had in fact moved the court for modification and because he believed there was an order compelling him to pay the increased amounts.

The COA rejected father's argument, noting that when a child support obligor pays an excess amount above the obligation, the expressed intent of the obligor determines whether the excess amount is applied as an offset to the future obligation. The COA reasoned that despite father's mistaken belief of the existence of an order compelling increased payments, father clearly intended to make each excess payment in the specific amounts specified by the agreed stipulations. Thus, because father expressed an intent in the agreed stipulations as to the increased child support payments, the child support division, to whom father made all payments, was under a statutory obligation to give effect to this expressed intent. Although the child support division credited father's excess amounts as prepayments, trial court was not bound by the actions of the child support division. Accordingly, the COA concluded that trial court did not abuse its discretion in refusing to credit father's excess payments to his future obligation. [Reversed in part on other grounds]

TRIAL COURT ABUSED ITS DISCRETION BY NOT HEARING EVIDENCE ON RETROACTIVE CHILD SUPPORT WHEN MOTHER SPECIFICALLY REQUESTED RETROACTIVE SUPPORT IN HER PLEADINGS.

¶11-2-29. ***Taylor v. Taylor,*** -- S.W.3d --, 2011 WL 678915 (Tex. App.—Fort Worth 2011, no pet. h.) (op. on rhrng) (02/24/11).

Facts: This is a reissued opinion after COA denied mother's request for en banc reconsideration. In her original divorce petition, mother requested that a child support order, and further sought a temporary order for "child support . . . while this case is pending." At a hearing, the parties reached agreement on most issues with the exception of retroactive child support. When mother raised the issue at a hearing, father objected claiming mother did not specifically plead for retroactive child support. Trial court sustained father's objection finding that retroactive child support must be pled in the face of an objection and that mother had not pleaded for retroactive child support. Mother appealed.

In the COA's original opinion, it found that mother failed to plead for retroactive child support but that that father had specific notice from hearings that mother sought retroactive child support. The COA held that due to the ambiguity, father was required to specially except. One justice dissented, arguing that father did not have notice from the pleadings, thus, the COA should not have addressed the issue of special exceptions. In this reissued opinion, the panel determines that, in her pleadings, mother did in fact request retroactive child support. All three justices joined the opinion.

Holding: Reversed and remanded

Opinion: Mother argued that trial court abused its discretion by refusing to hear evidence concerning child support during the pendency of the trial. Generally, a pleading provides fair notice of a claim when an opposing attorney of reasonable competence can examine the pleadings and ascertain the nature and basic issues of

the controversy and the relevant testimony. TRCP 90 provides that any defect in the pleadings must be pointed out by special exception in writing otherwise the defect will be deemed to have been waived by the excepting party.

Here, mother's original petition requested that father to be ordered to make payments for the support of the child, and further sought a temporary order for "child support . . . while this case is pending." This pleading provided father with fair notice of mother's request for child support during the pendency of the case. Thus, trial court abused its discretion by refusing to hear evidence concerning child support from the date of mother's original petition through the date of judgment.

Mother also argued that trial court abused its discretion by refusing to hear evidence concerning child support from the date of separation through the date of her original petition and that father waived complaint because he failed to specially except. But mother's petition does not mention or refer to a request for child support for that period of time. Father was not required to except to the petition and ask whether there are other theories that mother wanted to allege. Thus, while mother's petition provided father with fair notice of her request for child support during the pendency of the case, nothing in her petition suggests that she sought child support from the date of separation through the date she filed her original petition.

SAPCR

CHILD SUPPORT ENFORCEMENT

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING FATHER'S MOTION OF ENFORCEMENT FOR MEDICAL SUPPORT BECAUSE FATHER FAILED TO TIMELY NOTIFY MOTHER OF EXPENSES AS REQUIRED BY THE DIVORCE DECREE.

¶11-2-30. ***In re L.L.,*** -- S.W.3d --, 2010 WL 5385376 (Tex. App.—San Antonio 2010, no pet. h.) (12/29/10).

Facts: Mother and father divorced in 2002. In 2009, father filed a motion for enforcement of a medical support seeking reimbursement of uninsured medical expenses which incurred in 2004, 2006, 2007, and 2008. The divorce decree originally provided that "the party who pays for a health-care expense on behalf of the children shall submit [the expenses] to the other party, within ten days of receiving them" for payment of the other parties' share of the expenses. In May 2008, trial court extended the notification period from ten days to thirty days. Trial court denied father's motion, finding that he failed to give wife timely notice of her share of uninsured medical expenses. Father appealed.

Holding: Affirmed in part, reversed in part

Opinion: Father argued trial court erred by finding that he failed to give wife timely notice of her share of uninsured medical expenses. Father testified that he first sent requests for reimbursement to mother around March 2008; however, none of the documents introduced into evidence reflect any dates in March 2008. The earliest document is dated April 15, 2008. The evidence father submitted does not support his claim that he timely sent mother copies of uninsured medical expenses for 2004, 2006 and 2007.

As to the uninsured medical expenses in 2008, father testified the expenses occurred on October 11, 2008, and that he promptly sent notice to mother on October 14, 2008. However, child's surgery took place on August 1, 2008. Trial court ruled that the notification for reimbursement for the surgery charges was not timely because father paid for the surgery on August 1, 2008, and the evidence showed that he did not notify

mother until October 14, 2008. Accordingly, trial court did not abuse its discretion by denying the requested reimbursement because father failed to provide timely notice of the expense as required by the decree.

Father argued mother had a duty to support the children regardless of whether he provided notice of the uninsured medical expenses in accordance with the provisions of the divorce decree. In support of this contention, father relies on *In re A.C.B.*, 302 S.W.3d 560 (Tex. App.—Amarillo 2009, no pet.). In that case, the trial court awarded the mother reimbursement for uninsured medical expenses even though she failed to provide notice of the expenses to the father within ten days of receipt of the medical bills as required by the decree. The COA affirmed, stating: "Even if [the mother] failed to provide copies of medical bills within the 10 day deadline established by the modification order, each parent is obligated to support his or her child during the child's minority and is liable to any other person, including the other parent, who provides necessities for the child." In essence, the Amarillo COA found the trial court did not abuse its discretion in ordering reimbursement because there was a legal basis for its decision, independent of any requirement contained in the decree.

Here, the parties are in a different posture on appeal because the issue is whether the trial court abused its discretion by denying the requested reimbursement rather than by allowing a reimbursement. Because trial court chose to enforce the notice requirement contained in the decree, this court cannot conclude it failed to follow guiding principles or acted in an arbitrary manner.

Editor's Comments: *I think the court here simply got it wrong. The decree clearly states that the nonpaying party shall pay his or her share of the uninsured portion of the health care expense within ten days after receiving the explanation of benefits stating the benefits paid. Period. There was evidence that the child had surgery on August 1, and that dad sent the bill to mom on October 14. Thus, mom had until October 24 to get her half of the bill paid back to either dad or the health care provider. The decree never states that if dad does not get the explanation of benefits to mom by the timeframe given (also 10 days), then mom is off the hook. The appellate court states that it cannot conclude that the trial court abused its discretion by "enforcing the notice requirement" - but the problem is that enforcing Dad's "notice requirement" does not negate Mom's PAYING requirement. I think it was an abuse of discretion, and I think this is the sort of case that makes me want to revamp the uninsured health care expenses in my own decrees to specify that, regardless of whether the paying party sends the bill to the nonpaying party within the 30 days specified, the nonpaying party still must reimburse their portion. (R.T.)*

Editor's comment: *This is called a condition precedent to recovery. Before a parent can blame the other parent for failing to pay medical support, the parent incurring the charges must comply with his part of the deal by providing timely notice. In other words, your house must be clean before you can complain about someone else's not being clean. (M.M.O.)*

ASSIGNEES OF TEXAS LOTTERY INSTALLMENT PRIZE PAYMENTS DO NOT TAKE THE ASSIGNMENT SUBJECT TO THE LOTTERY ACT'S DELINQUENT CHILD SUPPORT OFFSET WHEN THE DELINQUENCY ARISES SUBSEQUENT TO THE ASSIGNMENT.

¶11-2-31. ***Great West & Annuity v. Tex. Att'y Gen. CS Division,*** -- S.W.3d --, 2011 WL 350467 (Tex. App.—Austin 2011, no pet. h.) (02/03/11).

Facts: In 1994, father won a Lotto Texas jackpot prize of $10,123,227, to be paid in annual installments of $506,000 in each September of the years 1994 through 2013. In March 1998, mother and father divorced. The divorce decree confirmed that the lottery winnings were father's separate property, and ordered father to pay monthly child support as well as an annual payment to a trust fund for the children. In July 1999, father assigned his rights to future installment payments of his lottery prize to Singer Asset Finance Company in exchange for a lump-sum payment of $3,400,000. Singer in turn assigned the future lottery payments to another firm who eventually assigned them to appellant Great West & Annuity.

Following his assignment of rights to the lottery payments, father failed to make any annual payments to the trust fund and had begun failing to pay his $2,250 monthly child support in August 2004. In advance of the September 2008 lottery prize payment coming due, the AG obtained and delivered to the Lottery Commission a notice of child support lien and order of withholding. The notice asserted that father had become delinquent in paying his child support by $170,716.34 and ordered the Lottery Commission to withhold that amount from the upcoming prize payment. The right to receive that prize payment had been assigned to Great-West eight years earlier.

Faced with conflicting demands to $170,716.34 of the $506,000 prize payment, the Lottery Commission, filed a petition in interpleader in trial court as to the disputed amount. Trial court granted summary judgment in favor of AG. Great West appealed.

Holding: Reversed and rendered.

Opinion: Great-West argued that the district court's rulings were predicated on an erroneous construction of the Lottery Act, specifically the word "person" as it is used in Gov't Code 466.407 and 466.4075. These are statutes for "state debt" offsets by the parties which the State can recoup from lottery prize winnings the amounts of certain enumerated debts, including child support. Gov't Code 466.407 permits the Lottery commission to "deduct the amount of a … [state debt] *from the winnings of a person who has been finally determined to be* ... delinquent in making child support payments." Gov't Code 466.4075 requires deductions from "an amount a court has ordered *a person* to pay as child support from a person's periodic installment winnings."

Great-West contended that father was the "person" contemplated by Gov't Code 466.407 and 466.4075 and that it stood in father's shoes at the time of the assignment and before his child support liens and offsets arose. Great West contended further that any liens subsequent to the assignment did not affect the right that it received from the assignment. In contrast, AG argued that assignee Great West was the "person" contemplated by Gov't Code 466.407 and 466.4075 and stood in the shoes of its assignor (father) at the time each annual disbursement was made.

As a general rule, an assignee is subject to claims and defenses against its assignor only if those claims and offsets accrued prior to the assignment, or at least before the obligor was notified of the assignment. Further, on their face, Gov't Code 466.407 and 466.4075 plainly contemplate that a state-debt offset can arise only where the "person" whose delinquency or debt gives rise to the offset is the same "person" who presently owns the right to receive the prize payment to be offset. Clearly, Great-Western did not give rise to father's child support delinquency.

AG argued further, that Gov't Code 466.410(h)'s prohibition against assigning "payments or portions of payments that are *subject to any offset provided by this chapter*" meant that a lottery winner could not assign prize payment amounts that either already were or would later become "subject to" an offset to recoup the winner's state debts. AG's argument lacks support in the provision's text. Gov't Code 466.410(h) does not purport to independently create state-debt offsets, only to prohibit assignments of prize payment amounts that are "subject to any offset provided by this chapter." Further, the AG's construction of Gov't Code 466.410(h) would lead to the absurd result that a prize winner's assignment of the full amount of future installment prize payments could be considered lawful when made if there are no existing state-debt offsets at the time, yet would be retroactively deemed unlawful if, after the fact-perhaps years after the fact-it turned out that the prize winner became delinquent on a state debt.

Accordingly, because it is undisputed that no state-debt offsets existed against father at the time he assigned his rights in the 2008 and 2009 prize payment installments, the AG cannot recoup father's delinquent child support by offsetting Great Western's lottery prize payments.

TRIAL COURT PROPERLY CONFIRMED FATHER'S CHILD SUPPORT ARREARAGE ORDERED 40 YEARS AGO BECAUSE THE 10-YEAR DORMANCY STATUTE ONLY APPLIES AFTER THE COURT REDUCES THE ARREARAGE TO JUDGMENT.

¶11-2-32. ***Overton v. Overton,*** 2011 WL 398046 (Tex. App.—Houston [14th Dist. 2011, no pet. h.) (mem. op.) (02/08/11).

Facts: Mother and father divorced in 1970. Trial court granted mother custody of the parties' four minor children and ordered father to pay $350 per month in child support until the youngest child turned eighteen. In 1977, trial court held father in contempt for failure to pay child support. Father never paid his child support obligation. In 2009, mother applied for a judicial writ of withholding as well as child support liens. Afterward, mother requested foreclosure of her child support liens and a determination of child support arrears. Following a hearing, trial court granted mother's request for affirmative relief and a $263,215.52 cumulative child support arrearage judgment. Father appealed.

Holding: Affirmed

Opinion: Father argued that mother was barred from recovering past-due child support because her 1977 contempt judgment was dormant. TCPRC 34.001(a) provides that "[i]f a writ of execution is not issued within 10 years after the rendition of a judgment of a court of record or a justice court, the judgment is dormant and execution may not be issued on the judgment unless it is revived. The ten-year dormancy statute comes into play only when child support arrearages are reduced to a judgment confirming arrearages.

Here, the ten-year dormancy period began to run upon trial court's signing of the judgment confirming arrearages in July 2009, from the date of the 1977 contempt order.

Father also argued that mother's "statutory judgments" under TFC 157.261(a) are dormant. TFC 157.261(a) provides that "[a] child support payment not timely made constitutes a final judgment for the amount due." Thus, father argued, each missed child support payment, the last of which occurred in January 1987 when his youngest child turned eighteen years old, became dormant ten years from the date it became due. However, this court has previously held that the ten-year dormancy period under TCPRC 34.001 does not run from the dates on which individual child support payments are due.

TRIAL COURT PROPERLY ISSUED A WRIT OF WITHHOLDING AGAINST FATHER FOR UNPAID CHILD SUPPORT OVER 37 YEARS AFTER CHILD SUPPORT ORDERS ISSUED BECAUSE THE 10-YEAR DORMANCY STATUTE EXPRESSLY EXCLUDES ITS APPLICATION TO JUDGMENTS FOR CHILD SUPPORT.

¶11-2-33. ***Cobb v. Gordy,*** 2011WL 494801 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (mem. op.) (02/10/11).

Facts: Mother and father divorce in 1972. The divorce decree ordered father to pay $50 per month in child support. In 2009, mother filed with trial court an application for judicial writ of withholding alleging father owed $78,164 in unpaid child support. Following a hearing, trial court issued mother's requested writ of withholding. Father appealed.

Holding: Affirmed.

Opinion: Father argued that trial court lacked jurisdiction because trial court's judgments regarding his child support payments were dormant. TCPRC 34.001a states that if writ of execution not issued within 10 years after rendition of a judgment, the judgment is dormant.

Until recently, this was a disputed issue in the courts of appeals. Some courts held that individual monthly arrearages were not final judgments to which the dormancy statute should be applied. Other courts held conversely that that the 10-year dormancy statute applied to individual child support payments even if not reduced to a solitary judgment. However, effective June 19, 2009, the legislature amended TCPRC 34.001 adding that "[t]his section does not apply to a judgment for child support under the Family Code." The legislative history indicates the amended statute applies regardless of the date a trial court rendered the order. Accordingly, the 37-year-old child support orders were not dormant. Trial court had jurisdiction to issue mother's requested writ of withholding.

Editor's comment: *Because each singular unpaid monthly child support payment constitutes an implied judgment of its own and, because there is no dormancy provisions applied to child support judgments, collection of those judgments can occur forever and ever. You don't have to like it, but it is the law. What happens when the banks don't keep records and the courts don't keep records of what happened 40-years ago? Sounds like a cluster… well, you get it. (M.M.O.)*

TRIAL COURT HAD SUBJECT-MATTER JURISDICTION TO MODIFY NEW YORK SUPPORT ORDER EVEN THOUGH MOTHER FAILED TO REGISTER THE ORDER IN TEXAS BECAUSE UIFSA'S REGISTRATION REQUIREMENTS ARE PROCEDURAL RATHER THAN JURISDICTIONAL.

¶11-2-34. ***Kendall v. Kendall,*** -- S.W.3d --, 01-09-00948-CV, 2011WLxxx (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding) (02/24/11).

Facts: Mother and father divorced in New York in 1997. The parties settled all disputes by agreement. Trial court incorporated various stipulations into the divorce decree including that father would pay child support, maintain education trusts for the children, and that disputes involving these stipulations would be settled by a Texas court. In 2008, father filed a SAPCR seeking to be named as the managing conservator with the right to designate children's primary residence. Mother counter-petitioned seeking an increase in child support. Following a trial, trial court increased father's child support obligations. Father appealed.

Holding: Affirmed (mandamus denied)

Opinion: Father argued that (1) mother's failure to register the New York Judgment in accordance with the Uniform Interstate Family Support Act (UIFSA), deprived trial court of subject-matter jurisdiction to enforce or modify the New York support order, and (2) the parties never filed consents in New York for Texas to modify the New York order. UIFSA is a uniform law, adopted by all US jurisdictions, governing procedures for establishing, enforcing, and modifying foreign child support orders. Under UIFSA, a registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a Texas court. *See* TFC 159.603(b). UIFSA provides specific procedures for registration of interstate support orders for both enforcement and modification purposes.

No Texas state court has squarely addressed the issue of whether failure to comply with a UIFSA registration requirement deprives a Texas court of subject-matter jurisdiction to enforce or modify a foreign support order. Other jurisdictions have expressly rejected the argument that specific UIFSA registration procedural requirements are jurisdictional, finding instead that the filing of foreign support order satisfies the registration requirement so long as no one was prejudiced by the failure to follow the statutory procedures. This court agrees that UIFSA's registration procedures are not jurisdictional, thus, mother's failure to register the New York judgment did not deprive trial court of subject matter jurisdiction.

Additionally, registration is required, but not sufficient, when seeking to modify (rather than simply enforce) a support order of another state. A Texas court may modify another state's support order and assume

continuing, exclusive jurisdiction if it finds that, among other requirements, that the child or an individual is subject to personal jurisdiction in Texas, and that all parties have "filed consents" in the issuing state. *See* TFC 159.611(a)(2).

Because mother, the party seeking modification of a foreign support order, resides in Texas, consent is a necessary prerequisite to a Texas court's acquiring jurisdiction to modify, rather than simply enforce, the support obligations in the New York judgment. Other jurisdictions considering the adequacy of consents under the UIFSA indicate there is no particular form in which such consent must be made so long as it clearly reflects the parties' intent to consent to transferring exclusive and continuing jurisdiction in the new forum.

Here, the parties stipulated on the record in New York that all future matters related to visitation and custody would be referred to a Texas court. Additionally, the parties' conduct in the underlying suit indicates that they understood their consent to transfer of jurisdiction to Texas courts. In father's various pleadings, he has stated that "all future proceedings incident to this divorce and custody matter are to be heard in Harris County, Texas." Accordingly, the parties effectively consented to the Texas court's exercise of jurisdiction to modify the New York Judgment's support provisions.

Because the failure to strictly comply with TFC 159.602's registration procedures does not deprive the Texas courts of subject-matter jurisdiction over a foreign support order and because the parties consented to trial court's acquiring jurisdiction to modify New York's support order, father's arguments that the modification orders are void are without merit.

SAPCR

TERMINATION OF PARENTAL RIGHTS

IN TERMINATING MOTHER'S PARENTAL RIGHTS, TRIAL COURT VIOLATED MOTHER'S DUE PROCESS RIGHTS BY NOT CONDUCTING A HEARING PRIOR TO ISSUING AN ORDER RETAINING THE CASE BEYOND THE ONE-YEAR DISMISSAL DATE; THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT JURY'S FINDING THAT MOTHER'S CONDUCT ENDANGERED CHILD.

¶11-2-35. ***In re T.T.F.,*** -- S.W.3d --, 2010 WL 4925010 (Tex. App.—Fort Worth, 2010, no pet. h.) (12/02/10).

Facts: CPS removed child from mother in March 2008. Numerous witnesses testified at trial including several caseworkers and a pediatrician. The testimony revealed that at the time of removal, child was malnourished, had failed to thrive, and was acutely ill with pneumonia and ear infections. Following a jury trial, the jury found that mother's parental rights to child should be terminated, and trial court found that mother had engaged in conduct that endangered child, and that termination was in child's best interest. Mother appealed.

Holding: Affirmed

Opinion: Mother argued that her due process rights were violated because trial court did not conduct a hearing before retaining the case on the docket beyond the initial one-year dismissal date. TFC 263.401(a)-(b) provides that in termination suits initiated by CPS, if a trial on the merits has not commenced within one year after filing, the trial court must dismiss the case "unless the court finds that extraordinary circumstances necessitate the child remaining in the temporary managing conservatorship of the department and that continuing the appointment of the department as temporary managing conservator is in the best interest of the child."

1. The plain language of TFC 263.401 does not require the trial court to conduct a hearing before granting an extension. Thus, this court must presume that the legislature did not intend to require a hearing before the trial court retains a case on its docket pursuant to TFC 263.401(b). Moreover, the evidence shows that trial court signed the order retaining the case on the docket, that trial court conducted a permanency hearing the same day, and that trial court's permanency hearing order reflects that mother and her counsel attended the permanency hearing in person. Thus, trial court did not violate mother's procedural due process rights by not conducting a hearing before retaining the case on the docket beyond the one-year dismissal date.

Additionally mother argued that trial court denied her procedural due process rights by retaining the case on the docket beyond the initial dismissal date because extraordinary circumstances did not exist to justify the retention. In its order retaining the case on the docket, trial court found that extraordinary circumstances justified retention because it could not set the case for a jury trial until a date beyond the one-year dismissal date. Because an extension of the dismissal date is similar to a continuance and because section TFC 263.401(b) does not indicate which appellate standard of review to apply, trial court's extension of the dismissal date will be reviewed for abuse of discretion.

The record reflects that CPS requested that the case be continued from the original trial setting so that it could be tried before a jury and also that mother did not oppose CPS's motion. Trial court granted the unopposed motion for continuance but found that the case could not be set for a jury trial until June 2009, beyond the one-year dismissal date. Importantly, mother did not argue or cite to any portion of the record to suggest that trial court had another available date for a jury trial before the one-year dismissal date. Further, mother did not argue that she was harmed by trial court's retention of the case beyond the one-year dismissal date. In fact, the delay permitted mother to present evidence that she had maintained a stable home in the four months before trial, evidence that she could not have presented to the jury before the one-year dismissal date. Thus, this court cannot conclude that trial court abused its discretion.

Mother argued that the evidence was legally and factually insufficient to support the jury's finding that she engaged in conduct which endangered child's physical or emotional well-being. TFC 161.001(1)(E) permits a trial court to order termination of the parent-child relationship if it finds by clear and convincing evidence that the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." The relevant inquiry is whether evidence exists that the endangerment of the child's physical well-being was the direct result of the parent's conduct, including acts, omissions, or failures to act. Termination under TFC 161.001(1)(E) must be based on more than a single act or omission; the statute requires a voluntary, deliberate, and conscious course of conduct by the parent.

Here, the record reflects that mother was effectively homeless between August 2007 and March 2008. Afterward, mother moved into a house that had rat feces on the floor, exposed nails on the floorboards, and rotting meat on the counter, and she did not sufficiently clean the house despite being asked to do so by a caseworker. Mother also allowed her Medicaid and food stamps to lapse and she admitted that the lapse made it difficult for her to provide for child. Indeed, child did not receive his immunizations when they were due because mother did not have Medicaid.

Pediatrician testified that she examined child the day after his removal and stated that child was acutely ill with pneumonia and ear infections. Pediatrician explained that child's lack of growth was due to a failure to thrive and that the failure to thrive was caused by the lack of nutrition given to him by mother. Pediatrician testified that, as a result of child's failure to thrive, child was in danger of severe bodily injury or death at the time she examined child. In addition, pediatrician opined that it constituted medical neglect for mother to allow child to develop significant ear infections without taking him to the doctor. Mother admitted that she did not take child to a pediatrician to determine if there was a problem, even though she had noticed that he was not getting any better.

Many of mother's difficulties relate to her impoverishment. However, mother failed to secure for child the basic necessities of life even to the extent available through public assistance. Mother allowed her government benefits to lapse, did not timely renew them, and neglected child's medical condition despite actual knowledge that he was not gaining weight. Accordingly, the evidence is legally and factually sufficient to support the jury's belief that mother engaged in conduct that endangered child's physical or emotional well-being.

APPELLATE COURT DID NOT ERR IN AFFIRMING TRIAL COURT'S TERMINATION OF FATHER'S PARENTAL RIGHTS BECAUSE TERMINATION IS SUPPORTABLE ON ALTERNATIVE GROUNDS AND BECAUSE EVIDENCE SUPPORTING FATHER'S ARGUMENT WAS NOT ADMITTED TO THE TERMINATION TRIAL.

¶11-2-36. ***In re M.C.G.,*** 329 S.W.3d 674 (Tex. App.—Houston 14th Dist.] 2010, no pet. h.) (12/02/10).

Facts: In *In re C.L.*, 322 S.W.3d 889 (Tex. App.—Houston [14th Dist.] 2010), trial court terminated father's parental rights in child. Trial court then determined that appellant's appeal did not present a substantial question for appellate review and was therefore frivolous. Appellate court affirmed. Father moved for rehearing, contending that the appellate court's opinion relied on improper evidence in affirming the termination of his parental rights to child based on failure to provide support. Father argued appellate court erred in considering testimony from prior hearings, rather than only the termination trial, in assessing the evidence regarding failure to support child.

Holding: Father's rehearing argument overruled

Supplemental Opinion on Rehearing: Testimony from a prior hearing can be used at trial only if the testimony is admitted into evidence. The evidence at the termination trial shows that father paid no support, but it does not establish whether he had means to provide support during the relevant time frame. Thus, based solely on the evidence admitted at trial, the evidence is insufficient to support trial court's termination based on failure to support.

However, trial court's termination order is supportable on another ground. Trial court also terminated father's parental rights based on his failure to complete his family services plan. It is undisputed that father did not complete one requirement in the family services plan: to undergo individual therapy. Caseworker testified that she accepted father into individual counseling and that she gave him the necessary information but he did not attend and was therefore terminated from the program. Father argues that this failure is excused because caseworker admitted she made a mistake in the paperwork referring him to counseling, and he has never been notified that the mistake has been corrected. However, the evidence regarding this mistake is contained in testimony from a prior hearing, which was not admitted into evidence at the termination trial.

The Family Code does not provide for excuses for failure to comply in assessing a statutory violation. Further, the Family Code does not provide for substantial compliance with a family services plan. Father failed to fully comply, and thus trial court could have properly concluded that his sufficiency challenge to the termination of his parental rights lacked a substantial basis in law or fact and was thus frivolous. Accordingly, father's argument on rehearing is overruled.

TRIAL COURT DID NOT ERR IN SUMMARILY TERMINATING ALLEGED FATHER'S PARENTAL RIGHTS BECAUSE HE FAILED TO SUBMIT TO A PATERNITY TEST, NEVER ADMITTED PATERNITY, AND NEVER FILED A COUNTERCLAIM FOR PATERNITY.

¶11-2-37. ***In re J.L.W.,*** 2010 WL 5541187 (Tex. App.—El Paso 2010, no pet. h.) (mem. op.) (12/29/10).

Facts: TDFPS filed suit to terminate father's rights as the alleged father of child. Father requested paternity testing and trial court ordered father to submit to paternity testing. Father failed to submit to the paternity test. Father thereafter filed both a motion for genetic testing and a motion to extend the statutory dismissal deadline to permit genetic testing to occur. Trial court retained the suit on its docket, directed father to submit to paternity testing per his request, and set the case for final hearing. Prior to the final hearing, TDFPS filed multiple reports with the court, noting that father had not contacted TDFPS, that its efforts to contact father to arrange paternity testing had been unsuccessful, and that father had not returned over twenty-seven of the it's phone calls or messages.

Ultimately, father never admitted paternity and never filed a counterclaim for paternity and never submitted to paternity testing. At the final hearing, father's attorney, orally requested a continuance on due process grounds because he was uncertain that father had been provided notice of the hearing. Noting TDFPS's efforts in trying to make sure all parties had timely notice to prepare and present their cases, trial court found that the notice requirements had been met and that due process for all parties had been protected. Trial court denied the request for continuance. Trial court then terminated the parent-child relationship between father and child. Father timely filed points of appeal with trial court arguing his due process rights were violated when trial court denied his counsel's request for continuance and in terminating his parental rights. Trial court determined father's points of appeal to be frivolous.

Holding: Affirmed

Opinion: Father argued trial court erred in finding as frivolous his point of error that his alleged parental rights were improperly terminated because TDFPS failed to follow due process. Under TRAP 33.1, to preserve a complaint for appellate review, the record must show that the complaint was presented to the trial court by a timely motion, request, or objection. Constitutional issues must also be properly raised in the trial court or they are waived on appeal. Further, TRCP 251 requires a party seeking a continuance to show sufficient cause by affidavit, consent of the parties, or operation of law as support for his motion. If a motion for continuance is not verified or supported by affidavit, we presume the trial court did not abuse its discretion in denying the motion.

Here, the record is void of a written motion, verification, or affidavit in support thereof. Because father failed to properly present to trial court his motion for continuance based upon due process grounds, he failed to preserve his complaint for appellate review. Accordingly, this court presumes that trial court did not abuse its discretion in denying the oral motion for continuance.

Father argued trial court erroneously determined that his point of error challenging the legal and factual sufficiency of the evidence to support termination of his alleged parental rights was frivolous. Under TFC 161.002(a), except as otherwise provided in the TFC, the procedural and substantive standards for termination of parental rights also apply to the termination of an alleged father's rights. However, TFC 161.002(b)(1) provides that an alleged father's rights may be terminated if, after being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under TFC Chapter 160.

Where an alleged father admits or otherwise claims paternity, TFC 161.002(a) permits him to fend off summary termination of his rights and requires the TDFPS to satisfy the high burden of proof of clear and convincing evidence necessary for the termination of parental rights. However, if an alleged father fails to file an admission or counterclaim for paternity, TFC 161.002(b) permits the trial court to summarily terminate his alleged parental rights.

Here, trial court expressly found that, after being served with citation, father did not respond to citation by timely filing an admission of paternity or by filing a counterclaim for paternity or for voluntary paternity to be adjudicated under TFC Chapter 160 before the final hearing. Although father expressed a willingness to undergo genetic testing, and despite both the trial court's order that testing be performed and the TDFPS's attempts to assist father in being tested, father never submitted to testing, never admitted his paternity, and never filed a counterclaim for paternity. Accordingly, trial court was statutorily authorized to terminate father's rights as an alleged father without requiring the TDFPS to meet the clear and convincing burden of proof under TFC 161.001. Consequently, because father's points of appeal lack an arguable basis in law or in fact, trial court did not err in determining it to be frivolous.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO SUBMIT MOTHER'S JURY INSTRUCTION TO THE JURY BECAUSE THE INSTRUCTION INCORRECTLY STATED THE LAW.

¶11-2-38. ***In re D.O.,*** -- S.W.3d --, 2011 WL 173555 (Tex. App.—Eastland 2011, no pet. h.) (01/20/11).

Facts: Following mother's arrest for methamphetamine possession, TDFPS removed children from mother's care. TDFPS also filed a SAPCR seeking termination of mother's parental rights. Prior to trial grandmother intervened seeking to be to be appointed as the permanent managing conservator of the children. During the course of the trial, evidence revealed mother had engaged in methamphetamine manufacture and distribution, and that mother had been arrested on several occasions. Evidence also revealed that father had physically abused mother. Following trial, the jury found that mother's parental right should be terminated and that termination was in the best interest of the children. Trial court then issued a termination order and appointed TDFPS as children's permanent managing conservator. Mother appealed.

Holding: Affirmed

Opinion: Mother argued trial court erred by failing to submit her jury instruction stating that before the jury could find termination to be in the child's best interest, "[the jury] must find by clear and convincing evidence that it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator."

Mother's jury instruction was based on TFC 263.404, which provides that the trial court "may render a final order appointing the department as managing conservator of the child without terminating the rights of the parent of the child if the court finds that … it would not be in the best interest of the child to appoint a relative of the child or another person as managing conservator. The COA held that trial court properly rejected mother's jury instruction because TFC 263.404, by its plain language, only applies when the trial court does not order termination of parental rights. Because termination of parental rights was in issue, trial court did not abuse its discretion by refusing to submit mother's requested jury instruction.

RES JUDICATA DID NOT BAR SECOND TERMINATION PROCEEDING.

¶11-2-39. ***In re D.S.,*** -- S.W.3d --, 2011 WL 222218 (Tex. App.—Amarillo 2011, no pet. h.) (01/25/11).

Facts: In 2005, father was convicted and sentenced to prison for 10 years for methamphetamine possession with intent to deliver. In March 2007, based on father's conviction as well as allegations of drug use by mother and father, TDFPS filed a SAPCR seeking termination of the parent-child relationship for both parents. Father's parental rights to the children were not terminated, but trial court appointed TDFPS as permanent managing conservator of the children and the father possessory conservator.

In September 2009, mother signed an open adoption agreement with children's foster parents, voluntarily relinquishing her parental rights in the children. Afterward, TDFPS initiated a second SAPCR seeking to terminate father's parental rights. In March 2010, following a bench trial in which father attended telephonically, trial court terminated father's parental rights in the children. Father appealed.

Holding: Affirmed

Opinion: Father argued that he received ineffective assistance of counsel at trial. Specifically, father contended his counsel at the March 2010 hearing should have interposed res judicata as a bar to litigating issues tried in the April 2007 termination proceeding. The COA rejected father's argument noting that TFC 161.004 permits trial courts to consider evidence of conduct preceding a previous order denying termination. Thus, father's counsel was not required to challenge the admissibility of evidence at the 2010 hearing on the ground it existed at the time of the 2007 hearing. In light of the function of TFC 161.004, something beyond failure to present a res judicata defense is necessary. Accordingly, the COA overruled father's argument.

PARENT'S WAIVED THEIR LEGAL AND FACTUAL SUFFICIENCY CHALLENGES TO TRIAL COURT'S TERMINATION OF THEIR PARENTAL RIGHTS BECAUSE THEY ONLY CHALLENGED FOUR OF THE FIVE STATUTORY GROUNDS FOR TRIAL COURT'S TERMINATION.

¶11-2-40. ***In re K.W.,*** -- S.W.3d --, 2011 WL 565641 (Tex. App.—Texarkana 2011, no pet. h.) (02/18/11).

Facts: Trial court terminated parents' rights in their two children based on five statutory grounds under TFC 161.001 and because termination was in the children's best interest. Parents appealed, arguing that the evidence was insufficient to support the trial court's termination of their parental rights.

Holding: Affirmed

Opinion: Only one predicate finding under TFC 161.001 is necessary to support a judgment of termination when there is also a finding that termination is in the child's best interest. If a trial court finds multiple predicate grounds for termination, an appellate court may affirm based on any one ground.

Here, in their statement of appellate points, parents argued the trial evidence did not support trial court's termination based on the predicate grounds found in TFC 161.001(1)(D), (E), (N), and (P). However, in addition to the grounds specified in the statement of points, trial court also terminated the parents' rights on ground (M), that the parents had their "parent-child relationship terminated with respect to another child based on a finding that the parents' conduct was in violation of TFC 161.001(1)(D) or (E). Because trial court's finding with respect to TFC 161.001(1)(M) was unchallenged, and can support trial court's termination, it is unnecessary to review legal and factual sufficiency arguments as to the other grounds.

miscellaneous

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING GRANDMOTHER'S MOTION FOR A NEW TRIAL WHEN SHE WAS NOT A PARTY TO THE UNDERLYING SAPCR.

¶11-2-41. ***In re Trevino,*** -- S.W.3d --, 2010 WL 5072192 (Tex. App.—Dallas 2010, orig. proceeding) (12/14/10).

Facts: Children's paternal aunt filed a SAPCR on August 2, 2010. The children's mother was deceased, and the father approved the decree appointing aunt as the sole managing conservator. Trial court entered the decree on August 6, 2010. On August 30, 2010, maternal grandmother filed a motion for new trial. Trial court granted the motion for new trial on October 6, 2010.

Holding: Petition for writ of mandamus granted

Opinion: Because maternal grandmother was not a party to the lawsuit, she could not file a motion for new trial after trial court entered its judgment. Moreover, because the court's plenary jurisdiction expired on September 6, 2010, it no longer had jurisdiction, under TRCP 329b(f), to set aside the decree and grant a new trial on its own motion. Thus, trial court abused its discretion by granting grandmother's motion for new trial on October 6, 2010.

TRIAL COURT'S DIVORCE DECREE ENFORCEMENT ORDER VACATED BECAUSE TRIAL COURT ISSUED THE ORDER WHILE WIFE'S APPEAL FROM THE DIVORCE DECREE WAS PENDING.

¶11-2-42. ***Mandell v. Mandell***, 2010 WL 5118347 (Tex. App.—Fort Worth 2010, no pet. h.) (mem. op.) (12/16/10).

Facts: Wife filed a notice of appeal from a divorce decree on July 7, 2008. On November 12, 2008, trial court issued an order granting husband's post-judgment motion to enforce the division of the marital estate provided in the couple's April 8, 2008 divorce decree. On April 15, 2010, appellate court issued an opinion on wife's appeal from the divorce decree. Wife's appeal from the divorce decree was therefore pending when the trial court rendered its enforcement order. Wife appealed trial court's enforcement order.

Holding: Reversed and remanded

Opinion: TFC 9.007(c) provides that the power of the trial court "to render further orders to assist in the implementation of or to clarify the property division is abated while an appellate proceeding is pending." Under the statute, trial court had no power to render the November 12, 2008 enforcement order because the appeal from the divorce decree was then pending. Accordingly, trial court's November 12, 2008 enforcement order is vacated.

Editor's comment: *Although this case does not elaborate as to what relief husband was requesting in his post-judgment motion to enforce the division of the marital property, this case and those like it (see Fischer-Stoker at 174 S.W.3d 268)) must be read in conjunction with In re Phillips (296 S.W.3d 682) which found that the trial court's post-judgment order disbursing funds to the parties (while an appeal was pending) was not in violation of section 9.007(c) of the TFC because it was "merely a direction to a ministerial officer to permit enforcement of the judgment." (R.T.)*

Editor's comment: *This case has interesting implications for enforcement and superseding a family law judgment. (M.M.O.)*

HUSBAND'S CHALLENGE TO TRIAL COURT'S DIVORCE DECREE ENFORCEMENT ORDER IS IMPERMISSIBLE BECAUSE IT AMOUNTS TO A COLLATERAL ATTACK ON THE UNAPPEALED DIVORCE DECREE.

¶11-2-43. ***Coleman v. Coleman***, 2010 WL 5187612 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.) (mem. op.) (12/23/10).

Facts: Trial court rendered an agreed final divorce decree on August 7, 2008 pursuant to a mediated agreement between husband and wife. The decree required husband to pay a lump sum of $350,000 to wife in addition to $9,500 on the first of every month. Husband never made any payments under the decree. Wife petitioned for enforcement and attorney's fees. Trial court conducted a hearing and then ordered husband to pay $464,629.98 to wife, which included the $350,000 lump sum, nine months of past-due $9,500 payments, and compound interest. The order stated that it did not effect the monthly $9,500 payments under the divorce decree, and they would continue to accrue until husband paid the entire past-due amount. Finally, trial court awarded $14,980 in attorney's fees to wife with eight percent post-judgment interest. Husband appealed.

Holding: Affirmed

Opinion: Husband argued that trial court's award of $464,629.88 in its enforcement order was impermissible because the final divorce decree contained a penalty under contract law. If an appeal is not timely perfected from the divorce decree, res judicata bars a subsequent collateral attack. Here, trial court signed the final divorce decree on August 7, 2008. Husband filed a motion for new trial, but 105 days had passed without either party filing an appeal from the final decree. Instead, husband appealed from trial court's judgment granting wife's petition to enforce. Under TFC 9.001, a motion to enforce a divorce decree is equivalent to a new suit. Accordingly, an appeal from a motion to enforce may not collaterally attack an unappealed divorce decree.

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING UNPAID ATTORNEY'S FEES BECAUSE TRIAL COURT WAS NOT REQUIRED ON REMAND TO ENTER A TAKE NOTHING JUDGMENT AGAINST ATTORNEY

¶11-2-44. ***Brockie v. Webb,*** -- S.W.3d --, 2010 WL 5395658 (Tex. App.—Dallas 2010, no pet. h.) (12/30/10).

Facts: The underlying case in this appeal is a divorce action. Appellee is an attorney who represented appellant- the wife in the divorce. A dispute arose between attorney and wife, wife refused to pay fees and attorney withdrew. Attorney then intervened in the trial seeking recovery of unpaid attorney's fees. [To assist in his intervention, attorney hired outside counsel (attorney's counsel)]. Following the trial, trial court awarded attorney $50,271.67 in unpaid attorney's fees and for fees that he incurred while defending wife's legal malpractice counterclaim. Wife appealed (Brockie I). This court concluded the evidence was factually insufficient to support trial court's award of attorney's fees, and reversed and remanded the issue "to the trial court for proceedings consistent with this opinion."

On remand, trial court held a hearing during which both sides were given time to present argument and evidence regarding the issue of necessary and reasonable attorney's fees. After the hearing, trial court awarded $51,267.19 to attorney as attorney's fees. Wife appealed again.

Holding: Affirmed

Opinion: Wife argued trial court erred on remand by awarding attorney's fees "because [trial court's] only option was to find that the evidence previously presented was insufficient to award additional attorney's fees and enter a take-nothing judgment in favor of [wife]." The very nature of a remand for "proceedings consistent with this opinion" anticipates that the trial court will hold further proceedings regarding the remanded issue. This, in turn, implicitly enables the trial court to allow the parties appropriate time to present argument and evidence regarding the remanded issue, after which it renders a judgment based on the evidence presented. Here, nothing in the record suggests trial court abused its discretion by refusing to enter a take-nothing judgment in favor of wife, giving the parties time to argue and present evidence, or admitting documentary evidence.

TEXAS LACKED STANDING UNDER THE "VIRTUAL REPRESENTATION" DOCTRINE TO CHALLENGE THE VALIDITY OF A SAME-SEX DIVORCE ON APPEAL.

¶11-2-45. ***State v. Naylor,*** -- S.W.3d --, 2011 WL 56060 (Tex. App.—Austin 2011, no pet. h.) (01/07/11).

Facts: Naylor and Daly, both female, married under Massachusetts law in 2004. The parties returned to Texas and adopted a child. Naylor filed for divorce in Texas trial court in 2009. In response, Daly moved to declare the marriage void under TFC 6.204. Eventually, the parties reached a settlement of all issues in the case and trial court granted a divorce pursuant to the agreement. At that time, State had not yet attempted to intervene in the case, and no party had presented any arguments or filed any pleadings challenging or defending the constitutionality of any provision of the TFC. Afterward, State filed a petition in intervention, arguing that the trial court lacked jurisdiction to grant the divorce because Naylor and Daly were of the same sex. Trial court determined it could not consider the intervention because it was not timely and because State could arguably reassert its late-intervention arguments on appeal. State appealed.

Holding: Appeal dismissed for lack of subject matter jurisdiction

Opinion: Because State was not a party to the divorce action, it must have standing under the "virtual representation" doctrine in order for appellate court to have subject matter jurisdiction. In order to claim virtual representation, an appellant must show that (1) it is bound by the judgment, (2) its privity of estate, title, or interest appears from the record, and (3) there is an identity of interest between the appellant and a named party to the judgment.

With respect to the first element, State relied on *Motor Vehicle Board. v. El Paso Indep. Auto. Dealers Ass'n* to support its contention that it had standing to appeal the divorce decree. In that case, the Texas Supreme Court held that the virtual-representation doctrine allowed the State to intervene on appeal and challenge a trial court's judgment that provisions of the transportation code unconstitutional and enjoining the enforcement of those provisions. The State relied on local officials to represent its interests and present the constitutional issues to the court. However, the local officials determined the law in issue was unconstitutional and settled the case with the plaintiffs. The supreme court determined that the State had standing to intervene under the doctrine of virtual representation, and that the State's right of appeal had not been waived by the attorney general's letter deferring to the local officials' ability to adequately defend the constitutionality of the law.

Here, State argues that like in *El Paso*, it was virtually represented by Daly until she abandoned her defense of TFC 6.204. However, this is not a suit to declare a statute unconstitutional or enjoin its enforcement, but a private divorce proceeding involving issues of property division and child custody. Neither of the named parties raised any constitutional challenge to any Texas statute. Neither of the named parties raised any constitutional challenge to any Texas statute. Daly simply sought to declare the marriage void under TFC 6.204. A request for relief under a particular statute is not the equivalent of a defense of that statute's constitutionality, especially where no constitutional challenge has been raised.

State also fails to meet the second and third virtual-representation doctrine requirements. The record does not reflect that the State had any interest in the parties' property division or the terms of their agreement related to child custody. Further, State cannot show an identity of interest between itself and any named party to the judgment.

Finally, even if State had been a deemed party under the virtual-representation doctrine, equitable considerations weigh against allowing State to participate on appeal. By entering into the agreed judgment, Naylor and Daly were able to settle a protracted and complex property dispute involving numerous business entities, and multiple creditors. To allow State to intervene would greatly prejudice not only the existing par-

ties and their creditors, but the child whose custody situation remains unsettled. Accordingly, State lacks standing to pursue this appeal.

Editor's comment: *This opinion seems to open the door for same-sex divorces in Texas, as long as the State does not intervene before rendition. Provided same-sex couples agree on the division of property, they can conceivably file a petition for divorce then proceed with the prove-up. If the trial court signs off before the attorney general can intervene, then they are divorced under Texas law according to this case. However, if a same-sex divorce comes to the State's attention and the State intervenes prior to rendition, as was the case in In re J.B. out of the Dallas Court of Appeals last year, the outcome is likely to be very different than what we see here in this opinion. (A.B.R.)*

Editor's comment: *Keep very, very quiet… dress in camouflage, use code words for our names, don't make any waves… we're getting a same-sex divorce. Shhhhh! Don't tell the AG. Okay, whew we got it – it's done! Now, all at once, everyone put your thumbs in your ears, wiggle your fingers and stick out your tongues! Naa, naa, naa, naa, naa. (M.M.O.)*

CONTRADICTING ITS OWN PRECEDENT, THE BEAUMONT COURT DETERMINES THAT A TRIAL COURT'S LATE FILED FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE A NULLITY.

¶11-2-46. ***Sonnier v. Sonnier,*** -- S.W.3d --, 2011 WL 175085 (Tex. App.—Beaumont 2011, no pet. h.) (01/20/11).

Facts: Following a bench trial for divorce, trial court signed a final decree of divorce, and divided the assets and debts between the parties. Approximately seven months after husband filed an appeal, trial court signed findings of fact and conclusions of law, and forwarded the findings to the COA. Husband argued trial court erred by failing to timely file findings of fact and conclusions of law after he requested them. Although husband contended that he timely filed a notice of past due findings of fact and conclusions of law, the clerk's record contained no such request.

Holding: Affirmed

Opinion: COA began its analysis by noting that when trial court signed its findings of fact and conclusions of law, it no longer had jurisdiction over the case. Some courts of appeals, including the Beaumont court, had previously suggested that a trial court may file "belated" findings of fact and conclusions of law even after the case is on appeal and the trial court's plenary power has expired. The COA felt that the previous case law, including its own, did not adequately explain under what authority a trial court could act in making belated findings and conclusions when an appellate court gained exclusive jurisdiction over the case.

The COA declined to follow its own precedent, but instead noted that when a case is on appeal and the trial court's power to perform certain acts after appeal has expired, generally the appellate court exercises exclusive jurisdiction over the case, and that a trial court's actions taken when it lacks jurisdiction are nullities. Following this reasoning, the COA determined that trial court's belated findings and conclusions after the COA had already gained exclusive jurisdiction over the case, was a nullity. The COA also determined that because husband did not file a notice of past due findings with trial court, that he waived any argument of trial court's failure to file findings and conclusions on appeal.

Concurring Opinion: The concurrence disagreed with the majority's assertion that the case law "[did] not adequately explain under what authority a trial court may act in making belated findings and conclusions when the appellate court has exclusive jurisdiction over the case." The concurrence noted the cited case law explained that belated findings of fact and conclusions of law, "do not vacate or change the judgment; they

merely explain the reasons for the judgment." Thus, even if a trial court's plenary power has expired, the trial court should not be prevented from entering properly requested findings and conclusions.

TRIAL COURT'S CONSENT JUDGMENT SET ASIDE BECAUSE THE PARTIES DID NOT AGREE TO THE AMOUNT OF CHILD SUPPORT AND BECAUSE FATHER DID NOT CONSENT TO THE ORDER.

¶11-2-47. ***In re D.L.S.,*** 2011 WL 240683 (Tex. App.—San Antonio 2011, no pet. h.) (mem. op.) (01/26/11).

Facts: In 2007, father filed a motion to modify conservatorship. The parties appeared for a hearing on July, 1 2008, announced they had reached an agreement, and mother's counsel read an agreement into the record that addressed conservatorship issues. Additionally, the parties agreed that child support would be off-set, however neither party introduced evidence regarding income or resources. Mother's counsel subsequently prepared an order. At a November 2009 hearing, mother moved for entry of judgment. Father objected to mother's proposed child support calculation stating the figures were derived from an earlier order. Following the hearing, trial court signed an order stating the order was pronounced and rendered at the July 1, 2008 hearing.

Holding: Reversed and remanded

Opinion: Father argued that the evidence did not support trial court's child support order. The COA began its discussion by noting that judgments rendered on a Rule 11 settlement agreement must be in strict compliance with the terms recited into the record and cannot remove or add material terms. Additionally, if a party withdraws its consent to the Rule 11 settlement agreement before the court renders judgment, the court is precluded from rendering a consent judgment.

The COA noted that trial court did not expressly state on the record at the 2008 hearing that it was rendering judgment. Instead, after the agreement was read into the record, trial court asked both parties if that was their agreement and then asked mother's counsel to prepare an order. Nothing said by trial court at the hearing indicated the intent to render judgment. Further, the agreement read into the record at the July 2008 hearing failed to resolve the amount of child support to be paid by the parties. Because the parties did not agree on the amount of child support at the July 2008 hearing, trial court could not render a valid consent judgment at the 2009 hearing. Moreover, father objected to numerous provisions in mother's proposed order, thus the order was rendered without father's consent.

★★★ TEXAS SUPREME COURT ★★★

TRIAL COURT ERRED BY DENYING MOTHER'S A FREE COURT RECORD WHEN SHE PROPERLY FILED AN AFFIDAVIT OF INDIGENCY AND NO ELIGIBLE PARTY TIMELY CONTESTED HER CLAIM.

¶11-2-48. ***In re C.H.C.,*** -- S.W.3d --, 2011 WL 263206 (Tex. 2011) (01/28/11) (per curiam).

Facts: Trial court entered a modification order appointing mother as sole managing conservator and father as possessory conservator. Later, father alleged mother denied him visitation on two occasions. After a hearing, trial court modified the custody order and held mother in contempt.

Afterward, mother filed with trial court an affidavit of indigence alleging she was unemployed, had no property, and limited cash availability. Mother attached no documentary evidence to her affidavit and no eligible party contested mother's affidavit within 10 days of her filing. Although nobody contested mother's indigency affidavit, trial court conducted a hearing, at which point father submitted a brief in opposition. In response, mother filed an amended affidavit with attachments demonstrating her indigence. Trial court con-

firmed its contempt order, denied mother's indigence, and denied her a free court record for appeal. Mother then petitioned the Dallas COA for a writ of mandamus. The COA returned the case to trial court providing 10 days for any party to contest mother's claim of indigence.

Nearly three months later, the court clerk challenged mother's affidavit contending the affidavit did not comply with TRAP 20.1. Trial court found mother's affidavit was insufficient and again denied mother's indigence. Afterward, the COA ordered mother to pay for the court record and any costs on appeal. When mother failed to pay, the COA eventually dismissed her appeal. Mother appealed to the Texas Supreme Court arguing that trial court erred by denying her a free record for appeal.

Holding: Reversed and remanded

Opinion: The Court began its analysis by detailing TRAP 20.1, which requires an indigent party seeking to appeal without paying costs to file an affidavit of indigency. Afterward, any party, including the court clerk, may contest the affidavit within 10 days of its filing. If no party contests the affidavit, it is deemed true, and the party may then proceed without paying costs.

The Court noted that in her first affidavit, mother swore that she had a negative cash flow, no investments to help pay for the record, no cash on hand, and a dependent to care for. Because no one contested the affidavit, the evidence she provided should have been deemed true. The Court noted further, even if mother's first affidavit were deemed too conclusory, she filed a second amended affidavit that more fully complied with TRAP 20.1. Again, no party challenged the affidavit within 10 days after mother filed it with trial court. Even though the court clerk challenged the second affidavit, the challenge occurred nearly three months after the COA remanded the case for a hearing. Thus, the Court concluded that because no party contested either of mother's indigency affidavits, trial court erred in denying her a free record on appeal.

BECAUSE OAG FAILED TO OBJECT AT BENCH TRIAL TO TRIAL COURT'S RULING THAT FATHER OWED $0 IN ARREARS, OAG WAIVED ITS SUFFICIENCY OF EVIDENCE AND ABUSE OF DISCRETION CHALLENGES ON APPEAL.

¶11-2-49. ***In re D.B.,*** -- S.W.3d --, 2011WL 679308 (Tex. App.—Fort Worth 2011, no pet. h.) (02/24/11).

Facts: In a bench trial, OAG sought confirmation of father's child support arrearage. After a hearing, trial court stated that because mother failed to disclose a social security disability payment, it found that father owed $0 in arrears. The record did not show that OAG objected or otherwise complained about the trial court's ruling. OAG appealed, challenging the sufficiency of the evidence and complaining that trial court abused its discretion in finding that father owed $0 in child support arrears.

Holding: Affirmed

Opinion: Here, the record does not show that OAG objected to trial court's ruling confirming father's arrearage at $0. Accordingly, OAG failed to preserve and therefore waived its complaint on appeal.

Dissent: In its briefing, OAG's clearly stated the issue of whether trial court abused its discretion by determining that father owed $0 in arrears when the evidence showed as a matter of law that father owed more than $0 in arrears. On appeal, OAG requests a new trial. A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case. Further, in bench trial, a complaint regarding the sufficiency of the evidence may be made for the first time on appeal. The majority cites no authority for the proposition that the general preservation rule controls over the specific rules exempting OAG from raising its issue in a motion for new trial and authorizing OAG to raise its complaint for the first time on appeal.

TRIAL COURT ABUSED ITS DISCRETION BY GRANTING GRANDMOTHER ACCESS TO CHILD WHEN SHE FAILED TO MEET THE STATUTORY BURDEN REQUIRED TO PROVE THAT SHE WAS ENTITLED TO GRANDPARENT ACCESS RIGHTS.

¶11-2-14. In re Nickelberry, 2010 WL 5019270 (Tex. App.—Fort Worth 2010, orig. proceeding) (mem. op.) (12/09/10).

Facts: Maternal grandmother filed a SAPCR requesting trial court to name her as the temporary conservator of three-year-old grandchild, with the right to designate child's primary residence. During a hearing on grandmother's motion for temporary orders, grandmother's counsel initially stated that she had evidence demonstrating some "concerns" about father's health and father's ability to care for child. However, grandmother's lawyer then acknowledged that she had "no evidence that [father was] an unfit father." Grandmother's counsel stated she was seeking discovery and a social study to obtain that evidence. Thus, grandmother presented no evidence to trial court on that date.

Afterward, trial court granted grandmother's motion for a social study and advised the parties that it would hear evidence on standing after the social study had been completed. Additionally, trial court entered an oral temporary order granting grandmother access and possession to child. Father filed this petition for writ of mandamus, arguing that trial court abused its discretion by awarding grandmother access to child without a showing that she had standing to file suit and without a showing that the denial of access would significantly impair the child's physical health or emotional well-being.

Holding: Petition for writ of mandamus granted.

Opinion: TFC 153.433 sets forth the requirements that a grandparent must satisfy before a court may grant a grandparent access to a grandchild. The legislature has set a high threshold for a grandparent to overcome the presumption that a parent acts in his or her child''s best interest: the grandparent must prove that denial of access would "significantly impair" the child's physical health or emotional well-being. A trial court abuses its discretion if it grants temporary access to a grandchild when a grandparent fails to overcome the presumption that a parent acts in the child's best interest by proving with a preponderance of the evidence that "denial ... of access to the child would significantly impair the child's physical health or emotional well-being."

Here, grandmother failed to present any evidence to meet the statutory burden required to prove that she is entitled to grandparent access rights. Accordingly, trial court abused its discretion by granting a temporary order for grandmother to have access to and possession of child.

Editor's comment: *Amazingly, in this case, the trial court granted grandparents access to the child after hearing limited statements from the attorneys, and without receiving ANY testimony or evidence. Attorney for father had filed a Plea in Abatement, and a Motion to Dismiss for Lack of Standing, and presented these arguments at the (very brief) hearing. After the trial court granted grandparents access, and before filing his petition for writ of mandamus, attorney for father also filed an emergency ex parte motion to reconsider, which the trial court denied. (R.T.)*

Editor's Comment: *In the last Section Report, the editors criticized In re: Scheller, 325 S.W.3d 640 (Tex. 2010, orig. proceeding) (per curiam). The Scheller court ordered a trial court to vacate a temporary order allowing a grandparent access to and possession of children over the widower father's objection because there was no evidence that the father was an unfit parent. But the Scheller court left undisturbed the trial court's appointment of a psychologist to serve as both guardian ad litem to the children and the court's expert. Nickelberry is an example of Scheller's unfortunate consequences: The Nickelberry grandparent expressed "concerns" about her grandchildren but conceded she had no evidence that the father was unfit. Grandmother's counsel "stated she was seeking discovery and a social study to obtain that evidence." The trial court ordered a social study. The father did not challenge the social study order in his mandamus proceeding, no doubt because of Scheller. It appears that a non-parent now can file a SAPCR in Texas without*

evidence that a parent is unfit, then obtain court orders allowing the non-parent to attempt to develop evidence to prove unfitness. Nickelberry, like Scheller, exemplifies the injection of the state "into the private realm of the family," a result forbidden by Troxel. (J.V.)

Editor's comment: *The moral of the story in this case, and so many like it, is that you cannot hope to prosecute a grandparent access case by obtaining the evidence you need to win through discovery or through court ordered social studies. You must already have evidence rebutting the parental presumption and showing that denying grandparent access would "significantly impair" the child's physical health or emotional well-being. (C.N.)*

Editor's comment: *The parental presumption is alive and well in the Fort Worth Court of Appeals! Even at temporary hearing, a nonparent/Grandparent must show that the parent's parenting actions will cause significant harm to the child's physical health or emotional development before access may be granted. A parent has a constitutional right to make parenting decisions, even if the trial court disagrees with them, absent significant harm. (M.M.O.)*