SECTION REPORT
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IN THIS MONTH'S REPORT

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MESSAGE FROM THE CHAIR

Given the fact that we are a volunteer organization of over 5,000 members with a lot on our plates, including law practices, families, and other volunteer organizations, I am amazed at how much we do and the imprint we leave on society, making it better for many of our clients.

A special thank you to my seminar co-chair, Cindy Tisdale, along with all the speakers, authors, and staff of the State Bar of Texas, especially Kandi Bottello, for their work in making this year's Advance Family Law Seminar in August one of the most successful, with more than 1800 family lawyers around the state participating.

The Legislative Committee is already meeting and working on family law bills that will be introduced in the 2013 Texas Legislative session. If you have any ideas or suggestions of legislative changes, please let Jack Marr (jwmarr@mmbllp.com) or me (tausley@ausley-algert.com) hear from you.

The Family Law Section is attempting to communicate with the Texas Supreme Court and their task force regarding ways to help the lower-socio economic and unrepresented population of our state. I have been contacted by many district judges and family lawyers from across the state who are concerned about this population's need for advice and representation; however, they do not believe a set of forms this population cannot understand is the solution. Brian Webb, Judge Judy Warne, Charlie Hodges, Steve Naylor, and I continue to try to convey this message to the Supreme Court's task force.

Below is Mr. Webb's response to the task force, setting out the position that many of us hold at this time. We, like many of you, believe having the task force create a set of forms to be approved by the Supreme Court of Texas is not the best way to assist this population.

We all share the desire to make access to the justice system available to everyone - family lawyers (by our actions, both as a group and individually) have proven that time and time again, by supporting Access to Justice, providing leadership in pro bono training, and by actually doing the work of representing those in need on a pro bono basis. Additionally, none of the products of the task force that I have seen so far indicates in any way that the use of these forms will be limited by those with a proven financial need.

I also hope we made it clear in the meeting Friday that many of us do not believe that the form project that your task force has embarked upon will in fact "enhance self representation for the poor." Instead many of us believe it does just the opposite, leading people to believe that their "Supreme Court approved" forms will somehow assure that their rights are being protected when in truth their rights are no more protected than by the forms issued by Legal Zoom and the like (strange company for the Supreme Court of Texas to associate itself with by the way) - many of us believe that this is a disservice to those seeking access to the system. Surely we can come up with something better than to hand them a new packet of forms, not really any better than what they can already get on the internet, and shove them through the system so that they are no longer a nuisance for librarians, clerks, coordinators and judges, all the while deluding them into believing that somehow these forms, by virtue of being anointed by the Supreme Court, protect their rights.

This approach does a disservice to the public and to those lawyers who practice family law, and to the legal system itself - when we move from taking the position that one who self-represents "has a fool for a lawyer" to an approach that sends the Supreme Court endorsed message 'here are some forms, anyone can do it', we have not only not met our responsibility to the public and to the bar, we have abdicated it.

Those of us who have become involved in this discussion have repeatedly suggested that the Family Law Section be called upon to seek solutions to providing access to those in need - we feel an obligation to take a stand for our members and for our practice and against what we believe to be a misguided plan. We have been very successful problem solvers in the past, but we have not been invited to play a meaningful role in this process and so far our offer of assistance has been met only with repeated justifications and defenses of

the form approach. Our offer remains open and, speaking for myself, strong opposition to this short-sighted "form" approach remains - I believe we are about to do harm to the legal system, to the public perception of the system, and those licensed to practice in the system.

Some argue that there have been no repercussions in other jurisdictions. For the poor, this ignores the reality of their circumstances - if they were unable to protect their rights in the first place, they almost certainly cannot undertake the more complicated and costly process of coming back to try and undo any wrongs later. They simply live with the results, out of sight and earshot of the system. That may be expedient but it is not access to justice. Perhaps the thousands of dollars being spent to further and promote this plan (e.g., Lubbock Bar video) would be better spent as direct contributions to programs like DVAP in Dallas and similar programs around the state rather than to prop up a plan that many find flawed.

The opposition amongst the family law bar runs the gamut of experiences - from legal aid providers to judges and all in between, strong opposition exists to this project. I would ask again that the leadership of the Family Law Section be contacted and asked to try and develop and implement meaningful approaches to this problem. The collective experience of 5,000 members of the Family Law Section, together with the thousands more who, while not section members, count family law as a significant component of their practice, should not be ignored.

Thank you, Brian, for your passionate leadership regarding this issue.

The **New Frontiers in Marital Property will be held in San Diego on October 13th-14th**. Come and join family lawyers to learn about and discuss cutting edge issues.

The **Advanced Family Law Drafting Course this year will be in Dallas on December 8th & 9th**. The course director, Cindi Barela Graham, informed me that the emphasis will be on implementing many of the legislative changes, including presentations regarding the explanation of new forms, something which will be helpful for both lawyers and legal assistants.

Without a doubt, one of the positive aspects of being a member of the Family Law Section and attending these seminars is the opportunity to mingle with old friends and meet new ones. In addition, because I know the quality of these seminars will be outstanding, I hope you will plan to attend and reap the benefits of obtaining new information and finding solutions to the problems our clients face.

----------**Thomas Ausley, Chair**

EDITOR'S NOTE

No rain and only a tantalizing relief from the, only to return. Time to start of dreaming of October in San Diego and New Frontiers—ocean view, cool breezes, great company, and a fabulous program to send you home smarter than ever. I still welcome you writers out there to contribute to the Section Report. I hope all of you like the new format of the Section Report, I must thank Tracy Nuckols and the folks at the State Bar in helping with the hyperlinks that makes maneuvering through the report easier than ever. Look for the next report on December 15, 2011.

--------- **Georganna L. Simpson, Editor**

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ASK THE EDITOR

***Dear Editor*:** My client's wife is claiming that her husband watches pornography on his computer and is using this as a basis for trying to obtain primary joint managing conservatorship. She has asked for a jury trial, and I am afraid that this evidence will be brought out at trial. There is no evidence that the children have ever seen father watching pornography or that they have ever been exposed to the pornography. Should this evidence be admissible? *Sizzling in San Angelo*

***Dear Sizzling in San Angelo*:** No. In Texas sexual activity of a parent committed outside the presence of a child is insufficient evidence upon which to base conservatorship of the child. *See Wolfe v. Wolfe*, 918 S.W.2d 533, 539-40; *Schwartz v. Jacob*, 394 S.W.2d 15, 18 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.).

In *Wolfe*, the mother wanted to introduce father's pornographic magazines and assorted sex toys to show that he was not fit to be appointed a joint managing conservator. *Wolfe*, 918 S.W.2d at 539. Court held that evidence more inflammatory, than relevant because there was no evidence that the child had been exposed to the materials. *Id.* at 540.

In *Schwartz* regarded a suit by the father to reduce his child support payments, which was later amended to a request that the Court grant him custody of his two children from his former wife. *Schwartz*, 394 S.W.2d at 17. The trial court denied the father's request for a change of custody, and the father appealed. *Id.* The Court of Appeals affirmed the trial court. The Court of Appeals noted that the trial court's judgment leaving custody of the children with their mother was supported by evidence of probative force and that the evidence was sufficient in quantity and quality. *Id.* at 18. The Court noted that the evidence had shown certain indiscretions on the mother's part. *Id.* The evidence showed that prior to her divorce from the father and between the time of that divorce and the divorce of the mother's current husband, Jacobs, that the mother had participated in a sexual relationship with Jacobs. *Id.* —However," the Court concluded, "the evidence reflects that these indiscretions took place away from the children. There is nothing from which the inference can reasonably be drawn that the children knew or probably knew of this conduct." *Id.* The Court further noted that other evidence bearing on the issue of the welfare of the children was such as to reasonably conclude that the mother had been a good parent and that the children's welfare would be best served by leaving them with the mother. *Id.*

THERAPY TO GO

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

Dear TTG, I have been seeing more and more parental alienation with my divorcing clients, more rancor between parents, more putting kids in the middle. It's bad strategy, legally, but it's also just bad behavior. What sort of person fights through their kids? I don't know if it's because we've finally identified and defined parental alienation, or if people are just getting meaner. Either way, it's not only reprehensible behavior but it is a BIG FAT no-no and a sure way to get slapped down by a judge. I tell my clients this but they do it anyway. Maybe it's hormones in the food chain. What do you think?

Thanks –
Vegan Vivian

Dear V. Viv., First of all, let me say that, though I am not a vegan by any means, I am NOT a fan of hormones in the food chain. Perhaps I'll address this in another column, but just for the record – those of you who have teenage daughters who fly into excessive, screaming rages or extreme bouts of catastrophic sadness and are 20 lbs heavier and two cup sizes larger than their mother was at the same age, please consider family therapy and an organic diet – especially meat and dairy. The parallel relationship between the introduction of hormones in meat and dairy products and the early onset of puberty, along with its many exaggerated accompanying symptoms, is well-documented. Pay the extra two dollars and buy organic. That's all I'm saying.

Beyond that, I can't say that I have an answer to the increase in frequency or intensity that you're seeing. I haven't seen any research that identifies any changes along those lines. I will, however, try to illuminate the underlying motivations for such appalling behavior.

In my experience, a relationship – marital or otherwise – sinks to the level of the weaker of the two parties. By weak, I don't mean the pitiful one who is cowardly and unable to stand up for him or herself. Well, I do, but that's not the only group. By weak, I mean the person with the weaker sense of self. A good way to illustrate this would be to look at a few personality disorders.

I've defined personality disorders in this space before, but just in case you missed it because you were doing something far more interesting than reading my column, let's take a look at what the DSM IV (ok, technically the DSM IV – test revision, fourth edition) has to say.

Diagnosis of mental/psychological disorders is a tiered process comprising five categories. Stay with me here. This is important.

Axis I includes the clinical disorders most of us are familiar with, such as depression, anxiety, bipolar disorder, alcohol or drug dependence, cha cha cha. There are also a couple of catch-all Axis I categories: most

situational symptoms, such as marital discord, and other conditions that need clinical attention, such as recovery from a brain injury, trichotillomania (compulsive hair-pulling), anorexia, etc.

I'll come back to Axis II.

Axis III is a differentiator, which calls for an evaluation of general medical conditions. Axis III conditions include any medical condition that's not directly caused by a mental disorder. This could include bacterial or viral infections, auto-immune disorders, cancers, various nervous system disorders. For example, a person suffering from giardiasis, a parasitic infection of the small intestine, would present with diarrhea, loss of appetite and rapid, sustained weight loss. The parent of a 14 year old girl with these symptoms might fear that she has an eating disorder and drag her to a shrink, when in reality she needs some Flagyl, bed rest and soft food diet. Conversely, a patient with diminished interest in pleasure, increased need for sleep, weight gain, and lethargy presents with symptoms of depression, when he is actually suffering from a thyroid disorder, such as hypo-thyroidism. Many clinicians overlook Axis III. This can lead to years of failed treatment and can literally be a fatal error.

Axis IV evaluates psychosocial and environmental problems. This is the stuff we deal with all day, you and I. It could be anything catastrophic happening in the person's life: the loss of a parent or child, a divorce, homelessness – any life circumstance that might affect a person's ability to function.

Axis V is the Global Assessment of Functioning Scale. This is a 1-100 scale that serves as a measure of a person's ability to function in life. 1 is bad. 100 is good. You can do the math.

As you can see there is a lot of overlap among these four categories. Throw in Axis II – personality disorders* - and you've got what we call in Texas a goat rodeo.

Personality disorders are different from other mental disorders in that they are not medical – meaning they can't be treated with medications. And they are not related to medical disorders or even directly to psychosocial or environmental problems. A personality disorder is a long-term (typically throughout adulthood) maladaptive, ingrained, pattern of inflexible behaviors – or personality traits – that impair healthy functioning in multiple areas of a person's life.

Now, back to your question about parental alienation. Working on the theory that all behavior makes sense in context, consider the context of any of the five diagnostic axes and slot the behavior in and you will typically find a predictable pattern that follows a typical course over time. With most situational and mental or physical disorders, this is something that can be managed through normal interventions.

Not so with personality disorders. I mentioned that relationships tend to sink to the functional level of the "weaker" individual – that is, the person with the least developed sense of self or whose personality is so rigid and maladaptive that relationships must function *around* this individual rather than *with* him or her. This is a generalization, of course, but in cases of extreme parental alienation, it's a good bet that you're dealing with a personality disordered individual. In particular, the triad of disorders including narcissistic, borderline, and antisocial personality disorders, would be a burr in the saddle to anyone in your line of work (and mine).

Let's use the example of a narcissistic personality disorder.

A narcissist, at first glance, seems like an aggrandized individual - someone who is bigger than life, all-about-me, charismatic, controlling, self-centered and without a well-developed conscience. Turn on your television and you will see numerous examples of this on pretty much any reality show. Though narcissists seem to have an exaggerated sense of self, in reality, they have an under-developed sense of self and tend to be fear- and shame-based.

These individuals tend to control other people and situations in order to manage or avoid their own feelings. Couple this with the all-about-me attitude and lack of conscience and you have an individual who, as in the other two personality patterns I've mentioned, sees others as objects to be manipulated for the benefit of the narcissist, rather than real people who have feelings and a right to respectful treatment. For these individuals, kids are simply game pieces to be bartered with and used as a means to an end.

The narcissist is a like a spoiled child who won't share his toys. Everything belongs to him. All the money. All the freedom. All the opportunities. And all of the property, pets and children involved in a dispute. There is no bottom for these people. Since we both know that the person who cares the least about a situation is the one with the most power, it follows that a person with an all about me attitude and an under-developed conscience would blithely toss the kids around by undermining, manipulating, gossiping, lying, making false allegations – whatever it takes to rip those kids away from the other parent and return them to their rightful owner – the narcissistic parent.

In this situation, your job will be much easier if you make a few strategic decisions early on. First, do not try to use moral or humane reasoning with this person. It just ain't gonna happen. Don't waste your time or your breath. Do, however, play to their weakness. They must see that it is to their advantage to do x, y, or z or they will not cooperate. These people need to win. Strategize accordingly.

Specifically addressing parental alienation, I would strongly recommend you get your client, the other parent, and any young children involved, into filial therapy. This is a little-known type of therapy that is not only extremely effective in altering and improving parenting skills and the parent-child relationship, but it will also give you ample information about how your client interacts with the kids and whether or not he or she truly objectifies them. A good filial therapist will make careful observations about parent/child interaction and clear recommendations based on those observations.

Filial therapy is similar to play therapy in that it is used with small children (typically ages 3 - 11) and uses play as a diagnostic and therapeutic tool. The difference between filial and play therapy, however, is that in filial therapy, the parents are a crucial part of the therapy process. Filial therapy involves working with the parents first, training them in the therapy process. Once the parents get the hang of it, the therapist introduces the child into the process and directs the parents as they interact with their kid. It is typically done in a one-on-one setting. One parent, one kid. The two warring parents, then, will never be expected to work and play well in the same sandbox. They will, however, learn specific skills, concepts, and techniques that can change their attitudes toward and understanding of their children and make them more effective parents.

For older kids, plain old individual and family therapy can work wonders in establishing boundaries and empowering all members of the family to deal with the situation and any disordered individuals in a healthier and more effective manner. Proactively addressing parental alienation and other parenting disasters – especially those involving a personality disordered client – will benefit you and your client (and the rest of the family) in a number of ways, and will show any judge that you have made a good faith effort to put a stop to any appalling behavior and knock some sense into your client without the use of a bat.

Consider these interventions and the organic thing and I think you've got a decent shot at managing the situation so that it's a win/win for everyone.

Good luck to you. You're going to need it.

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.

SCOTUS on contempt: The United States Supreme Court held that the 14th Amendment's due process clause does not require states to provide counsel to indigent respondents in contempt proceedings seeking incarceration for failure to pay child support, provided that (1) the proceeding is a private one rather than brought by the state; (2) the petitioner is not represented; and (3) there are "~~a~~lternative procedures" in place to ensure a "~~f~~undamentally fair determination" whether the respondent is unable to pay, including notice that inability to pay is a "~~c~~ritical issue," a form to elicit financial information, an opportunity to respond at the hearing, and an express finding by the court of inability to pay. The rationale? Requiring counsel for the respondent could create an unfair "~~a~~symmetry of representation." *Turner v. Rogers*, -- S.Ct. --, 564 U.S. --, 2011 WL 2437010. The dissent agrees that no counsel is required but would not have reached the "~~a~~lternative pro-

cedural safeguards" issue and therefore would have affirmed. *Note:* In Texas, a respondent has the right to counsel regardless of indigency if incarceration is a possible result of the proceedings. Tex. Fam. Code § 157.163.

Agreements: An ex-wife failed to persuade a New York appellate court that under a stipulation of settlement awarding the parties the bank accounts in their respective names, she was entitled to the funds in the children's 529 college savings plans because they were held in her name, the court holding the ex-wife's construction of the stipulation of settlement to be unreasonable. *Zuchowski v. Zuchowski*,85 A.D. 777, 925 N.Y.S.2d 541 (June 7, 2011). Treating the issue as one of contract law rather than governed by ERISA, the Florida Supreme Court held a decedent's ex-wife entitled to the proceeds of a deferred compensation fund that had been awarded to the decedent in their divorce, as against the decedent's daughter, when the decedent never had changed his ex-wife as the designated beneficiary. *Crawford v. Barker*, 64 So.3d 1246 (Fla. 2011). A husband who agreed to divide the marital estate by paying cash to his wife was estopped from complaining that public policy should not allow a late payment to carry interest from the date of the stipulation for judgment rather than from the payment's due date when the husband had testified at the prove-up that he had had ample opportunity to study the stipulation for judgment and agreed with it. *Dougan v. Dougan*, 292 Conn. 920, 974 A.2d 721 (2011).

Alimony (or maintenance): A Connecticut court did not abuse its discretion when it awarded a wife alimony of $20,000 per month because the couple had lived on $600,000 to $1 million per annum withdrawn from husband's businesses tax free and, toward the end of the marriage, the husband had been giving the wife $40,000 per month ~~f~~for her personal expenses." *Brown v. Brown*,-- A.3d --, 130 Conn. App. 522 (2011). *Note:* Because of the recent changes to Texas' maintenance statute, we'll begin covering alimony cases.

Child support: A New York court abused its discretion by imputing income of $85,000 per annum to an obligor who lost his insurance license and served three years in prison after a felony conviction on drug charges. *Cabral v. Cabral*, -- N.Y.S.2d --, 2011 WL 3600503 (2011). The New Hampshire Supreme Court refused to allow an obligor to claim a dollar-for-dollar credit for Social Security Income (SSI) benefits received by his disabled son because, unlike Social Security retirement benefits and Social Security Disability Income, SSI is not financed by withholding from a worker's earnings. *In the Matter of Lister*, -- A.3d. --, 2011 WL 1834229 (N.H. 2011). The District of Columbia Court of Appeals reiterated that non-periodic distributions of a testamentary trust's corpus cannot be considered part of an obligor's gross income for child support purposes although such distributions may be considered as a factor warranting deviation from the child support guidelines. *Lasché v. Levin*, -- A.3d --, 2011 WL 3610702 (D.C. 2011).

Division: Massachusetts courts have discretion to treat an in-pay pension as either a stream of income (which provides the other spouse with an interest that could be modified by way of an increase in alimony) or as an asset subject to division upon divorce (in which case the other spouse's interest is fixed), but a trial court abused its discretion by treating a military pension as a stream of income because, coupled with the failure to award any alimony, the resulting division of property became inequitable. *Casey v. Casey*, 79 Mass. App. 623, 948 N.E.2d 892 (2011).

Nonparental rights: The Alabama Supreme Court held Alabama's grandparent visitation statute unconstitutional because it does not take into account ~~t~~the fundamental right of a fit parent to direct the upbringing of his or her child," per *Troxel v. Granville*, 530 U.S. 57 (2000). *Ex parte E.R.G. & D.W.G.*, -- So.3d --, 2011 WL 2279206 (Ala. 2011). In Nevada, the parental presumption that fit parents act in the best interests of their children applies only to initial custody determinations, not later modification proceedings, so that a parent who wishes to terminate grandparent visitation must show a substantial change in circumstances and that termination would be in the child's best interests. *Rennels v. Rennels*, 257 P.3d 396 (Nev. 2011). In contrast, Wisconsin's grandparent visitation statute does not require grandparents to rebut the parental presumption when attempting to modify a visitation order. *In re the Paternity of E.M.B.*, 2011 WL 3330366 (Wis. App. 2011). After a custodial mother's death, a New York court did not abuse its discretion when it awarded custody of a child to the child's half-sister's father, who had fostered a close relationship with the child, as against

the child's father, when the child had special needs, suffered from bereavement and her father had not played a significant role in her life. *Pettaway v. Savage*, -- N.Y.S.2d --, 2011 WL 3611215 (2011).

Same sex: The Wyoming Supreme Court held that a Wyoming trial court had jurisdiction to divorce a same-sex couple who had married legally in Canada, despite Wyoming's statutory definition of marriage —as a contract between a man and a woman," because allowing a Wyoming court to grant a same-sex divorce would have no effect on whether a same-sex couple could marry in Wyoming. *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011). —Whether a parent relinquishes rights to custody is a question of fact," wrote the Ohio Supreme Court, but the evidence introduced by a biological mother supported the trial court's finding that the biological mother did not relinquish custodial rights to her former companion, so the former companion could not share custody of the child with the biological mother. *In re Mullen*, -- N.E.2d --, 2011 WL 2732258 (Ohio 2011).

Waste by travel: Faced with a wife's contention that her husband traveled too often to Laos —to throw lavish parties and to have sexual trysts with other women," and the husband's response that he traveled to his homeland of Laos to visit family and friends and to get away from his wife, a Wisconsin trial court properly determined that one trip per calendar year to Laos did not constitute waste of the marital estate but that more than one trip per year did. *Yang v. Yang*, 801 N.W.2d 348 (Wis. App. 2011).

COLUMNS

MAKING SENSE OF COMPUTER-BASED TEST RESULTS
by John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Ms. Smith, mom's lawyer preparing to depose the court-appointed psychologist, expressed concern as she read the detailed descriptions in the psychologist's report. She noted that the psychologist interviewed the parents twice, administered the MMPI-2 to them, and also talked briefly with the child. No one else was interviewed, and no relevant records were reviewed. Nevertheless, the report's descriptions of mom seemed both too specific and too generic—and too artfully phrased. Ms. Smith's consulting expert agreed and suspected the problem's source. Upon reviewing the psychologist's subpoenaed records, the consulting expert confirmed his suspicion: the psychologist had essentially copied, without attribution, several statements into her evaluation report from a computer-based test interpretation (CBTI) of the mom's MMPI-2 test results. When told of this finding, Ms. Smith suspected that the psychologist had cherry-picked and plagiarized CBTI statements—a professional, ethical indiscretion. Then Ms. Smith asked her consulting expert two questions: First, may a psychologist rely on a CBTI as the primary tool in an evaluation? Second, is a CBTI report valid and reliable just because it was computer-generated?

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

Likewise, evaluators misuse testing when they depend solely on test results to establish their expert opinions, even if they interpret the tests correctly. At best, psychological test interpretations compare examinees'

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answers with answers from selected groups of people studied during and after the test's development. For evaluation conclusions, experts still must connect the litigant's test profile with her life circumstances—information gathered from the other evaluation components. The court's concern centers on this litigant and her capacities and circumstances in this case, not on unnamed research subjects. Ms. Smith's first concern is well-placed: a psychologist cannot rely on a computer-based test interpretation (CBTI) report as the primary tool in a psychological evaluation at the expense of good interviews or adequate, relevant information from collateral sources.

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

But CBTIs do not, by themselves, provide legally relevant and reliable psychological profiles of examinees. CBTIs, camouflaged by digital auras of precision and accuracy, may present evidentiary problems of which lawyers should be aware. For example, a psychologist may obtain a CBTI report of an MMPI-2 profile from one of several companies. Some companies produce reports that are more research-based than others, and some meld clinical impressions with research findings without noting the differences in the interpretive narrative. In addition, these companies may treat the algorithms that produce their profile interpretations as proprietary information that they will resist disclosing—a possible *Daubert-Robinson* concern if experts are challenged to show the quality of the sources of their opinions. *See* *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) (~~n~~othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* [unproven assertion] of the expert").

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

Finally, an expert invoking certain CBTI narrative statements to support her opinion must show why those statements fit the litigant in the litigant's life situation, and why other unchosen narrative statements do not. The competent evaluator will reference information from the examinee interviews, from collateral information, and from relevant research or professional writings to address this issue. An expert's failure to show such fit may be grounds for a relevance objection or for a *Daubert-Robinson* motion to exclude testimony based on the expert's unsupported selective reliance on the CBTI narrative.

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

ADVANTAGES OF SECURING A FUTURE STREAM OF PAYMENTS IN UNCERTAIN TIME

by Christy Adamcik Gammill, CDFA[1]

Long after the papers are filed, the custody is decided, the property is divided and the spousal maintenance amount is clear, money often continues to change hands or bank accounts for a continued period of time for Child Support, Property Division Buy-Out, and/or Spousal Maintenance. Any one, combination of two or even all three of the above may have a divorced client at the mercy of being the creditor to an ex-spouse for a period of time beyond the divorce by waiting patiently (or not so patiently) to receive periodic payments from the other spouse.

Whether the payments are for Child Support, Property or Alimony there is a future obligation of the payor spouse to the recipient spouse in a form of payments that can yield unwanted communications and ultimately frustrated and dissatisfied clients. Although not every client has enough liquidity or the ability to access a lump sum of money to fund a buy-out of the future obligation, the concept is highly attractive under the right circumstances for many reasons.

Let's say that Contractual Alimony is agreed to be paid for 10 years by husband to wife, age 50, in the amount of $7,500/month and husband has access to funds to buy an instrument called an immediate annuity that will allow him to benefit from the preferential tax treatment of Alimony by deducting the payments at his highest tax-bracket but also know that his wife, who historically is a poor manager of money and needs saving from herself, will have a reliable monthly income stream during this period of time until she accesses retirement funds. With a 2.75% annual guaranteed interest rate, a lump sum of $787,874.00 would fund the future spousal maintenance obligation of 120 payments of $7,500 for total payments received of $900,000 by the recipient spouse. Husband would enjoy the annual tax deduction as payments are made to wife and taxes paid by her in a lower tax bracket. Husband does not have to think about writing the check for the monthly obligation or goodness forbid that it snows in Texas and the mail doesn't show for days on end and he receives the dreaded call of _where is my money?!'.

Many do not have access to the $787,874 or the means to contractually be obligated to pay Spousal Maintenance of $7,500 per month but they do have a Child Support Obligation of say $2,250 per month for triplets that are 6 years old. It is September of their first grade year and they have July birthdays so payor spouse owes a total of 119 payments of $2,250 for support. Husband receives a large bonus in late February and funds an immediate annuity for the remaining 113 payments beginning March 15th with $224,285 to satisfy the future obligation of payments. Because he wants the support payments recorded in San Antonio at the Child Support office he has them electronically transmitted by the insurance company guaranteeing the payments and then disbursed to the ex-spouse after his child support payment is logged in the system. If there is a delay in receiving the payment, recipient spouse can call the Attorney General's office versus payor spouse's home on Thanksgiving evening because the check in the mail hasn't arrived. If custody ever changes or there is a need for payments to change, a court order can redirect payments back to the payor spouse or other party. The annuity is structured properly on the front-end with Owner, Annuitant, Payee and Beneficiary so that this can easily be done should custody or other modification occur.

The same concept holds true for a Property Settlement or Buy-Out. The present value of the future stream of payments is calculated and a lump sum funds a portion or the entire obligation through an immediate annuity. The divorce contract is adhered to by the payor spouse and at the same time frees him or her of the continued reminder and/or pain of writing those checks.

Most people want to move on from one of the, if not the, most painful experiences of their life. Funding a stream of future payments can be freeing for both parties.

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Motivating Factors

- Remove the emotional side of dealing with Ex-spouse on financial issues post-divorce and reduces communication between parties
- Security of knowing checks will arrive on time and for exact amount
- Either one or both parties do not know how to handle money and would likely use unwisely or spend prematurely if given a lump sum
- Often a portion of lump sum monies awarded go into fixed income instruments anyway, so an annuity can be a substitute for a bond portfolio
- Removes Market Risk if an investment portfolio is being used to pay the obligation monthly
- Recipient spouse may feel more independent if checks are not written directly from the payor spouse's account
- New spouse of Payor spouse doesn't have to see the money go out of the family checking account and be reminded of what the obligations are or why the shoe budget is reduced that month

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EVIDENCE BYTES: SERVICE OF PROCESS IN FOREIGN COUNTRIES

By Jeff Coen[2]

When we last met up with our intrepid attorney she was attempting to contact the Portuguese speaking biological father in Brazil. The bio father's residence address is known and regular mail letters have been exchanged. Because he refused to voluntarily relinquish his parental rights in favor of the stepfather, service of citation will be necessary. The topic for discussion is how to accomplish service that will support an anticipated default by the bio father.

The first point of reference is Texas Rule of Civil Procedure 108a SERVICE OF PROCESS IN FOREIGN COUNTRIES. This rule gives you several alternatives in which to accomplish service. You can:

a) use the manner of service prescribed in accordance with the country (Brazil) in which the respondent resides;
b) use the procedures prescribed in response to a letter rogatory;
c) use the methods of service in Rule 106;
d) utilize the terms of any treaty;
e) use assistance of the U.S. diplomatic or consular officials when authorized; or,
f) use any other means directed by the court and not prohibited by the foreign country (Brazil) which provides reasonable notice.

But you cannot rely on Rule 108(a) alone. The United States is a signatory to *The Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Yes, there are more Hague Conventions than just the one dealing with abduction of children. Like all international treaties ratified by the United States it supercedes Texas law under the supremacy clause of the United States Constitution. You can check for other signatories at: http://www.hcch.net/index_en.php?act=conventions.status&cid=17.

If a country is a signatory, you may not serve citation by any form of regular or registered mail. So Rule 106(a)(2) isn't available. *Velasco v. Ayala*, 312 S.W.3d 783, (Tex. App.– Houston [1st Dist.] 2009, no pet). Nor is the United States Consular Service much help in physically serving a respondent. By federal law they may not serve papers in foreign countries, though they do provide valuable information on a country's requirements. See http://travel.state.gov/law/judicial/judicial_680.html#publication. Additionally, local country

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attorneys or process servers may use the U.S. Consulates to have return of citation affidavits verified for use in U.S. courts.

The *Hague Convention on Service Abroad* generally requires that a country designate a central authority to receive foreign legal notices and citations, and then serve them in a manner consistent with what we would term "due process" according to that country's laws and legal traditions. The central authority may require the citation or notice to be translated prior to service. A request to serve is initiated by "letters rogatory," which is a formal request directed to the central authority and completed by returning a verified certificate of service that operates as a return of citation.

However, the *Hague Convention on Service Abroad* is of little help to our intrepid attorney because Brazil isn't a signatory. Of course, everyone in your office will volunteer to personally serve the Respondent, if you're offering to pay for a trip to Rio de Janeiro, especially during Carnival. But in reality you want to use the most cost effective method possible. The easiest method, though far from the most reliable, would be to rely upon Rule 108a(c) which authorizes Rule 106(a)(2) service by the District Clerk issuing citation and sending it by international registered mail. However, even though Brazil is a signatory of the *International Postal Convention* it is not required to provide "restricted delivery service" under Art 3.5 of the Convention and unless bio-dad lives in a major city, obtaining the required proof of delivery even if available, is problematic. What's next?

Brazil and many other countries who have not adopted the *Hague Convention on Service Abroad* do have treaties with the United States regarding service of legal documents. You can use the U.S. State Department portal to find the information and requirements for individual countries at: http://travel.state.gov/law/judicial/judicial_2510.html. The treaty with Brazil is multilateral and known as the *Inter-American Convention on Letters Rogatory*. The required procedures are much like those found in the *Hague Convention*.

There are also several international process servers who can be found with a simple google search. Most will provide all the services you need to obtain proper service from issuance of the citation in the initiating court to having a suitable return filed upon completion of service. But they are expensive. The filing fees alone for a letter rogatory to Brazil is currently $753.00. That does not include the service provider's fee.

As a final caveat, if you know the address of the person to be served with reasonable certainty, you may not apply for substituted service (Tex R Civ P Rule 106(b)(2)) or service by publication in your local newspaper (Tex. R. Civ. P. Rule 109) unless you have made several attempts to obtain personal service. The court may not assume that the requirements for substitute service have been met simply because the respondent is in a foreign country. See *Hubicki v. Festina*, 226 S.W.3d 405 (Tex. 2007). The court in *Velasco* also held that publication was not sufficient notice in matters involving respondents in foreign countries.

In conclusion, you have two competing goals, i.e. obtain service that will withstand a due process challenge, and get it done as quickly and inexpensively as possible. In our Brazilian example, the first thing to do is call the nearest Brazilian Consulate or private international process service provider for information. If Brazil does not prohibit service by mail, attempt Rule 106(a)(2) service. Maybe the mail carrier will get lucky. If that isn't successful, then apply to your originating court for an order allowing substitute service (Rule 108a(f)) by restricted signature delivery using FedEx, DHL or UPS all of whom will probably do a better job of locating the respondent than the local postal service. If you're in a country that prohibits service by mail, follow the treaties and good luck.

P.S. Many of the treaties and procedures for foreign service require translations into the receiving country's language, you could try using Babel Fish, it's free.

TEXAS ADVANCED PARALEGAL SEMINAR (TAPS) 2011
Marriott Hotel & Golf Club
October 5-7, 2011 - Austin, TX

The Paralegal Division of the State Bar of Texas is sponsoring the Texas Advanced Paralegal Seminar (TAPS), a three-day CLE seminar in Fort Worth, TX on October 5-7, 2011. This event is attended by over 250 paralegals from across the State of Texas each year. The seminar features a total of 67 speakers that present various areas of law topics and social networking events for paralegals. This year, the attendees' luncheon will feature, as the keynote speaker, Roland Johnson, Partner with Harris, Finley & Bogle, P.C., Fort Worth, Past President of the State Bar of Texas, and TBLS Board Certified Attorney in Civil Trial Law. Mr. Johnson will present *Where You Are Now is Nowhere Compared to Where You Can Go* during the Friday attendee luncheon.

This CLE seminar features several prominent family law speakers and topics. The seminar will cover such topics as *Defending or Attaching Mediated Settlement Agreements in Family Law* presented by Brian Webb of Dallas, TBLS Board Certified Attorney in Family Law. Mr. Webb is a past Chair of the State Bar Family Law Section and currently serves as a Section Representative on the State Bar of Texas Board of Directors and is an officer in the Texas Family Law Foundation. *Military Divorces* will be presented by Carole Cross of Arlington, who is a member of the State Bar Military Law Section. *Venue, Standing and Jurisdiction* will be presented by Stephen Naylor of Fort Worth, who is the Pro Bono Committee Chair of the State Bar Family Law Section and a TBLS Board Certified Attorney in Family Law. *Social Networking in Family Law, Blessing or Curse?* will be presented by Heather King of Southlake, TBLS Board Certified Attorney in Family Law. Ms. King is President of the Texas Academy of Family Law Specialists and is a former President of the Tarrant County Bar Association and the Tarrant County Family Law Bar Association. *Additional Causes of Action in Original Divorce Petitions* presented by Charla Bradshaw of Denton, TBLS Board Certified Attorney in Family Law. Ms. Bradshaw is a past president of the Texas Academy of Family Law Specialists, a member of the State Bar of Texas Family Law Council Legislative Committee, and a member of the State Bar Family Law Section. There are a total of 13 family law CLE hours that are available by attending this event. Serving on the TAPS 2011 Planning Committee are two family law paralegals: Jennifer Barnes of The Woodlands who works for Vernier & Barry, P.C., Gloria Porter of Denton who works for Philip Mack Furlow, P.C., and Sunnie Palmer of Denton who works for the Joseph F. Zellmer P.C.

Any interested paralegal may attend this event. For more detailed information on TAPS please visit www.txpd.org/taps. A seminar brochure was included in the Summer 2011 issue of the Texas Paralegal Journal.

ARTICLES

POWERS OF ATTORNEY

By Marilyn Shell[3]

Powers of attorney are common and often based upon a statutory form, but these powerful tools should not be overlooked. Consider this: the statutory durable power of attorney states in bold face type: —THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.”[4] Voila, a fiduciary duty, as a matter of law.

I. Creation, Validity, Revocation and Termination

A. Definition of “power of attorney.”

1. Common Law. A power of attorney is a written instrument by which one person, the principal, appoints another person, the attorney in fact, as agent and confers on the attorney in fact the authority to perform specified acts on behalf of the principal.[5]

2. Durable Power of Attorney Act. The —durable power of attorney” is governed by the Durable Power of Attorney Act in Chapter XII of the Texas Probate Code.[6] A —durable power of attorney” is defined as a written instrument that designates another person as attorney in fact or agent, is signed by an adult principal, contains words showing the principal‘s intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal‘s subsequent disability or incapacity, and is acknowledged by the principal before an officer authorized to take acknowledgements to deeds of conveyance and to administer oaths under the laws of this state or any other state.[7]

A —statutory durable power of attorney” is one in substantially the form provided in the Durable Power of Attorney Act.[8] All acts done by an attorney in fact or agent pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal‘s successors in interest as if the principal were not disabled or incapacitated.[9]

Whenever a principal is given an authority to act under the Durable Power of Attorney Act (such as to demand an accounting from an attorney in fact), that shall include not only the principal but also any persons designated by the principal, a guardian of the estate of the principal, or other personal representative of the principal.[10]

The rights set out in the Durable Power of Attorney Act are cumulative of any other rights or remedies the principal may have at common law or other applicable statutes and not in derogation of that right.[11]

B. Capacity Required of a Principal to Make a Power of Attorney. The capacity to make a power of attorney is same as the capacity to make a contract. A party has mental capacity to contract if he appreciates

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[4] Tex. Prob. Code Ann. § 490(a). *See also* Vogt v. Warnock, 107 S.W.3d 778 (a fiduciary duty existed even though attorney in fact never acted under the power of attorney).

[5] Comerica Bank Tex. v. Tex. Commerce Bank Nat‘l Assoc., 2 S.W.3d 723, 725. (action by executor to set aside transaction and impose constructive trust).

[6] Tex. Prob. Code Ann. §§ 481-506.

[7] *Id*. § 482.

[8] *Id*. § 490.

[9] *Id*. § 484.

[10] *Id*. § 489B(i).

[11] *Id*. § 489B(j).

the effect of what he is doing and understands nature and consequences of acts and business being transacted.[12] A power of attorney by one of unsound mind and a conveyance of land by virtue thereof is not void, but merely voidable.[13]

C. Termination of Durable Power of Attorney by Principal's Divorce if Former Spouse is Attorney in Fact or Agent. As to the former spouse, a divorce or annulment after execution of a durable power of attorney terminates the powers on the date the divorce or annulment is granted unless otherwise expressly provided in the durable power of appointment.[14] A divorce or annulment granted after execution of a durable power of attorney does not revoke or terminate the power of attorney as to a person (other than the principal's former spouse) even if the person has actual knowledge of the divorce or annulment if the person acts in good faith under or in reliance on the power.[15] If an effective revocation as to the spouse is desired prior to the date the divorce or annulment is granted, a written revocation should be delivered to the spouse and recorded in the real property records. This should also be done for any revocation with respect to a non-spouse agent or attorney-in-fact.

Unless otherwise provided by the durable power of attorney, a revocation of a durable power of attorney is not effective as to a third party relying on the power of attorney until the third party receives *actual notice* of the revocation.[16]

The statutory durable power of attorney form states that the principal agrees that any third party who receives a copy of the power of attorney may act under it, that revocation as to a third party is not effective until the third party receives actual notice of the revocation, and that the principal agrees to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.[17] The power of attorney should be examined to determine if there are instructions for what is required to give actual notice of revocation. Practice Tip. Inquire at the initial consultation with the client whether there is a power of attorney that needs to be revoked.

D. Bankruptcy. After execution of a durable power of attorney, the filing of a voluntary or involuntary petition in bankruptcy in connection with the principal's debts does not revoke or terminate the agency as to the principal's attorney in fact or agent. Any act the attorney in fact or agent may undertake with respect to the principal's property is subject to the limitations and requirements of the United States Bankruptcy Code until a final determination is made in the bankruptcy proceeding.[18]

In a bankruptcy filed by a spouse, bankruptcy courts determine the character and management of the property under state law, and then look to the bankruptcy code in determining what is property of the bankruptcy estate.[19] The bankruptcy estate includes community property that is ~~"u~~nder the sole, equal or joint management and control of the debtor." Should the solely managed community property, such as a spouse's earnings, become mixed or comingled with solely managed property of the other spouse, the property becomes jointly managed, "unless the spouses provide otherwise by power of attorney in writing or other agreement."[20]

E. No Lapse by Passage of Time. A durable power of attorney does not lapse because of the passage of time unless the instrument creating the power of attorney specifically states a time limitation.[21]

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[12] Mandell & Wright v. Thomas, 441 S.W.2d 841, 845 (Tex. 1969), *See also* Bates v. Fuller, 663 S.W.2d 512, 519 (Tex. App.—Tyler 1983, no writ), *Accord* Calvin v. Olschewske, 62 S.W.2d 574, 578 (Tex. Civ. App.—Galveston 1933), *aff'd sub nom.*, Boddeker v. Olschewske, 127 Tex. 598, 94 S.W.2d 730 (1936).

[13] Williams v. Sapieha, 61 S. W. 115, 116 (Tex. 1901); Mitchell v. Inman, 156 S.W. 290, 292 (Tex. Civ. App.—Fort Worth 1913, writ ref'd).

[14] Tex. Prob. Code Ann § 485A.

[15] *Id*. § 486B.

[16] *Id*. § 488.

[17] *Id*. § 490.

[18] *Id*. § 487A.

[19] In re: Renee Marie Martin, Debtor, United States Bankruptcy Ct, Northern Dist. Tex., Fort Worth Division, No. 08-46189-DML (2009).

[20] Tex. Fam. Code Ann. § 3.102(b).

[21] Tex. Prob. Code Ann § 483.

II. Powers and Construction.

A. Common Law Rules of Construction of the Attorney in Fact's Powers. When authority is conferred upon an agent by power of attorney there are two rules of construction to be carefully adhered to: (1) the meaning of general words in the instrument will be restricted by the context, and (2) the authority will be construed strictly so as to exclude the exercise of any power that is not warranted either by actual terms used or as a necessary means of executing the authority with defect.[22] Where the authority to perform specific acts is given and general words are also employed, such words are limited to the particular acts authorized.[23]

If a principal invests two or more individuals with authority to represent it in a particular transaction, it is ordinarily presumed that such authority was thus conferred because of special and personal considerations, so that the principal might obtain the benefit of the combined experience, discretion, and ability of such persons. Unless it appears that the principal's intention was otherwise, as a general rule the powers invested by the principal in such agents must be jointly exercised by all of them, and may not be exercised by less than all of them.[24]

It has been held that where an instrument is free from qualifying features either on its face or from the evidence, the agent has unlimited power to act in complete substitution for any act that the principal might himself do if present and acting."[25] Modern day powers of attorney usually will have qualifying features limiting the agent's power.

B. Powers Conferred by a Statutory Durable Power of Attorney. A statutory durable power of attorney is a power of attorney in substantially the form in section 490, and has the meaning and effect prescribed by the Durable Power of Attorney Act. Its validity is not affected by the fact that one or more of the categories of optional powers listed in the form are struck or the form includes specific limitations on or additions to the attorney in fact's or agent's powers.[26]

In the statutory form, the principal appoints a person ~~a~~as my agent (attorney-in-fact) to act for me in any lawful way with respect to all of the following powers except for a power that I have crossed out." The form lists thirteen categories of powers, and states in bold print that if no power listed above is crossed out, the document shall be construed and interpreted as a general power of attorney and the agent (attorney in fact) shall have the power and authority to perform or undertake any action that the principal could perform or undertake if he were personally present. Broad and general language used in connection with other provisions in a power of attorney have been held to abridge the exercise of a power.[27]

The Durable Power of Attorney Act has separate sections for the construction of the powers generally,[28] and for each category of transaction.[29] The categories for transactions are real property, tangible personal property, stock and bond, commodity and option, banking and other financial institution, business operation, insurance, estate, trust and other beneficiary, claims and litigation, personal and family maintenance, benefits from certain governmental programs or civil or military service, retirement plan, and tax matters.

Among the extensive powers in the form statutory durable power of attorney are the following:

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[22] Gouldy v. Metcalf, 75 Tex. 455, 458, 12 S.W. 830, 831 (1889). (power to buy, sell, or exchange property, to receive and receipt for money, to sell and dispose of property, to give bills of sale thereto, or to sell and transfer real estate, and execute deeds thereto, or to do and perform any lawful act in or about or concerning the principal's business did not authorize an assignment of the principal's property for the benefit of his creditors).

[23] Frost v. Erath Cattle Co., 81 Tex. 505, 509, 17 S.W. 52, 54 (1891). (power to convey in sale of lands did not authorize conveyance in exchange or partition of lands); Dockstader v. Brown, 204 S.W.2d 352, 354-55 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.) (valid deed was made by attorney in fact under power of attorney that was free from qualifying features, giving attorney in fact unrestricted and unlimited power to do any lawful act for and in the name of principal as if he were present).

[24] Musquiz v. Marroquin, 124 S.W.3d 906, 912 (Tex. App.–Corpus Christi 2004, pet. denied). (setting aside a deed signed by only one of two attorneys in fact under durable power of attorney).

[25] Armstrong v. Roberts, 211 S.W.3d 867, 870.

[26] Tex. Prob. Code Ann. § 490(a).

[27] See Dockstader, 204 S.W.2d at 354, and Hardy v. Robinson, 170 S.W.3d 777 (Tex. App.—Waco 2005, no pet.) (statutory durable power of attorney strictly construed, language in special instructions expanded attorney in fact's power by authorizing attorney in fact to create a trust, but did not create a trust).

[28] Tex. Prob. Code Ann. § 491.

[29] *Id*. §§ 492-504.

1. Construction Generally—To Use Money for the Purposes Intended and Keep Records of Each Transaction. The principal, by executing a statutory durable power of attorney that confers authority with respect to any class of transactions, empowers the attorney in fact or agent for that class of transactions to, among other things, "use any money or other thing of value received on behalf of the principal for the purposes intended,"[30] and "keep appropriate records of each transaction, including an accounting of receipts and disbursements."[31]

2. Construction of Power Relating to Real Estate Transactions—Any Act of Management. The language conferring authority with respect to real property transactions empowers the attorney in fact or agent to do any act of management or of conservation with respect to an interest in real property.[32]

3. Construction of Power Relating to Personal Property Transactions—Moving from Place to Place. The language conferring authority with respect to personal property transactions empower the attorney in fact or agent to do an act of management or conservation with respect to tangible personal property, including moving from place to place.[33]

4. Construction of Power Relating to Stock and Bond Transactions—Buy, Sell and Exchange Securities. The language conferring authority with respect to stock and bond transactions empowers the attorney in fact or agent to buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and other financial instruments with a few exceptions.[34]

5. Construction of Power Relating to Claims and Litigation—Divorce Not Mentioned. The language conferring general authority with respect to claims and litigation empowers the attorney in fact or agent to act for the principal with respect to bankruptcy or insolvency proceedings.[35] There is no mention of a power to represent the principal with respect to a divorce or annulment proceeding.

6. Construction of Power Relating to Insurance Transactions—Beneficiary Designation. The language conferring authority with respect to insurance and annuity transactions empower the attorney in fact or agent to designate the beneficiary of the contract, except that an attorney in fact or agent may be named a beneficiary of the contract or an extension, renewal, or substitute for the contract only to the extent the attorney in fact or agent was named as beneficiary under a contract procured by the principal before executing the power of attorney.[36]

7. Construction of Power Relating to Estate, Trust, and Other Beneficiary Transactions—Transfer to Revocable Trust. The language conferring authority with respect to estate, trust, and other beneficiary transactions empowers the attorney in fact or agent to transfer all or part of an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property to the trustee of a revocable trust created by the principal as settlor.[37]

8. Construction of Power Relating to Personal and Family Maintenance. The language conferring authority with respect to personal and family maintenance empowers the attorney in fact or agent to perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse and children, and other individuals customarily or legally entitled to be supported by the principal.[38]

9. Construction of Power Relating to Bank and Other Financial Institution Transactions. The language confers authority and empowers the attorney in fact or agent to withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution[39] and to enter a safe deposit box or vault and withdraw or add to the contents.[40]

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[30] *Id*. § 491(2).
[31] *Id*. § 491(8).
[32] *Id*. § 492(4).
[33] *Id*. § 493(4)(D).
[34] *Id*. § 494.
[35] *Id*. § 500(7).
[36] *Id*. § 498(4).
[37] *Id*. § 499(6), *See* Hardy, 170 S.W.3d 777 (statutory durable power of attorney strictly construed, language in special instructions expanded attorney in fact's power by authorizing attorney in fact to create a trust, but did not create a trust).
[38] *Id*. § 501(1).
[39] *Id*. § 496(5).
[40] *Id*. § 496(7).

10. Compensation of Attorney in Fact Not Expressly Authorized. The attorney in fact or agent may be reimbursed for expenditures made in exercising the powers granted by the durable power of attorney,[41] and may engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant.[42] There is no express provision authorizing the attorney in fact to be compensated for services performed while acting under the statutory durable power of attorney.

The above is not a complete listing. Reference to the express language of the power of attorney (and, if applicable, to the statutory construction) should be made for each transaction or occurrence at issue. Even when an attorney in fact or agent is empowered to act with respect to a transaction or occurrence, there can be a breach of fiduciary duty.

III. Breach of Fiduciary Duty

A. Elements of Breach of Fiduciary Duty. The elements of breach of fiduciary duty are: the existence of a fiduciary relatiionship, and a breach of duty by the fiduciary that causes damages to the client or improper benefit to the fiduciary.[43] Practice tip: Discovery requests should inquire about existence of a power of attorney, actions taken by the attorney in fact under a power of attorney, and reliance on a power of attorney by a third party dealing with an attorney in fact.

B. Fiduciary Duty With Respect to Matters Within the Scope of a Power of Attorney. A power of attorney creates an agency relationship, and the agent owes a fiduciary duty to its principal with respect to matters within the scope of its agency.[44] The scope of the agency and the nature of the fiduciary duties will depend upon the power of attorney and facts of the case.[45] If a transaction or occurrence is made under under conditions that could be a breach of an attorney in fact's duty of loyalty (such as self-dealing), equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable.[46]

C. Duty to Inform and Account Under Durable Power of Attorney. The Durable Power of Attorney Act provides that the attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney.[47]

Section 489B of the Texas Probate Code provides that the attorney in fact or agent:

- is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney.
- shall timely inform the principal of all actions taken pursuant to the power of attorney. Failure of the attorney in fact or agent to inform timely, as to third parties, shall not invalidate any action of the attorney in fact or agent.
- shall maintain records of each action taken or decision made by the attorney in fact or agent.
- shall give an accounting to the principal upon demand.

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[41] *Id*. § 491(11).
[42] *Id*. § 491(7).
[43] Schwartz v. Gregg, 2010 WL 2977479 (Tex. App.—Austin 2010, no. pet.) (mem. op.).
[44] Plummer v. Estate of Plummer, 51 S.W.3d 840 (Tex. App.—Texarkana 2001, no pet.) (attorneys in fact acting under power of attorney transferred funds among accounts with different survivorship designations); *See also* Sassen v. Tanglegrove Townhouse Condo. Ass'n, 877 S.W.2d 489 (attorney in fact acting under power of attorney in condominium declaration subcontracted for repairs and construction) and Miller v. Unger, 2011 WL 3373291 (Tex. App.—Austin, 2011, no pet. h.) (mem. op.) (attorney in fact acting pursuant to durable power of attorney at time of withdrawal of funds from principal's bank account found to be an agent for banking transactions.)
[45] National Plan Administrators, Inc. v. National Health Insurance Company, 235 S.W.3d 695, 700 (Tex. 2007) (—courts take all aspects of the relationship into consideration when determining the nature of the fiduciary duties flowing between the parties..."). There are many excellent articles about fiduciary duties published in State Bar of Texas advanced courses, including comprehensive treatment in the Advanced Fiduciary Litigation Course, December 2010.
[46] Stephens County Museum, Inc. v. Swenson, 517 S.W.2d 257 (Tex. 1974) (presumption of unfairness and invalidity applied to transfers by principals to museum even though principals knew about and approved the transactions; principals' trusted business advisor and attorney in fact was officer and director of museum); Vogt v. Warnock, supra at 783 (attorney in fact/recipient of gift from the principal had burden to establish that transfers were fair to the principal);
[47] Tex. Prob. Code Ann. § 489B(a). *Accord* *In re* Estate of Boren, 268 S.W.3d 841, 847.

- shall also provide to the principal all documentation regarding the principal's property, unless directed otherwise by the principal.
- shall maintain all records until delivered to the principal, released by the principal, or discharged by a court.

If the attorney in fact or agent fails or refuses to inform the principal, provide documentation, or deliver the accounting within 60 days (or such longer or shorter time that the principal demands or a court may order), the principal may file suit to compel the attorney in fact or agent to deliver the accounting, to deliver the assets, or to terminate the power of attorney.[48] The duty to inform and account section does not limit the right of the principal to terminate the power of attorney or to make additional requirements of or to give additional instructions to the attorney in fact or agent.[49]

Section 489B(d) of the Texas Probate Code further provides that, unless otherwise directed by the principal, an accounting demanded by the principal under a durable power of attorney shall include**:**

- the principal's property that has come to the attorney in fact or agent's knowledge or into the attorney in fact or agent's possession;
- all actions taken or decisions made by the attorney in fact or agent;
- a complete account of receipts, disbursements, and other actions taken by the attorney in fact or agent, including their source and nature, with receipts of principal and income shown separately;
- a listing of all property over which the attorney in fact or agent has exercised control, with an adequate description of each asset and its current value if known to the attorney in fact or agent;
- the cash balance on hand and the name and location of the depository where the balance is kept;
- all known liabilities; and
- such other information and facts known to the attorney in fact or agent as may be necessary to a full and definite understanding of the exact condition of the principal's property.

The failure of the attorney in fact or agent to fully account for the principal's property may subject the attorney in fact or agent to liability for damages[50] and equitable remedies as well as other consequences such as potential disqualification as guardian in a guardianship proceeding.[51]

D. Division of Community Property Upon Divorce. In a divorce proceeding in which the wife brought independent tort claims against her husband and his father for fraud, breach of fiduciary duty, and conspiracy, the supreme court held that the well-developed "just and right" standard should continue to be the sole method used to account for and divide community property upon divorce.[52] There was no power of attorney in the facts of the Schlueter case.[53] In 2011, a section entitled "Fraud on the Community, Division and Disposition of Reconstituted Estate" was added to the family code that appears to codify and clarify the Schlueter holding.[54]

E. Remedies. Where a fiduciary breaches his duty and has profited or benefited from a transaction with the beneficiary, the plaintiff is entitled to equitable relief (such as rescission, constructive trust, profit disgorgement, or fee forfeiture) without showing that the breach caused damages.[55] The court may impose a constructive trust to restore property or profits lost through the fiduciary's breach.[56] The court may grant injunctive

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[48] Tex. Prob. Code Ann § 489B(g).
[49] *Id*. § 489B(h).
[50] *Id*. *Id*. § 489B(g).
[51] *See In re* Guardianship of Walzel, No. 13-08-00509-CV, 2010 WL 335686, at *6 (Tex. App.—Corpus Christi Jan. 28, 2010, no pet.) (mem. op.).
[52] Schlueter v. Schlueter, 975 S.W.2d 584 (Tex. 1998).
[53] See Sims v Sims, 2003 WL 22025907 (Tex.App.—El Paso 2003, no pet.) [unpublished] in which the evidence supported a finding that the wife breached her fiduciary duty by using her husband's power of attorney to transfer community real estate to her name.
[54] Tex. Fam. Code Ann. § 3.102(b).
[55] Burrow v. Arce, 997 S.W. 2d 229, 245 (Tex. 1999), *See also* Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 512 (1942).
[56] *In re* Estate of Wallis, No. 12-07-00022-CV, 2010 WL 1987514, at *3 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.) (decedent's attorney in fact under power of attorney was required to create constructive trust with proceeds of decedent's retirement plan obtained as result of breach of fiduciary duty).

relief.[57] Pursuant to the Durable Power of Attorney Act, the court may compel the attorney in fact or agent to deliver the accounting, to deliver the assets, or terminate the power of attorney.[58] In addition to equitable relief, the plaintiff may also recover actual and exemplary damages caused by the fiduciary's breach.[59]

The exemplary damage cap does not apply to recovery of exemplary damages based on conduct described as a felony in the listed sections of the Penal Code.[60] Among those listed are the following criminal offenses committed by an attorney in fact or agent appointed under a durable power of attorney: if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held (misapplication of fiduciary property);[61] if, with intent to defraud or harm any person, he, by deception causes another to sign or execute any document affecting property or service or the pecuniary interest of any person (securing execution of document by deception);[62] or if he unlawfully appropriates property with intent to deprive the owner of property (theft).[63]

Attorney's fees may not be awarded for a breach of fiduciary duty claim.[64]

F. Affirmative Defenses. Some of the affirmative defenses to a claim of breach of fiduciary duty are statute of limitations, accord and satisfaction, waiver and ratification**.** Each has an element of full disclosure of material facts by the fiduciary.

1. Statute of Limitations. The —discovery rule" applies to breach of fiduciary duty cases.[65] As a result of the fiduciary duty of full disclosure, the beneficiary has no affirmative duty to investigate for possible violation of duty until he has actual knowledge of fact sufficient to excite inquiry.[66]

2. Accord and Satisfaction. Failure to comply with an agreement is excused if a different performance was accepted as full satisfaction of performance of the original obligations of the agreement. In order to prevail on a defense of accord and satisfaction, the fiduciary must show that a bona fide controversy existed between him and his principal,[67] and that in making the —settlement," the fiduciary must show that he made full disclosure, acted in good faith, and did not take advantage of his position.

3. Waiver and Ratification. A beneficiary or principal can waive or ratify a breach of fiduciary duty, as long as it is done with —full knowledge of the material facts." Ratification occurs if the principal retains the benefits of the transaction after full knowledge of unauthorized acts of a person acting on principal's behalf.[68] Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming the right.[69]

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[57] Hyde Corp. v. Huffines, 314 S.W.2d 763, 775-76 (Tex. 1958) (injunction allowed to prevent damage through abuse of confidence in wrongfully appropriating trade secrets).
[58] Tex. Prob. Code Ann. § 489B(g).
[59] Manges v. Guerra, 673 S.W.2d 180, 184 (Tex. 1984) (breach of fiduciary duty is an independent tort that will support award of actual damages); *See also* Morehead v. Gilmore, 2003 WL 1848724 at *1 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (mem. op.) (seven siblings awarded $27,800 from sister who breached fiduciary duty by asserting that she would assist their parents with their finances, and that the assets were to be managed for the benefit of all of the children.). See In Estate of Arrendell, 213 S.W.3d 496, 503 (Tex. App.—Texarkana 2006, no pet.) (attorney in fact violated fiduciary duty in making herself beneficiary of certificates of deposit, monetary damages awarded and constructive trust imposed over remaining funds.)
[60] Tex. Civ. Prac. & Rem. Code Ann. § 41.008.
[61] Tex. Penal Code Ann. § 32.45.
[62] *Id*. § 32.46(a)(1).
[63] *Id*. § 31.03(a).
[64] Maeberry v. Gayle, 955 S.W.2d 875, 881 (Tex. App.—Corpus Christi 1997, no pet.) (en banc).
[65] Willis v. Maverick, 760 S.W.2d 642, 647 (Tex. 1988).
[66] *See* Slay v. Burnett Trust, 187 S.W.2d 377, 394 (Tex. 1945).
[67] *See* Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 863-64 (Tex. 2000) (suggesting that accord and satisfaction may bar tort claims, including claims for breach of fiduciary duty, but ultimately holding facts did not support defense).
[68] Land Title Co. of Dallas v. F.M. Stigler, Inc., 609 S.W.2d 754, 756 (Tex. 1980).
[69] United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353, 357 (Tex. 1971).

The Approximation Rule Survey:
The American Law Institute's Proposed Reform Misses the Target

By Richard A. Warshak, Ph.D.[70]

The American Law Institute [ALI]'s *Principles of the Law of Family Dissolution* [hereinafter *Principles*] proposes the *approximation rule* to govern decisions regarding the division of the child's time with each parent, i.e., the physical (residential) custody of children whose parents live apart from each other – in Texas law terms, the periods of possession.[71] The rule states: "[T]he court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation."[72] The rule is intended to function as a default presumption in disputes decided by a court and as a backdrop for pre-trial negotiations.

The past caretaking presumption is overcome by exceptions enumerated by the *Principles* such as a gross disparity in the parenting ability or quality of emotional attachment, or a child's firm and reasonable preferences.[73] The application of the approximation rule, with its exceptions, is further limited by the requirements of § 2.11, "to protect the child and the child's parent from domestic violence and other serious parental failures." The other serious parental failures include child abuse, substance abuse, and persistent interference with a parent's access to the child.[74]

Proponents of the approximation rule make a number of assumptions and predictions about how the approximation rule will work in practice and expect the rule to accomplish certain objectives. They argue that the rule will function as a determinate standard. This will reduce the level of judicial discretion, make the outcome of custody trials more predictable, and lead to more pre-trial settlements that spare litigants the financial and emotional costs of a trial. Not only will the rule promote settlements, but also negotiations will be more

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[71] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Matthew Bender & Co., Inc. 2002).

[72] PRINCIPLES, *supra* note 2, at § 2.08 (1).

[73] PRINCIPLES, *supra* note 2, at § 2.08 (1). The complete list of exceptions is:

(a) to permit the child to have a relationship with each parent which, in the case of a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions, should be not less than a presumptive amount of custodial time set by a uniform rule of statewide application;

(b) to accommodate the firm and reasonable preferences of a child who has reached a specific age, set by a uniform rule of statewide application;

(c) to keep siblings together when the court finds that doing so is necessary to their welfare;

(d) to protect the child's welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs;

(e) to take into account any prior agreement, other than one under § 2.06, that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;

(f) to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangements;

(g) to apply the Principles set forth in § 2.17(4) if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the presumptive amount of custodial responsibility under this section [PRINCIPLES, *supra* note 2, at § 2.17(4) states: "The court should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose."]

[74] PRINCIPLES, *supra* note 2, at § 2.11 (1).

amicable with fewer strategic and manipulative behaviors because the negotiations will occur in the context of the parties knowing the likely outcome of a trial the parties. In addition to reducing the incidence of trials, in cases that fail to settle, the rule reduces the complexity and length of trials by restricting the scope of fact-finding to a single, relatively easy to measure, factor. In turn, this reduces the need for costly, comprehensive custody evaluations and expert witnesses.

ALI's Restatements of the Law – formulated by influential jurists, bar leaders, and law professors – profoundly influence American law, even prior to legislative endorsement.[75]

After a slow start, the approximation rule is gaining ground. Its impact is felt in courts. In *In re Marriage of Hansen* the Iowa Supreme Court, electing not to adopt the approximation rule absent legislative approval, nevertheless praises the rationale behind the rule: "By focusing on historic patterns of caregiving, the approximation rule provides a relatively objective factor for the court to consider."[76] In *In re The Marriage of Powers* the same court favorably cites a rationale for the approximation rule offered by ALI's reporter: "past caretaking patterns likely are a fairly reliable proxy of the intangible qualities such as parental abilities and emotional bonds that are so difficult for courts to ascertain.'"[77] The Massachusetts Supreme Judicial Court cited the approximation rule in *In re Custody of Kali* to support a preference for the continuity of current relationships.[78]

In addition to case law citations, the approximation rule has been enacted in one legislature (West Virginia) and is under serious consideration in others, including Illinois and Pennsylvania.[79] Even when the rule falls short of adoption, proponents' arguments present formidable obstacles to other family law reform proposals, such as joint custody presumptions.

The approximation has become the pivotal issue in discussions of child custody reform, generating much debate in the law and mental health literature.[80] But, to date the debate consists of speculations about how the

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[75] An intermediate appellate court in Florida tried to adopt the "approximate the time" standard, but was overruled. *See* Young v. Hector, 740 So. 2d at 1158. *Also see* Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal,* BYU L. REV. 2001 1189-1234, "Because many influential jurists, law professors, and bar leaders helped to create it, it is certain to find a receptive audience in at least some lawmaking, legal, and academic circles." *Also see* Robin F. Wilson, *Introduction, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION at 2 [fn 5] (Robin Fretwell Wilson ed., 2006), "It is difficult to overstate the degree of the ALI's influence. As of March 1, 2004, state and federal courts have cited the Restatements 161,486 times." And, Wilson at 3, "Because of the prestige of the ALI, judges will undoubtedly rely on the *Principles* as they have relied on the ALI's Restatements. Legislators are also likely to turn, rightly or wrongly, to the *Principles* for guidance. . . ." And, Robert J. Levy, *Custody Law and the* ALI's Principles: *A Little History, a Little Policy, and Some Very Tentative Judgments, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson, ed., 2006), 67, 74, "Because the drafters' proposal comes with the prestigious imprint of the American Law Institute, whose products in the past have attracted state Supreme Court approvals even without legislative enactment, and because the proposal has already been enacted by one legislature, the scheme is likely to receive widespread legislative scrutiny." And, Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson, ed., 2006), 489, 491, "The ALI has wielded influence beyond the fantasies of its founders. The Model Penal Code and the Restatements are as close to binding precedent as nongovernmental authority can be, and they are only part of the Institute's agenda." For a contrary view describing "the anemic influence of the *Principles* with rule makers" *see* Michael R. Clisham and Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution, *Eight Years After Adoption: Guiding Principles or Obligatory Footnote?* 42 FAM. L. Q. 573, 608 (2008).

[76] In re Marriage of Hansen, 733 N.W.2d 683, 690, 17 (Iowa 2007).

[77] In re Marriage of Powers, 752 N.W.2d 23, 2008 WL 2312873. Citing, Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests,* 35 WILLAMETTE L. REV. 467, 470 (1999).

[78] In re Custody of Kali, 792 .N.E.2d 635 (Mass. 2003

[79] West Virginia has adopted the approximation rule, W. VA. CODE ANN. 48-11-106 [or West's Annotated Code of West Virginia, 2007, § 48-9-206]. Illinois is currently considering a proposal that adopts verbatim ALI's description of caretaking functions and incorporates the approximation rule as one factor in determining best interests. HB 4158, 94th Gen. Assem. (Ill. 2010) In testimony before the House Judiciary Committee, Subcommittee on Family Law of the PA House of Representatives, PA Supreme Court Justice Baer recommends adoption of the approximation rule as the next standard in custody legislation. Hearing on Feb. 4, 2010. http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2010_0022T.pdf (last visited Aug. 7, 2010).

[80] *E.g.*, Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids,* 45 FAM. CT. REV. 600-619 (2007) [hereinafter Warshak, *Punching the Parenting Time Clock*]; Richard A. Warshak, *The Approximation Rule, Child Development Research, and Children's Best Interests After Divorce,* 1 CHILD DEV. PERSPECTIVES 119-125 (2007) [hereinafter Warshak, *The Approximation Rule*]; Robin F. Wilson, *Introduction, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION at 1 (Robin Fretwell Wilson ed., 2006); Barbara A.

proposal would work if endorsed by state legislatures. What is largely missing from the literature on the approximation rule is empirical research that could provide evidence directly relevant to the goals of the proposal. Steeped in assumptions about child and family development, yet lacking reliable social science support, the approximation rule begs for closer examination before judges and legislators embrace it.

Previously, I have argued that: 1) the approximation rule is difficult to apply and creates a new focus for disputing parents, and 2) the exceptions to the rule enumerated by the *Principles* are precisely the issues raised in custody disputes; thus, the exceptions swallow the rule and undermine the *Principles'* goals of reducing the incidence of custody litigation, of narrowing the scope of custody trials, and of decreasing judicial discretion in custody cases.[81] In the one state that has adopted the approximation rule, my prediction was confirmed. In the three cases referenced by the West Virginia appellate courts, all involved exceptions to the approximation rule and triggered a best-interests analysis.[82]

If more states adopt the approximation rule, this will create opportunities to compare the impact of the rule on the rate of custody trials versus pre-trial settlements. Unless and until this occurs, other types of research can help predict the likely impact of the proposed reform. This article reports the results of the first survey of lawyers and child custody evaluators regarding the approximation rule.

Approximation Rule Survey

Respondents to the Approximation Rule Survey (ARS) were recruited via articles in two online publications: *State Bar of Texas Section Report: Family Law*[83] and *AFCC eNews* (a publication of the Association of Family and Conciliation Courts).[84] The survey was administered using the online service SurveyMonkey (www.surveymonkey.com). Lawyers and child custody evaluators answered seven questions about the last custody case in which they were involved in which the court decided the schedule of time the child spends with each parent. The questions tapped the respondents' view of the impact the approximation rule would have had on the focus of the trial, the likelihood of pre-trial settlement, and the tenor of negotiations. Also, for comparison purposes, and to control for the possibility that any perceived impact might be attributable to any rebuttable presumption rather than specifically the approximation rule, additional questions tapped the expected or perceived impact of alternative presumptions. The alternative presumptions are: the Texas Standard Possession Order, equal periods of possession, and possession periods preferred by the child of a designated age.

A total of 40 completed surveys were received: 19 Texas lawyers and 21 AFCC members (14 child custody evaluators and 7 attorneys). The sample was predominantly female (31 of the 36 who reported gender) and highly experienced. The average number of years in practice is 20 years, and the majority have been practicing law or conducting evaluations for more than 20 years.

Atwood, *Comment on Warshak: The Approximation Rule as a Work in Progress,* 1 CHILD DEV. PERSPECTIVES 126-128 (2007); Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 Duke J. Gender L. & Pol'y 301, 302, 313 (2001); Mary E. O'Connell, *When Noble Aspirations Fail: Why We Need the Approximation Rule,* 1 CHILD DEV. PERSPECTIVES 129-131 (2007); Robert E. Emery, *Rule or Rorschach: Approximating Children's Best Interests,* 1 CHILD DEV. PERSPECTIVES 132-134 (2007); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 Fam. L. Q. 27, 43 (2002); Michael E. Lamb, *The "Approximation Rule": Another Proposed Reform that Misses the Target,* 1 CHILD DEV. PERSPECTIVES 135-136 (2007); Shelley A. Riggs, *Is the Approximation Rule In the Child's Best Interests?: A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 489 (2005); Molly L. Sanders. 2010. "SHOULD CHILD CUSTODY AWARDS BE BASED ON PAST CARETAKING? THE EFFECT OF THE APPROXIMATION STANDARD TEN YEARS AFTER ITS ADOPTION." ExpressO Available at: http://works.bepress.com/molly_sanders/1; and Richard A. Warshak, *Best Interests and the Fulfillment of Noble Aspirations: A Call for Humbition,* 1 CHILD DEV. PERSPECTIVES 137-139 (2007) [hereinafter Warshak, *Best Interests*].

[81] Richard A. Warshak, *Parenting by the Clock: The Best Interests of the Child Standard, Judicial Discretion, and The American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. (forthcoming Dec. 2011) [hereinafter Warshak, *Parenting by the Clock*]; Warshak, *Punching the Parenting Time Clock, supra* note 11; Warshak, *The Approximation Rule, supra* note 11; Warshak, *Best Interests, supra* note 11.

[82] *See generally* B.M.J. v. J.D.J., 575 S.E.2d 272 (W. Va. 2002); Adoption of Jon L, 625 S.E.2d 251 (W. Va. 2005); and Lindsie D.L. v. Richard W.S., 591 S.E.2d 308, 313 (W.Va. 2003).

[83] Warshak, R. A. (2008). An Overview and Survey Regarding the American Law Institute's "Approximation Rule" Proposal. *State Bar of Texas Section Report: Family Law* , Volume 2008-1 Spring, 10-12.

[84] Warshak, R. A. (2008). An Overview and Survey Regarding the American Law Institute's "Approximation Rule" Proposal. *AFCC eNews* (2008). Volume 3 (4).

Results

Results are reported for the total sample as well as separately for the three groups (Texas attorneys, AFCC attorneys, and custody evaluators).

1. *If the approximation rule were the law in your jurisdiction, considering the definition and list of caretaking functions, would the litigants in your last custody trial have agreed on the proportion of time each parent spent performing caretaking functions in the past?*

This question assesses whether past caretaking is relatively easy to measure and agree upon versus whether it is likely to become a focus of dispute.

Would Litigants Agree on Time Spent in Past Caretaking?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	12.5 %	0	3	2
No	87.5 %	19	4	12

Texas attorneys and child custody evaluators nearly unanimously believe that parents would dispute the relative proportion of their past caretaking. AFCC attorneys were about evenly divided.

2. *If the approximation rule were the law in your jurisdiction, whether or not the litigants would have agreed on past caretaking time, would either of the litigants have raised any of the exceptions or circumstances that modify the approximation rule?*

This question assesses whether the ALI *Principles* would succeed in focusing trials on claims about past caretaking, or whether the exceptions to the approximation rule would trigger inquiries on a wider scope.

Would Litigants Raise Exceptions to the Approximation Rule?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	95 %	17	7	14
No	5 %	2	0	0

The results are nearly unanimous across all groups. Respondents report that the litigants would have invoked the exceptions to the approximation rule.

3. This question asked respondents who answered yes to question #2 (N=38) to indicate the specific exceptions that would have been raised in the case.

Each exception was endorsed by at least 25% of the sample, most exceptions were endorsed by 1/3 or more of respondents, and four exceptions were endorsed by more than half the sample. The most frequent exceptions that would have been raised are (because a respondent could select more than one exception, the results do not add up to 100%):

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Ability of parents to cooperate	74%	13	5	10
Gross disparity in each parent‘s demonstrated ability or availability to meet the child‘s needs	74%	12	6	10
Child‘s preferences	55%	11	3	7
Gross disparity in the quality of the emotional attachment between each parent and the child	55%	11	4	6

4. *If the approximation rule (with its exceptions) were the law in your jurisdiction, would the outcome of the trial have been more predictable?*

This question addresses the *Principles*' assumption that the approximation rule would reduce uncertainty about the likely outcome of a trial, and thus promote a higher percent of pre-trial settlements.

Approximation Rule: Increase Predictability of Trial Outcome?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	35 %	4	5	5
No	65 %	15	2	9

This was one of two questions in which the direction of results differed among the groups. For the majority of cases reported by Texas attorneys and AFCC custody evaluators, the approximation rule would not have made the trial's outcome more predictable. It is worth noting, though, that AFCC attorneys showed the opposite pattern, and a sizable minority of Texas attorneys and evaluators agreed that the approximation rule would make trial outcomes more predictable.

5. *If the approximation rule (with its exceptions) were the law in your jurisdiction, would there have been fewer strategic or manipulative behaviors during the negotiations?*

Much of the emotional and financial wear and tear of custody litigation occurs prior to the trial. The *Principles* assumes that the approximation rule provides a determinate standard that will reduce litigant's ability to rely on strategic or manipulative bargaining tactics, such as asking for more possession time than is actually desired.

Approximation Rule: Reduce Manipulative Negotiations?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	25 %	4	2	4
No	75 %	15	5	10

Three-quarters of the sample think that the approximation rule would not have reduced manipulative negotiation tactics in their last custody case that went to trial. But, one-quarter of the sample do believe that the approximation rule would have made it more difficult for litigants to use strategic or manipulative bargaining tactics.

6. *If the approximation rule (with its exceptions) were the law in your jurisdiction, would the negotiations have been less hostile?*

By narrowing the scope of inquiry, the *Principles* assumes that the approximation rule would result in more amicable negotiations, thus reducing children's harmful exposure to parental conflict.

Approximation Rule: Reduce Hostile Negotiations?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	17.5 %	3	2	2
No	82.5 %	16	5	12

Again, most respondents do not think the approximation rule would improve the tenor of negotiations, but about one in six do think it would have this positive impact.

7. *If the approximation rule were the law in your jurisdiction, would the case have settled without trial?*

This question directly addresses the Principle's argument that the approximation rule would improve settlement rates.

Approximation Rule: Improve Pre-trial Settlement Rate?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	12.5 %	3	2	0
No	87.5 %	16	5	14

Only one in eight respondents believe that the approximation rule would have averted their last trial. Evaluators were unanimous in their view that the rule would not have the impact predicted by ALI. Most attorneys report the same for their cases, but about one in five believes that under the approximation rule the last case would have settled without a trial.

The next series of questions asked respondent‘s to rate the likely impact of three alternative presumptions on pre-trial settlement rates and on manipulative behaviors during negotiation. Texas lawyers were asked to draw on their experience with the Standard Possession Order to assess its impact. The two remaining groups were asked to rate the likely impact of such a presumption, described in the same terms as the SPO, but labeled a 9/5 schedule because it allocates, in a two-week period, 9 nights with one parent and 5 nights with the other. The other two rebuttable presumptions surveyed were equal division of the child‘s time between homes and possession periods preferred by the child of a designated age. A five-point response scale was used ranging from *a lot more likely* to *a lot less likely*.

8. *In your experience, to what extent does the Standard Possession Order (SPO) in the Texas Family Code (Chapter 153, subchapter F) influence the likelihood that parties reach agreement versus go to trial on the division of the child's time between homes, i.e., on possession periods?* [Alternate form for AFCC lawyers and child custody evaluators: If the law in your state was revised to create a rebuttable presumption for the 9/5 schedule, in your opinion to what extent would this increase the likelihood that parties reach agreement versus go to trial on the allocation of the child's time in each home?] Responses are aggregated into two groups: those who thought the presumption is a lot more likely and somewhat more likely to result in more pre-trial settlements (labeled *Yes*) versus a lot less likely, somewhat less likely, or no significant influence (labeled *No*).

Standard Possession Order (9/5 Schedule): Improve Pre-trial Settlement Rate?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	77 %	18	5	7
No	23 %	1	2	6

More than three-quarters of the sample believe that the Texas Standard Possession Order makes pre-trial settlements more likely. Texas attorneys almost unanimously endorse this belief but child custody evaluators were split on this question.

9. *In your experience, to what extent does the Standard Possession Order (SPO) in the Texas Family Code influence the likelihood of one or both parties engaging in strategic or manipulative behaviors during negotiations?* Responses are aggregated into three groups: those who think the presumption would make manipulative negotiations a lot or somewhat less likely, those who think it would have no influence, and those who think it would have make manipulative negotiations a lot or somewhat more likely.

Standard Possession Order (9/5 Schedule): Reduce Manipulative Negotiations?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Reduce manipulation	28 %	7	2	2
No influence	41 %	10	3	3
Increase manipulation	31 %	2	2	8

Nearly three-quarters of the sample believe that the Texas Standard Possession Order does not reduce the likelihood of strategic or manipulative behaviors during negotiations. This is similar to the respondents' views regarding the likely impact of the approximation rule on negotiations. However, 37% of the Texas attorneys (who, unlike the other two groups, have experience with the SPO) credit it with reducing strategic and manipulative negotiations.

10. *If the Texas Family Code* [alternate form*: the law in your state*] *was revised to create a rebuttable presumption that the child's time would be divided equally between homes, in your opinion to what extent would this increase the likelihood that parties reach agreement versus go to trial on the possession schedule?* Responses are aggregated into two groups: those who thought the presumption is a lot more likely and somewhat more likely to result in more pre-trial settlements (labeled *Yes*) versus a lot less likely, somewhat less likely, or no significant influence (labeled *No*).

Equal Division of Time: Improve Pre-trial Settlement Rate?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	51 %	9	8	2
No	49 %	8	5	5

Respondents were about equally divided on whether a presumption of equal residential custody would make pre-trial settlements more likely.

11. *If the Texas Family Code* [alternate form*: the law in your state*] *was revised to create a rebuttable presumption that the child's time would be divided equally between homes, in your opinion to what extent would this influence the likelihood of one or both parties engaging in strategic or manipulative behaviors during negotiations?* Responses are aggregated into three groups: those who think the presumption would make manipulative negotiations a lot or somewhat less likely, those who think it would have no influence, and those who think it would have make manipulative negotiations a lot or somewhat more likely.

Equal Division of Time: Reduce Manipulative Negotiations?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Reduce manipulation	32 %	4	2	6
No influence	14 %	4	0	1
Increase manipulation	54 %	9	5	6

Two-thirds of the sample believe that a presumption of equal residential custody would not reduce the likelihood of strategic or manipulative behaviors during negotiations and a majority think it would increase manipulative behaviors.

12. *If the Texas Family Code* [alternate form*: the law in your state*] *was revised to create a rebuttable presumption in favor of the division of time between homes preferred by the child of a designated age, in your opinion to what extent would this increase the likelihood that parties reach agreement versus go to trial on the allocation of the child's time in each home?* Responses are aggregated into two groups: those who thought the presumption is a lot more likely and somewhat more likely to result in more pre-trial settlements (labeled *Yes*) versus a lot less likely, somewhat less likely, or no significant influence (labeled *No*).

Presumption Based on Child's Preference: Improve Pre-trial Settlement Rate?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Yes	51 %	13	3	3
No	49 %	5	4	9

The total sample was about equally divided on whether a presumption based on the child's preference would make pre-trial settlements more likely. But the pattern of responses differed between Texas attorneys and the other groups. Texas attorneys were far more likely (72% versus 32% in the other two groups combined) to believe that such a presumption would reduce the likelihood of cases proceeding to trial.

13. *If the Texas Family Code* [alternate form*: the law in your state*] *was revised to create a rebuttable presumption in favor of the division of time between homes preferred by the child of a designated age, in your opinion to what extent would this influence the likelihood of one or both parties engaging in strategic or manipulative behaviors during negotiations?* Responses are aggregated into three groups: those who think the presumption would make manipulative negotiations a lot or somewhat less likely, those who think it would have no influence, and those who think it would have make manipulative negotiations a lot or somewhat more likely.

Presumption Based on Child's Preference: Reduce Manipulative Negotiations?

	Total Sample %	Texas Attorneys	AFCC Attorneys	AFCC Evaluators
Reduce manipulation	10.5 %	3	0	1
No influence	10.5 %	1	1	2
Increase manipulation	79 %	14	6	10

All but four respondents believe that a presumption based on the child's preference would not reduce the likelihood of manipulative negotiations, and more than three-quarters think that such a presumption would increase the likelihood of manipulative negotiations.

Summary of Results

The following tables are provided to facilitate comparisons of the approximation rule with the three alternative presumptions regarding impact on settlement rates and manipulative negotiations. Questions about the approximation rule were directed to the last case in which the respondent was involved and allowed a response of only yes or no about whether the case would have settled. Questions about the alternative presumptions asked respondents to rate the likely impact of the presumptions on cases in general. For the three alternatives, the first figure is the percent of respondents with a rating of *a lot more likely* combined with ratings of *somewhat more likely*. The figure in parentheses is the percent of respondents who rated the presumption *a lot more likely* to improve pre-trial settlement rates or reduce manipulative negotiations.

Approximation Rule vs. Alternative Presumptions: Improve Pre-trial Settlement Rate

Approximation Rule	SPO (9/5)	Equal Possession	Child's Preference
12%	77% (23%)	51% (19%)	51 % (7%)

Approximation Rule vs. Alternative Presumptions: Reduce Manipulative Negotiations?

Approximation Rule	SPO (9/5)	Equal Possession	Child's Preference
25%	28% (8%)	32% (8%)	10.5% (0%)

A majority of respondents believe that all three alternative presumptions are either *somewhat or a lot more likely* to promote pre-trial settlements compared to 12% who think the approximation rule would bring this outcome. Looking only at respondents who believe that the presumptions are *a lot more likely* to promote

settlements, the figures for the SPO and an equal possession presumption remain higher than the 12% for the approximation rule, but lower for the child preference presumption.

More respondents believe that the SPO (28%) or the equal possession presumption (32%) is *somewhat or a lot more likely* to reduce manipulative negotiations than is the approximation rule (25%), but this pattern changes when considering only those respondents who think the alternative presumptions are *a lot more likely* to reduce manipulative negotiations (8% for both the SPO and equal possession). Relatively few respondents expect the child's preference presumption to reduce manipulative negotiations and, as reported above, 79% believe such a presumption would increase manipulative negotiations.

Discussion

Proponents of the approximation rule assume that the adoption of the rule, by providing an objective, easy to measure criterion to predict the outcome of trials, would reduce the incidence of child custody trials and reduce manipulative behavior in settlement negotiations. According to the attorneys and child custody evaluators who responded to this survey, these assumptions are unwarranted. Instead, the results of this survey support the hypotheses I advanced in my previous articles on the approximation rule[85]: the rule will trigger disputes about how much time each parent invested in past caretaking, and the exceptions to the rule are the precise issues most likely to be disputed in cases that go to trial.

The discrepancy between the ALI predictions and those of the survey respondents may be, in part, a function of the different contexts in which each operates. The members of the committee primarily responsible for drafting the *Principles* bring an academic perspective. The survey respondents are practicing professionals with an average of 20 years experience in the trenches of family law cases.

The survey respondents do not expect litigants to agree on measures of past caretaking. This should not be too surprising. Developmental psychologists who specialize in measuring quantity of parent-child involvement struggle with how best to do this and disagree among themselves about the most accurate procedure. If the experts, with no personal stake in the outcome, fail to reach consensus about how to measure the amount of parent-child interaction in families they *currently* study, surely parties with so much staked on the measure will disagree when measuring caretaking *retroactively*.

Regardless of whether parents can agree on the proportions of time each spent caring for the children in the past, the survey reveals that in cases that go to trial, the approximation rule would be swallowed by its exceptions, thus triggering a best interests analysis that considers factors in addition to past caretaking. Ninety-five percent of the respondents reported that their last custody trial involved issues that would have modified the application of the approximation rule. This means that the rule would not succeed in restricting the scope of fact-finding to a single factor. Although the *Principles* takes a jaundiced view of the need for custody evaluations and expert witnesses, we have no reason to believe that the approximation rule, with its exceptions, will reduce the court's propensity to appoint custody evaluators or the litigants' engagement of expert witnesses.

The *Principles* expects the approximation rule to make the outcome of a trial more predictable and thus induce litigants to settle more often than they do under the less definite best-interests standard. Although 65% of the sample reported that the approximation rule would not have increased the predictability of the trial's outcome in their last case, 35% thought it would have done so. Nevertheless, only 12% of the sample think that their last custody trial would have been averted if the negotiations took place in the context of the approximation rule.

The belief that in some cases the approximation rule would make the trial's outcome more predictable but would not reduce trial rates may be attributed to the possibility that for some litigants the uncertainty of a trial's outcome is a deterrent rather than an inducement to proceed to trial. Also, under the prevailing best-interests standard, the rate of custody trials is so low that it leaves little room for reduction. In one study, only 1.5% of the cases proceeded to a full trial.[86] Powerful interests and emotions drive cases that proceed to trial and, even if the outcome is somewhat predictable, this may do little to dissuade litigants who are bound for

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[85] Richard A. Warshak, *Parenting by the Clock, supra* note 12; Warshak, *Punching the Parenting Time Clock, supra* note 11; Warshak, *The Approximation Rule, supra* note 11; Warshak, *Best Interests, supra* note 11.

[86] ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 137 (Harvard Univ. Press 1992)

trial to settle for something less than they want. One survey respondent commented that some litigants want to have their day in court. Even some proponents of the approximation rule concede that the *Principles'* assumption that the rule will reduce litigation (a key rationale offered for the proposal) is unrealistic. As Professor Mary E. O'Connell writes, "Changing the law to decrease this already low litigation rate is of dubious value."[87]

If the goal is to increase pre-trial settlement rates, it is worth noting that more respondents thought that the alternative presumptions—the SPO, equal division of time, and endorsing the child's preference—would have this effect than the number of respondents who thought their last trial would have been averted under the approximation rule. Despite the obvious toll that custody litigation takes on the family, pre-trial settlements are not always better for children. A trial may be preferable to a settlement where a healthier parent capitulates to the position of a disturbed parent (e.g., a victim of coercive controlling violence concedes to the spouse's demands).

Much of the emotional and financial costs of custody litigation occur prior to a trial. A custody presumption that dampens the destructive atmosphere of custody disputes would be a significant benefit. ALI regards the approximation rule as a determinate criterion that discourages asking for more possession time as a strategy to negotiate a better financial settlement. As we have seen, though, this survey reveals that the difficulties in measuring past caretaking and the exceptions to the rule combine to make the rule less determinate than ALI intends.

Only 25% of respondents to the ARS believe that the approximation rule would have reduced strategic and manipulative behaviors during negotiation in their last case that proceeded to trial. Although these results fail to provide strong support for ALI's assumption, we should not dismiss a positive impact on one out of four cases. We need to learn more about the reasons for this anticipated benefit. Is it the approximation rule itself that this minority of respondents believes would bring a better tone to negotiations, or is this benefit anticipated with other legal presumptions? The ARS survey supports the latter hypothesis. More respondents thought that the SPO or the equal possession presumption would reduce manipulative bargaining. Nevertheless, a majority of respondents believe that it is unrealistic to expect any legal presumption to reduce manipulative bargaining tactics in the cases that proceed to trial. One survey respondent remarked on the high percentage of litigants with personality disorders in cases that proceed to trial and noted that such litigants were unlikely to feel restrained by any legal presumption.

Limitations

The invitation to participate in the Approximation Rule Survey was included in articles that appeared in two online publications. Thus, it is impossible to determine the proportion of actual to potential respondents. As with most surveys of this type, the sample is self-selected. We cannot rule out the possibility that some respondents took the survey with preconceived attitudes about the approximation rule and about other presumptions and skewed their answers to support these attitudes. For instance, a lawyer who favors the approximation rule might be more prone to credit the rule with reducing the likelihood that a case goes to trial.

The survey asked professionals to speculate about the likely impact of the approximation rule on their most recent custody trial. Until and unless more states adopt the approximation rule, we have no way to verify the accuracy of such predictions just as ALI has no way to verify the accuracy of its optimism about the proposed reform. Nevertheless, the respondents do know the issues that were raised in their last custody case, relatively objective information, and all but two respondents indicated that in their last case one or more of the exceptions to the approximation rule would have trumped the application of the rule. This supports Parkinson's observation that the *Principles'* exceptions are the rule in litigated cases.[88]

Conclusion

ALI assumes that the approximation rule provides a determinate custody criterion that will improve the tenor of settlement negotiations, increase the likelihood of pre-trial settlements, and reduce judicial discretion

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[87] Mary E. O'Connell, *supra* note 11, at 130. *See also* Barbara A. Atwood, *supra* note 11, at 126: "The ALI's presumption is unlikely to reduce litigation for those few couples who cannot resolve matters on their own."

[88] Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 446, 446 (Robin Fretwell Wilson ed., 2006)

by restricting the scope of fact-finding to one factor: the proportion of time each parent took care of the children prior to the separation. The attorneys and child custody evaluators who responded to this survey disagree. Asked to rate the likely impact of the approximation rule on their last custody case that proceeded to a full trial, most respondents report that it would not have reduced strategic and manipulative bargaining and that the litigants would have disputed their relative past caretaking contributions and would have raised one or more exceptions to the rule, thus triggering a wider best-interests judicial inquiry.

Even if we assume that respondents failed to follow the survey instructions to base their ratings on their last custody case that went to trial, and instead responded in a global manner in an attempt to shape the results they favor, the vote of no confidence that the approximation rule will accomplish its goals may serve as a harbinger of its fate in state legislatures.

If more states adopt the approximation rule, this will provide opportunities for research on its impact. Until and unless this occurs, absent other data, the results of this study are consistent with West Virginia's experience with the rule and fail to support ALI's assumptions about the approximation rule.

A major selling point of the *Principles* is that it promises to simplify, expedite, and reduce the incidence of trials and protracted negotiations while retaining a focus on children's welfare. The results of this survey show that the rule will not accomplish its goals with respect to trials and negotiations. My previous work draws on child development research to show that the approximation rule misses the mark as an estimate of parents' contributions to their child's best interests.[89] Quantity of care is a poor proxy for quality of care.

The best-interests test is not without its drawbacks. It is natural to search for rules that will do a better job.[90] But as H. L. Mencken observed, "There is always an easy solution to every human problem—neat, plausible, and wrong." In the few cases that go to trial, courts will come closer to determining children's needs with a nuanced, multi-factored inquiry that goes beyond an exclusive focus on adjudicating parents' completing claims about their parenting histories.

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[89] Richard A. Warshak, *Parenting by the Clock, supra* note 12; Warshak, *Punching the Parenting Time Clock, supra* note 11; Warshak, *The Approximation Rule, supra* note 11; Warshak, *Best Interests, supra* note 11.

[90] *See,* Paul L.Smith, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?* 75 INDIANA L.J. 731, 746 (2000) ("Law reformers are constantly seeking magical solutions or formulas for determining who should be awarded custody in divorce cases. While mathematical formulas might work in determining child support payments, there are no such mechanical tests for child placement. The focus in child custody today should not be placed on searching for such tests, but rather on humanizing the process by which custody disputes are resolved. This requires the judge to approach each case with an open mind, apply the appropriate standards, and support the decision with specific reasons.").

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

DIVORCE

STANDING AND PROCEDURE

DEFAULT JUDGMENT APPROPRIATE DESPITE LACK OF SERVICE BECAUSE FATHER WAS REPRESENTED BY COUNSEL AT MOTION TO QUASH

¶11-5-01. ***In re A.M.,*** -- S.W.3d --, 2011 WL 2471766 (Tex. App.—El Paso 2011, no pet. h.) (06/22/11).

Facts: Mother and Father divorced, and trial court awarded custody of their Child to Father. Subsequently, Mother filed a SAPCR seeking modification. Father was represented by an attorney, who filed a special appearance and a motion to quash on Father's behalf. Trial court determined that service was defective and reset the hearing. Father was not served with notice of the reset hearing and did not appear. Trial court entered a default judgment against Father. Mother was subsequently awarded custody of the Child. Father filed a petition for bill of review asking trial court to set aside the default judgment because he was never served with notice of the reset hearing. Trial court denied the petition. Father appealed.

Holding: Affirmed

Opinion: A bill of review is appropriate when the petitioner has a meritorious defense, justification for his failure to assert the defense, and the default judgment against petitioner was not due to fault or negligence of the petitioner. However, if the petitioner was not properly served with notice, the petitioner does not need to show a meritorious defense or justification for not asserting it. Here, conversely, service was not necessary because Tex. R. Civ. P. 122 applied. Rule 122 states that if service is quashed on motion of the defendant, then the defendant shall be deemed to have been duly served, and a court may enter a default judgment against him. Father's attorney filed pleadings and appeared on Father's behalf with regard to the motion to quash. Father failed to show that he lacked notice for the hearing, so trial court did not abuse its discretion in denying the bill of review.

Editor's comment: *Always litigate jurisdiction first by way of the Texas special appearance procedure. Only after contesting jurisdiction should you complain about defective service by way of a motion to quash because that procedure constitutes a general appearance. (C.N.)*

RETURN OF SERVICE CITATION SIGNED BY PRIVATE LICENSED PROCESS SERVER WAS INVALID BECAUSE IT WAS NOT NOTORIZED

¶11-5-02. ***Chupp v. Chupp,*** No. 01-10-00197-CV, 2011 WL 2623996 (Tex. App.—Houston 2011, no pet. h.) (mem. op.) (06/30/11).

Facts: Husband filed for divorce against Wife. The record reflected that Husband served Wife with the first amended petition for divorce. The return of service stated that Wife was personally served, and the return of service citation was signed by a private licensed process server. Wife did not appear to the divorce hearing. Trial court granted Husband a default judgment against Wife and divided the marital estate. Wife later learned of the divorce and property division. Wife appealed, contending that trial court lacked personal jurisdiction over her due to defective service.

Holding: Reversed and Remanded

Opinion: There is no presumption that service is valid when examining a default judgment. Tex. R. Civ. P. 107 states that the process server must sign or attach a signature to the return of service, and that if the server is not an officer, ―[t]he return of citation . . . shall be verified." Similar to the verification of an affidavit, the return of citation should be acknowledged before a notary public in order to be valid. Here, the licensed process server signed the return of service of citation and indicated her license number, but the document was not notarized. Therefore, the service of process was invalid and of no effect. Trial court did not have personal jurisdiction over Wife, and it erred in rendering the default judgment.

Editor's comment: *Procedures for default judgments in family law cases continue to be a trap for the unwary. It is hard to believe that a licensed process server would forget to have his or her signature acknowledged before a notary. It's another reason to double check everything before taking a default judgment. (J.A.V.)*

Editor's comment: *When asked by a client to review and give advice about attacking a default judgment, start by looking at the citation and return of service. You will be surprised how often there is an error in these documents that provide grounds for setting aside a default judgment. (C.N.)*

Editor's comment: *Be sure to tell your process server. (J.V.)*

MANDAMUS RELIEF IS AVAILABLE WHEN A TRIAL COURT DENIES A PARTY'S REQUEST THAT IT DECLINE TO EXERCISE ITS JURISDICTION BECAUSE IT IS AN INCONVENIENT FORUM UNDER TFC 152.207

¶11-5-03. ***In re Alanis,*** -- S.W.3d --, 2011 WL 2713606 (Tex. App.—San Antonio 2011, orig. proceeding) (07/13/11).

Facts: Mother and Father were appointed joint managing conservators of the Child, and Father was granted the right to designate the primary residence of the Child. About eight years later, Father and the Child moved to California. Mother lived in Oklahoma. Father filed a SAPCR in California requesting the court take jurisdiction and modify the visitation provisions. Mother subsequently filed a SAPCR in Texas. Father filed with the Texas court a plea to the jurisidiction and a request for trial court to decline jurisdiction in favor of California because Texas was an inconvenient forum. The California court chose to wait for the decision of the Texas court before moving forward with the case. Trial court denied Father's plea to the jurisdiction and the request for trial court to decline jurisdiction. Father filed a petition for writ of mandamus.

Holding: Mandamus conditionally granted in part

Opinion: Under TFC 152.201 a Texas court loses its exclusive continuing jurisdiction over a child custody case when the child, the child's parents, and any person acting as a parent do not reside in Texas. Here, neither the parents nor the Child live in Texas. However, TFC 152.202(a) provides a Texas court with the ability to modify an original determination if it has jurisdiction to make an initial determination under TFC 152.201. This determination is made using the circumstances at the time of filing. Here, California had not become Child's home state because he and Father had only lived there a little over one month, so California did not have jurisdiction under TFC 152.201(a)(1). No evidence was presented that Father and the Child had a connection with California beyond a mere physical presence, so California did not have jurisdiction under TFC 152.201(a)(2). Texas did not decline jurisdiction, so California did not have jurisdiction under TFC 152.201(a)(3). Thus, Texas had jurisdiction under 152.201(a)(4).

A motion asking a court to decline to exercise jurisdiction because it is an inconvenient forum is not a jurisdictional question. Therefore, mandamus is only appropriate if trial court clearly abused its discretion, and Father lacked an adequate remedy by appeal. TFC 152.207(b) provides factors for determining the convenience of a forum. These factors include the relative financial circumstances of the parties, the nature and location of the evidence, and the familiarity of the court with the facts and issues of the case. Here, neither

party, nor the Child lives in Texas. To attend the hearings, Father and the Child would have to travel from California, and Mother would have to travel from Oklahoma. Mother already travelled regularly to California for work. Mother was a doctor and paid the maximum amount of child support allowed. Father was a pharmacist and testified that the travelling would put a tremendous financial burden on him. Mother presented no evidence that the distance would place a financial burden on her. Traveling to Texas for trial would be detrimental to the Child's school and extracurricular activities. Father testified that he would not rely on any witnesses in Texas, and Mother did not name any witnesses from Texas she intended to call. Finally due to the length of time between the original custody proceedings and this SAPCR, the Texas court would have no more familiarity with the facts and issues of the case than a California court would have. Because the factors overwhelmingly weighed in favor of finding Texas was an inconvenient forum, trial court clearly abused its discretion in denying Father's request that trial court decline jurisdiction.

COA stated that whether mandamus is proper in this situation appeared to be a case of first impression. Tex. Sup. Ct. has held that mandamus may be proper in order to preserve a relator's procedural rights, to allow a COA to provide needed and helpful direction, and to prevent a waste of public and private resources. COA decided this situation was analogous to a motion for *forum non conveniens*, for which Tex. Sup. Ct. has held mandamus relief is available. Here, neither the parents nor the Child live in Texas. If the proceedings were held in Texas, all the parties would have to travel to attend. Allowing the California court to move forward with the case would promote judicial economy and avoid wasting the time and resources of the parities. Mandamus was proper.

Editor's comment: *Put a double star by this one. Mandamus available to review ruling on request to decline jurisdiction based on inconvenient forum. (C.N.)*

DIVORCE

CHARACTERIZATION

PERSONAL INJURY SETTLEMENTS RECEIVED BY HUSBAND AND WIFE WERE SEPARATE PROPERTY BECAUSE THE SETTLEMENT AGREEMENT AWARDED EACH SPOUSE SEPARATELY, AND IN CLOSE PROXIMITY TO RECEIVING THE COURT APPROVAL OF SETTLEMENT, THEY EXECUTED A TRUST AGREEMENT THAT PROVIDED THAT ANY SEPARATE PROPERTY WOULD REMAIN SEPARATE

¶11-5-04. ***Harrell v. Hochderffer,*** -- S.W.3d --, 2011 WL 2297730 (Tex. App.—Austin 2011, no pet. h.) (06/10/11).

Facts: Husband and Wife had one child together (Daughter), and Wife had two children from a prior marriage (Step-Children). Husband suffered a stroke and was placed in a nursing home. The couple later sued the nursing home for negligence that had led to the amputation of both of Husband's legs. The suit was pursued by Daughter, as their "next friend." They sought damages for past and future mental anguish, past and future pain and suffering, past and future disfigurement and impairment, past and future medical expenses, and exemplary damages. Wife also sought damages for loss of consortium. Subsequently, they settled with the nursing home, and each of the spouses separately agreed to dismiss the action, with prejudice, for a specific sum. Daughter signed the agreement on behalf of her parents. Less than four months later, Husband and Wife executed a trust document. Each separately contributed $10 plus his/her settlement amount to the trust. The agreement stated that any separate property of the spouses would remain separate property. Further, upon the death of both spouses, Wife's share would be divided equally among the three children, and Husband's share would be administered solely for the benefit of Daughter. After both spouses died, Step-Children filed suit against Daughter for tortious interference with inheritance. Step-Children later added Trustee as a defendant and sought a declaratory judgment that the settlement proceeds were community property. All the parties filed motions for summary judgment. Trial court granted Daughter's motion and granted Trustee's motion in part.

Trial court denied Step-Children's motion. Step-Children appealed the partial grant of Trustee's motion and the denial of their own, arguing the settlement proceeds were community property, Husband and Wife never executed a valid partition agreement, and Husband and Wife lacked the mental capacity to execute the documents relied on by Trustee.

Holding: Affirmed

Majority Opinion: (C.J. Jones, J. Henson)

There is a presumption that property possessed during marriage is community property. Husband and Wife received the settlement proceeds during marriage, so the general presumption applied. Damages for pain and suffering, mental anguish, and disfigurement would have been Husband's separate property. Damages for loss of consortium would have been Wife's separate property. Damages for past and future medical expenses are classified as community property. Because the settlement proceeds could have been both community and separate property, there is a presumption that the proceeds are entirely community property. To rebut this presumption, Trustee provided copies of the family trust agreement, which included the "Schedule of Property." The Schedule of Property identified the contributions of Husband and Wife to the trust account. Each contributed a check on his/her own behalf in the amount of his/her own agreed settlement amount. Trustee also provided copies of the two checks representing Husband's and Wife's contributions. This evidence indicated that when they settled, the spouses intended to be compensated for their own individual injuries, rather than any injury to the community. Additionally, the settlement agreement lists each spouse separately with an amount to which he/she agreed to dismiss the suit. Moreover, the only type of damages that would have been community property would have been damages for past and future medical expenses, and Husband's medical expenses had been paid in full from Husband's separate trust. Step-Children cite a case in which the court held that exemplary damages were community property, but that case is distinguishable. That case involved a contract dispute, rather than a claim for personal injuries. Furthermore, TFC 3.001(3) states that a recovery for personal injuries is separate property except for recovery for loss of earning capacity. Husband did not claim a loss of earning capacity. Exemplary damages do not fall under any exception, so they must be considered separate property under TFC 3.001(3). Since Step-Children did not enter any evidence disputing Trustee's evidence, trial court did not err in finding the property was separate property. Because the property was separate property, no partition agreement was necessary.

To establish mental capacity to execute a contract, the grantors must have had sufficient mind and memory at the time of execution to understand the nature and effect of their act on the day the contract was executed. Step-Children did not present any evidence that would lead to an inference that would have been more than a mere guess or suspicion. The meager fact that Husband signature appeared to be no more than the letter "G," even though there is no "G" in his name, is not enough to raise an issue of material fact. All the other evidence presented by Step-Children was from either years before or more than a year after the execution of the trust agreement, so it was not probative of the mental capacity at the time Husband and Wife executed the agreement.

Dissenting Opinion: (J. Puryear)

As stated by the majority, there is a presumption that the settlement proceeds are community property. To show property is separate property, the party must trace and identify the property in question. Trustee did not provide any tracing evidence. The only evidence presented was the checks and the schedule of property. This evidence only shows the parties believed the property was separate, not that it actually was separate. Additionally, the majority relies on the fact that Husband's medical expenses had been paid in full. However, this fact does not provide any insight as to the character of the funds at the inception of title. Thus the burden to show that the property is not community property was not met.

A valid partition agreement must be in writing, signed by both parties, and contain specific language indicating a partition was intended. Here, the Schedule of Property was in writing and it was signed by the parties, but it does not contain language making it a valid partition agreement. Merely showing the parties believed their property was separate is not enough to create a valid partition agreement. Thus, because the property was community property, and because there was no valid partition agreement, the burden shifted to Trus-

tee to raise a genuine issue of material fact. Trustee failed to raise any issues of material fact, so the judgment should be reversed in favor of the Step-Children.

Editor's comment: *The dissenting opinion concludes that because the settlement was received during marriage it was presumptively community and because it was possibly mixed community and separate damages, it was all presumptively community until properly traced or absent a partition agreement executed prior to the trust deposit. Because there was no partition agreement, the dissent felt that the deposits were community property as a matter of law and that the trustee failed to overcome this presumption. (S.S.S.)*

Editor's comment: *Hmm golden child and trustee say it's separate property. Stepchildren say it's community property and parents had no mental capacity to execute trust documents. Does not appear that settlement agreement makes clear what proceeds were provided for. The facts don't say, but if the trust scheme was golden child's idea, and intended to disinherit stepchildren, would that change the outcome? Would summary judgment be appropriate under that scenario? There is something fishy about the basic situation here. (C.N.)*

Editor's comment: *Hard cases make bad law, as this split decision demonstrates. The majority, as the dissent points out, essentially bootstraps a settlement agreement into a partition agreement, holding that the parties' intent to characterize community property as separate property is sufficient to transform one into the other. (J.V.)*

HUSBAND GIFTED A ONE-HALF INTEREST IN PROPERTY TO WIFE WHEN HE CONVEYED HIS SEPARATE PROPERTY TO HUSBAND AND WIFE AS "JOINT TENANTS WITH RIGHT OF SURVIVORSHIP"

¶11-5-05. ***In re Marriage of Skarda,*** -- S.W.3d --, 2011 WL 2502946 (Tex. App.—Amarillo 2011, no pet. h.) (06/23/11).

Facts: Husband purchased certain real property before marriage. After marriage, the couple lived in a house on the property. During marriage, Husband refinanced the property and signed a warranty deed conveying the property to Husband and Wife as joint tenants with a right of survivorship. Wife filed for divorce, and trial court divided the marital estate. Trial court found that during the refinancing, Husband transferred a one-half separate property interest to Wife by gift. Husband appealed. He contested the factual sufficiency of the evidence finding that Wife had a one-half interest in the property.

Holding: Affirmed

Opinion: Joint tenancy is a form of *separate* property ownership, in which the tenants have one and the same interest in an undivided whole. A gift requires intent, delivery, and acceptance. Here, although Husband testified that he did not intend to gift the property to Wife, she testified that she had a one-half interest in the property granted to her by gift ―otherwise." Wife also testified that the property was part of the community and that she owned a one-half interest by deed. The deed created a joint-tenancy, which created Wife's separate property. Trial court did not abuse its discretion in finding Wife received a one-half interest by gift.

Editor's comment: *Those recitals in your deed actually mean something. (C.N.)*

Editor's comment: *Members of the probate bar tell me that a JTWROS deed from a third party results in a married couple owning realty as community property. The difference here is that husband (and wife) signed a JTWROS deed conveying ownership to both spouses plus both spouses signed a deed of trust to obtain refinancing. Relying on Tex. Fam. Code § 3.005 (gifts between spouses), the Amarillo court concludes that each spouse owned an undivided half interest in the realty. Would it not make more sense to hold that husband's half was community property because no statute covers gifts by a spouse to himself? Of more importance,*

under this holding, any time a spouse refinances separate property, that spouse had better be careful about the paperwork. (J.V.)

DIVORCE
DIVISION OF PROPERTY

COURT MAY CONSIDER EACH SPOUSES' CONTRIBUTION TO THE COMMUNITY ESTATE IN ITS DIVISION OF THE MARITAL ESTATE

¶11-5-06. ***Monroe v. Monroe,*** -- S.W.3d --, 2011 WL 2348453 (Tex. App.—San Antonio 2011, no pet. h.) (06/15/11).

Facts: Husband and Wife divorced. They had signed pre- and post-marital agreements that had converted most of Husband's separate property to community property. The community property included interest in Husband's companies, a house, Wife's jewelry, and other valuable assets. In its division of the property, trial court awarded Wife the house and her jewelry, and it awarded Husband stock in his companies. Trial court also ordered Husband to pay Wife's attorney's fees and the mortgage and maintenance of the house for ten months. Wife appealed contesting the legal and factual sufficiency of certain findings by the trial court—primarily, the valuation of certain assets. Wife also argued trial court abused its discretion in its division of the community estate and that it was inequitable and unreasonable based on the *Murff* factors.

Holding: Affirmed

Majority Opinion: (J. Barnard, C.J. Stone, J. Angelini)

There was sufficient evidence to support trial court's finding that without Husband's contributions of his separate property, the value of the community estate would be minimal and that an unequal division of the property was justified because virtually all of the community estate was property owned by Husband prior to marriage. Further, Wife did not provide sufficient evidence to support an argument that the stock was not contingent on Husband's personal involvement with the company. There was evidence showing Husband ran a subsidiary company, held patents made by the company, and was an integral part of the company. Finally, Wife did not provide trial court with an alternative valuation method for certain pieces of furniture within the house. Thus, she could not challenge the value of the furniture on appeal.

Trial court did err in finding Wife's jewelry was community property. Husband did not contradict Wife's testimony that her jewelry was her separate property. However, "[r]eversal is not required if the mischaracterization has only a *de minimus* effect on the trial court's just and right division." The jewelry was valued at $150,000, and the entire estate was valued at over $9 million. Since the jewelry only amounted for less than 2% of the entire estate, the trial court's mischaracterization of the jewelry as part of the community estate had a *de minimus* effect on the division of the property.

Trial court's division of the estate is presumed to be proper. Wife had the burden to show the division was "so unjust as to constitute a clear abuse of discretion." Wife failed to meet this burden. A trial court may, but is not required to, use the *Murff* factors in its consideration. These factors include "(1) the spouses' capacities and abilities; (2) benefits which the party not at fault would have derived from continuation of the marriage; (3) education; (4) business opportunities; (5) relative physical conditions; (6) relative financial condition and obligations; (7) disparity of ages; (8) size of separate estates; (9) the nature of the property; and (10) disparity in the spouses' income or earning capacity." A trial court may look to other factors, including tax liability. Husband was responsible for all tax liabilities and any unforeseen liabilities associated with his companies. Husband still had outstanding debts, while Wife's debts had been paid during the marriage. Wife testified that she had some earning capacity, and Husband only had slightly more education than Wife. Both were in good physical condition and were approximately the same age. Trial court also found that it was a no

fault divorce. Although Husband was awarded more than two-thirds of the estate, Husband was also required to pay Wife's attorney's fees and mortgage and maintenance on the house for ten months. Trial court did not abuse its discretion in its division of the community estate.

Concurring Opinion: (C.J. Stone)

Although there may be some situations in which a court's discretion would be restricted by the terms of a marital property agreement, there was no such restriction here. Wife failed to establish trial court abused discretion by not restricting its division on the community estate to the terms of the premarital and marital agreements. While the agreements estopped the parties from claiming upon divorce that property converted into community property was separate property, the agreements did not prevent trial court from considering the genesis of the community estate as one of many factors in ordering a just and right division of the marital estate. Wife's separate debt was paid during the marriage, but Husband still had separate debt after the divorce. Husband contributed to increasing the estate, but Wife did not. The value of the corporations within the community estate was contingent on Husband's continued participation. Trial court considered these facts in its order, and thus, did not abuse its discretion in its division of the estate.

Editor's comment: *Golddiggers be warned! You may be successful in getting your dolt of spouse to convert their separate property to community property but that may not help you if you don't take away the court's equitable power to make a just and right division in your prenup or postnup. OMG! It's so hard to be a successful prospector these days!*

WIFE OF MEMBER OF ARMED FORCES WAS ONLY ENTITLED TO HUSBAND'S RETIREMENT EARNED UP TO THE TIME OF THE DIVORCE

¶11-5-07. ***Hicks v. Hicks,*** -- S.W.3d --, 2011 WL 2566302 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (06/30/11).

Facts: Wife filed for divorce. The parties entered into an informal settlement agreement, and trial court signed the final decree of divorce. Trial court signed the domestic relations order (DRO) on the same day, but references to the DRO are crossed out in the final decree of divorce. Husband appealed arguing trial court erred in signing the DRO because the formula calculating his retirement pay was incorrect. Husband also argued that the DRO improperly designated Wife as the former spouse beneficiary of his Survivor Benefit Plan.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: When a DRO is signed contemporaneously with a divorce decree, courts generally construe the DRO as part of the divorce decree. However, while the DRO and divorce decree were signed on the same day in this case, references to the DRO were expressly deleted from the decree, and the court approved the agreement —as contained in this Final Decree of Divorce." Thus, the DRO is a separate order from the divorce decree.

Under the Uniformed Services Former Spouses' Protection Act (USFSPA), a court may treat disposable retired pay as marital property. 10 USC 1408. Here, the DRO used the following formula to calculate sums owed to Wife:

> Former Spouse shall receive [50 percent] of Member's Disposable Retired Pay (DRP), if, as and when received, multiplied by the following formula:
>
> Number of months Member and Former Spouse were married during which Member was in service (183 mos.) divided by Number of months Member was in service as of retirement (not greater than 480 months)

X

> Active duty base pay for an 0-6 with 26+ years of creditable service as of 01/01/2010 ($10,047.00) per month) divided by Active duty base pay of Member as of his date of retirement.

The DRO used the fraction formula established in *Taggart v. Taggart*, 552 SW2d 422, but this fraction no longer applies in this situation. In *Berry v. Berry*, 647 SW2d 945, the court altered the formula by changing the denominator to the number of months employed under the plan *at the time of divorce*. This prevents a former spouse from benefiting from post-divorce increases in retirement. Because Husband was not retired as of the date of the divorce, the *Berry* formula should have been used.

10 USC 1406 applies to members who became members before 09/08/1980. 10 USC 1407 applies to members who became members after 09/07/1980. The DRO used 1406. Husband began military service after 09/07/1980, so 1407 should have been applied. The "high-36 month average" should have been used rather than the date of retirement. "High-36 month average means the total amount of monthly basic pay to which the member was entitled for the 36 months (whether or not consecutive) out of all the months of active service of the member for which the monthly basic pay to which the member was entitled was the highest, divided by 36." Further, Husband correctly points out that the denominator should refer to the "gross retired pay on the date of his retirement" rather than "active duty base pay of Member as of his date of retirement."

An eligible service member may elect to provide an annuity to a former spouse upon his death. However, in this case, the agreed divorce decree does not require Husband to name Wife as a former spouse beneficiary to a Spousal Benefit Plan (SBC) annuity. Because the DRO is not part of the agreement, and this additional obligation was not in the agreement, this obligation should not have been included in the DRO.

Editor's comment: *Kudos to the Fourteenth Court for this illuminating primer on the division of military retirement pay. (J.V.)*

DISPROPORTIONATE DIVISION OF PROPERTY IN WIFE'S FAVOR WAS APPROPRIATE BECAUSE HUSBAND WAS AT FAULT, WIFE WOULD NO LONGER RECEIVE CERTAIN BENEFITS DERIVED FROM THE MARRIAGE; THERE WAS A DISPARITY OF EARNING POWER; HUSBAND GIFTED SOME OF THE COMMUNITY ESTATE TO HIS FAMILY; AND WIFE INCURRED ATTORNEY'S FEES

¶11-5-08. ***Pagare v. Pagare,*** -- S.W.3d --, 2011 WL 2449511 (Tex. App.—Dallas 2011, no pet. h.) (06/21/11).

Facts: Husband and Wife were software engineers from India. Both spouses worked for a technology company, but Husband earned nearly twice what Wife earned. The couple traveled to India to visit family, where they had an argument. Wife walked out, leaving her passport in Husband's possession. There was conflicting testimony as to whether Wife simply left without the passport or Husband took her passport away from her. Husband returned to the U.S, and Wife remained in India. Wife learned she was pregnant, and there was conflicting testimony as to whether Husband knew of the pregnancy. Husband filed for divorce on the grounds of insupportability and abandonment. Husband obtained substituted service claiming he tried to call her several times and was unable to locate her, she refused to respond to his letters, and her parents her parents refused to tell him her whereabouts. In his original petition he alleged there were no children involved in the divorce. In an amended petition, Husband stated he was unaware of any children involved. In both petitions, Husband alleged the value of the estate was less than $50,000. Wife did not file an answer or appear, so Husband obtained a default judgment that ordered Wife's accounts to be garnished. About a year later, Wife learned of the judgment when she could not access her accounts. Wife filed a motion for new trial because "Husband procured the service of citation and default judgment by fraud." Trial court granted her motion. After a final

hearing, trial court found that the total value of the community estate was about $450,000, and it awarded 63% of the estate to Wife and 37% to Husband. Husband appealed.

Holding: Affirmed

Opinion: Trial court awarded wife a disproportionate share of the marital estate based on the following: —Husband's fault in the break-up of the marriage[;] benefits [W]ife may have derived from the continuation of the marriage that she will no longer receive[;] disparity of earning power of the spouses resulting in [W]ife['s] need to further means to support herself; gifts of U.S. dollar funds from the community estate given by [H]usband to his family[;] and the attorney's fees and costs to be paid to [W]ife's attorneys." As the sole trier of fact, trial court was within its discretion to believe Wife's testimony over Husband's. During trial, both spouses testified, and each claimed the other was at fault for the dissolution of the marriage. Husband testified that he tried to find Wife after their argument in India and could not locate her. Wife testified that Husband knew where she was. Further, a friend of the couple said he had called Wife with a phone number provided to him by Husband. Wife also testified that Husband took her travel documents, including her passport, which left her without means to return to the U.S. Because of Husband's refusal to return her documents, her green card expired, and she was no longer able to live and work in the U.S. Moreover, because of the gap in her employment, it was unlikely that she would be able to find a job that would pay her the same salary she received prior to the divorce. Additionally, Husband testified that he transferred funds from community property during marriage to a bank account he used to support his family in India. Finally, Wife had incurred attorney's fees in addressing this case, plus she would incur more in dealing with a subsequent case Husband had filed against her, in which he alleged that she hid his child and herself from him. COA found there was no clear abuse of discretion in trial court's distribution of the property based on the factors above.

Editor's comment: *It was all going so good for Husband, he was rid of wife, she was barred from coming home, he got all the property and garnished her accounts. He showed her who was boss! Yeah it was so great.....until the truth came out about what a jerk Husband was. Don't you know the judge had fun helping to vindicate wife and dividing the community estate disproportionately in favor of wife! (C.N.)*

DIVORCE
POST-DECREE ENFORCEMENT

MONEY DAMAGES WERE PROPER IN HEARING TO ENFORCE FINAL DECREE OF DIVORCE BECAUSE SPECIFIC PERFORMANCE NOT POSSIBLE

¶11-5-09. ***Campbell v. Campbell,*** No. 01-10-00562-CV, 2011 WL 2436513 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (mem. op.) (06/16/11).

Facts: Husband and Wife divorced. In the divorce decree, as part of the division of the marital estate, trial court ordered that a certain piece of real property be sold. Sixty percent of the net proceeds of the sale were to be paid to Wife, and 40% to Husband. Trial court ordered Husband to pay all —encumbrances, ad valorem taxes, liens, assessments, or other charges due" on the property until it sold. Husband failed to sell the property and failed to make payments on the note, so the property went into foreclosure. The property sold for less than what was owed on the note. Wife filed a —Motion for Enforcement of Final Decree of Divorce," asking the court to order Husband —to pay the monies owed" to her for the sale of the property. Trial court found Husband was in contempt for violating the divorce decree. Wife testified that the value of the property was $600,000 and the balance owed on the note was $556,215.36. Trial court found that payment of the net sales was no longer possible and awarded Wife money damages equal to 60% of the difference between the property's value and the balance owed on it. Husband appealed arguing there was insufficient evidence to support

the award of money damages because the ruling was based upon speculation of a sale, and —speculation of future events is not grounds for contempt."

Holding: Affirmed

Opinion: TFC 9.010 permits a court to award a money judgment if one party fails to comply with a divorce decree. Trial court found Husband in contempt, but it enforced the divorce decree by awarding Wife a money judgment. Trial court found that because Husband failed to pay the note on the property and it foreclosed, payment of the net sales proceeds was —nolonger specifically possible and not an adequate remedy." In determining the amount of the damages, trial court was authorized to exercise its discretion. Wife testified to the value of the property and amount due on the note, and the realtor testified that he did not know —whatthe closing costs would have been." Trial court was free to accept this testimony and use its discretion in awarding Wife 60% of the net sales proceeds based on Wife's valuation.

Editor's comment: *Divorcing spouses should be careful what they ask the court to do. In this case, the parties submitted an agreed decree of divorce that required the husband to sell upside-down real estate while making loan payments in the meantime. (J.V.)*

TRIAL COURT LACKED JURISDICTION TO ENTER AMENDED QDRO BECAUSE THE ORIGINAL DIVORCE DECREE UNAMBIGUOUSLY DIVIDED THE COMMUNITY PROPERTY

¶11-5-10. ***Joyner v. Joyner,*** -- S.W.3d --, 2011 WL 3714629 (Tex. App.—San Antonio 2011, no pet. h.) (op. on rehearing) (08/24/11).

Facts: Husband and Wife divorced. The divorce decree awarded Wife a portion of Husband's military retirement benefits. The specifics of the award were detailed in a Qualified Domestic Relations Order (QDRO), which was incorporated by reference in the divorce decree. After Husband retired, the Department of Finance and Accounting Services (DFAS) overpaid Wife for six months. Husband hired counsel to correct the mistake. Husband's attorney filed a motion to clarify the QDRO. DFAS contacted Husband and Wife acknowledging the mistake and stating that it had established a debt against Wife and credited the amount of the debt to Husband. Soon after, Husband and Wife agreed to the entry of an amended DRO. Subsequently, Husband moved for a new trial, alleging the amended QDRO did not address Husband's credit and that it impermissibly changed the terms of the divorce decree. Trial court conditionally granted the motion if Husband paid Wife's attorney's fees by a certain date. Husband's attorney then withdrew, and Husband claimed he had been unaware of the condition. Husband did not pay Wife's attorney's fees by the set date, and trial court entered an order denying Husband's motion for new trial. Husband retained new counsel and filed a petition for a bill of review. After a hearing, trial court denied Husband's petition because his petition did not meet the requirements for a bill of review. Husband appealed, arguing that because trial court lacked jurisdiction to enter the amended QDRO, he did not need to meet the formal requirements for a bill a review.

Holding: Reversed and Rendered

Opinion: If a bill of review seeks to set aside a judgment because the trial court lacked subject-matter jurisdiction, the petitioner does not need to meet the formal requirements for the bill of review. A trial court generally retains the power to enforce or clarify a property division in a divorce decree. However, a trial court may not enter an order that amends, modifies, alters, or changes the substantive division of property in a final decree. If a trial court enters such an order, the order is void. If a decree is unambiguous, the trial court —must effectuate the order in light of the literal language used." Here, the final divorce decree included a precise formula for calculating the portion of Husband's pension plan that would be distributed to Wife. The award was not ambiguous because it was expressed with mathematical certainty. Thus, trial court lacked jurisdiction to modify the formula. Husband did not need to comply with the bill of review requirements to challenge trial

court's subject-matter jurisdiction. Because trial court lacked subject matter jurisdiction to enter the amended QDRO, COA vacated the amended QDRO.

COA acknowledged that Husband was the one who originally sought the clarification and then appealed the modification to which he agreed. COA noted that this outcome may seem unfair. However, the legislature determined that a trial court is without power to modify an unambiguous property division, and subject-matter jurisdiction cannot be conferred by consent or waiver.

Editor's comment: *A void order is a void order. Subject matter jurisdiction cannot be waived or conferred by agreement. Thus, lack of subject matter jurisdiction is the ultimate trump card and the client gets to use it even if client participated in getting the court to sign a void order. (C.N.)*

Editor's comment: *The Court did leave ex-wife a possible solution. She argued that she and ex-husband entered into an enforceable Rule 11 agreement to increase ex-wife's share of the retirement "in exchange for other consideration." Footnote 6 to the opinion reads: "Our opinion should not be construed as affecting any contractual rights that either [ex-wife] or [ex-husband] might have under the Rule 11 agreement." (J.V.)*

DIVORCE
SPOUSAL MAINTENANCE

EVIDENCE SUPPORTS SPOUSAL MAINTENANCE AND TFC 106.002 PERMITS A JUDGMENT FOR AN EXPERT WITNESS FEE

¶11-5-11. ***Diaz v. Diaz,*** -- S.W.3d --, 2011 WL 2465455 (06/22/11).

Facts: Husband and Wife divorced. They had three minor children. Wife did not speak English. She ran a janitorial business, from which she netted $19,460 a year. Trial court awarded Wife the right to designate the primary residence of the children. Additionally, trial court awarded Wife spousal maintenance for three years and a judgment of $3,750 for an expert witness fee. Husband appealed, arguing Wife failed to present sufficient evidence to support an award of spousal maintenance. Husband also argued that trial court abused its discretion in awarding Wife an expert witness fee as court costs.

Holding: Affirmed as Reformed

Opinion: There is a statutory presumption against spousal maintenance unless the spouse seeking it 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. Wife did not speak English, and her net income was less than $20,000 a year. Wife's income came from a janitorial business she ran, and trial court found Wife was developing skills to become self-supporting during the period of separation and during the time the suit for dissolution of the marriage was pending. Wife overcame the statutory presumption against spousal maintenance.

A trial court may award spousal maintenance if the marriage lasted at least ten years and the spouse seeking maintenance (1) lacks sufficient property to provide for her minimum reasonable needs; and (2) lacks the earning ability to provide support for her minimum reasonable needs. Determining —minimum reasonable needs" if a fact-specific question made on a case-by-case basis. Here, Wife was awarded her house and two cars. She was also required to pay the mortgage on the house and the balance due on the cars. Trial court determined that Wife would need to pay $13,300 a year for mortgage, homeowner's insurance, and property taxes. This would leave Wife with about $500 a month to pay all other expenses, including her car payments and car insurance. Wife lacked sufficient property to provide for her minimum needs. Further, Wife lacked the earning ability to provide support for her minimum reasonable needs. Wife did not speak English. She had three children to care for, so her work schedule needed to remain flexible. Wife ran a janitorial business

and earned almost $20,000 a year. Trial court could have reasonably determined that three years' of spousal support would give her the opportunity to learn English and grow her business.

TFC governs a trial court's discretion in awarding an expert witness fee. Provisions of TFC were intended to supplant the Tex. R. Civ. P. with respect to attorney's fees and costs. Thus, trial court was not bound by the Tex. R. Civ. P.'s —good cause" requirement. In a case involving both a divorce and SAPCR, trial court has broad discretion in awarding costs and fees. TFC 106.002 allows a court to award expenses. Here, Wife paid $3,037.50 for the expert witness. Trial court's award exceeded this amount, so the judgment was reformed to the lower amount.

THERE IS NO REQUIREMENT THAT A SPOUSAL MAINTENANCE AWARD ENTIRELY ELIMINATES A SHORTFALL

¶11-5-12. ***Tellez v. Tellez,*** -- S.W.3d --, 2011 WL 2685967 (Tex. App.—Dallas 2011, no pet. h.) (07/12/11).

Facts: Husband and Wife divorced. Husband was ordered to pay $800 a month in spousal maintenance for three years. Wife appealed arguing that trial court abused its discretion in determining the amount and duration of the spousal maintenance award. Wife argued that the amount should have been nearly doubled, in order to cover her monthly expenses. Further, Wife argued that the award should have been set for an indefinite period of time because of her physical and mental disabilities.

Holding: Affirmed

Opinion: TFC 8.055(a) sets the maximum allowed spousal support at the lesser of $2500 or 20% of the obligor's income. Wife requested more than the statutorily allowed amount by asking for more than 20% of Husband's income. Husband's gross monthly income was $7318—twenty percent of which is $1463. Wife requested $1505.68. Additionally, —there is no requirement that a spousal maintenance award entirely eliminates the shortfall." Wife argued that her net monthly income was less than her monthly expenses, but this fact did not require trial court to award her additional funds. Moreover, trial court awarded Wife 72% of the net community assets.

TFC 8.054(a) limits spousal maintenance to last no more than three years. However, a trial court can award spousal maintenance for an indefinite period of time if the receiving spouse has an incapacitating physical or mental disability that prevents the spouse from support herself through appropriate employment. Here, although Wife argued in her appeal that she suffered an incapacitating physical and mental disability, this contention is not supported by the record. Wife submitted evidence of her diabetes, asthma, neuropathy, hypertension, allergies, arthritis, and severe depression; however, trial court did not issue any finding that Wife was disabled or incapacitated. Wife did not complete an application for disability benefits because she was ineligible. Wife was employed as a teacher's aide and as a nanny. The record did not demonstrate that Wife was unable to support herself through adequate employment.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT DOES NOT NEED TO DETERMINE WHETHER PROPERTY DIVISION IS JUST AND RIGHT IF HUSBAND AND WIFE HAVE ENTERED INTO AN MSA PURSUANT TO TFC 6.602

¶11-5-13. ***Koelm v. Koelm,*** No. 03-10-00359-CV, 2011 WL 2162879 (Tex. App.—Austin 2011, no pet. h.) (mem. op.) (06/02/11).

Facts: Husband and Wife filed for divorce and entered into an MSA pursuant to TFC 6.602. In the agreement, Wife would get half the 401(k) and half of an expected bonus from Husband's job if Wife paid off a debt on her Toyota. In the agreement, the expected bonus would go into her attorney's trust account. If she paid off the Toyota by the agreed date—one month after the bonus—the money would be distributed to her. Otherwise, Wife's half of the bonus would go back to Husband. Subsequently, Wife argued that she had intended to use her half of the bonus to pay off the debt on the Toyota, and that Husband had failed to transmit the funds to Wife's attorney's account. Both parties sent written submissions to the selected arbitrator, who rendered a decision and issued an award, concluding that Husband's attorney's submission reflected the parties' agreement in the MSA. After this decision, Wife refused to sign the final decree. Wife filed objections stating that the final decree included terms not in the MSA, the division of property was not just and right, and Husband failed to perform his obligations under the MSA. Trial court signed the Agreed Final Decree of Divorce in the form attached to the arbitration award. Wife filed a motion for new trial based on the same objections. Trial court denied her motion, and Wife appealed arguing that trial court erred in failing to hold a "formal arbitration hearing" prior to rendering its judgment and in entering the "Agreed Decree of Divorce" without her signature. Wife also argued that the MSA was unenforceable because Husband committed fraud. Finally, Wife argued that the final decree was not a just and right division of property.

Holding: Affirmed

Opinion: To preserve an issue for appeal, the party must have presented to trial court a timely request, objection, or motion stating specific grounds for the desired ruling. Here, Wife participated in arbitration without objecting to a lack of a formal hearing. She did not raise the issue by objecting, and she did not address the issue in her motion for new trial. Wife waived this issue for the purposes of appeal.

TFC 6.602 provides certain requirements that make an MSA binding, including notice of irrevocability and signatures by the parties. Further, TFC 6.602 states that if the requirements are met, a party to the MSA is entitled to judgment notwithstanding another rule of law. Here, the requirements were met, so the parties were bound by the MSA. TFC 6.601(b) and 6.602(c) required trial court to enter judgment despite Wife's attempted repudiation.

Irrespective of the clear language of TFC 6.602, the legislature likely did not intend MSAs to be enforceable if agreement was procured by fraud, duress, coercion, or other dishonest means. If Husband obtained Wife's participation by fraud, the agreement would be unenforceable. However, Wife failed to raise this issue in an objection or in her motion for new trial, so Wife has waived this issue on appeal. Although, even if Wife had not waived this issue, there was no evidence presented to support a claim of fraud.

TFC 7.001 states that in a divorce proceeding, "the court shall order a division of the estate of the parties in a manner that the court deems just and right . . . ." However, when a divorce decree is entered into pursuant to TFC 6.602, then TFC 7.001 does not apply. The language of 6.602 indicates that Legislature intended to create a procedural shortcut for MSAs in divorce proceedings. Because TFC 7.001 did not apply, trial court was not required to make a determination of whether the property division was just and right.

Editor's comment: *The COA got it right. It's amazing that an appeal was filed asserting that the division in a divorce decree based upon a mediated settlement agreement was not a just and right division or property. The more serious question involves the alleged requirement of a formal arbitration hearing, which was waived. If there is an arbitration provision in a mediated settlement agreement, there are several critical concepts to include in the arbitration provision to avoid any potential problems: (1) the mediator will serve as the sole arbitrator of disputes; (2) at the sole discretion of the arbitrator, the arbitration may be by written submissions without a hearing; and (3) the arbitration shall be binding. (J.A.V.)*

SAPCR

STANDING AND PROCEDURE

MOTHER'S GENERAL DENIAL TO SAPCR WAS SUFFICIENT TO REQUIRE TDFPS AND STEP-FATHER TO CARRY BURDEN TO SHOW APPOINTMENT OF MOTHER AS MANAGING CONSERVATOR WOULD SIGNIFICANTLY IMPAIR THE CHILD

¶11-5-14. ***In re T.R.B.,*** -- S.W.3d --, 2011 WL 2150348 (Tex. App.—San Antonio 2011, orig. proceeding) (06/01/11).

Facts: Mother adopted three Children, and she was their only legal parent. Mother married Step-Father, but the couple later separated. Step-Father filed a SAPCR seeking conservatorship. Mother filed a general denial, and she challenged Step-Father's standing to initiate the SAPCR. Subsequently, the Youngest Child made a sexual outcry against the Oldest Child and Mother. TDFPS investigated the allegation and determined an assault had occurred. TDFPS filed a parental termination suit seeking to terminate Mother's parental rights to the Youngest Child. Mother consented to the termination. TDFPS then filed a termination suit for the older two Children. Step-Father and Youngest Child sought to intervene, and TDFPS moved to strike the interventions and all related pleadings. Later, all the parties attended mediation, at which they reached an agreement to consolidate the parties and the cases.

At the consolidated trial, TDFPS began to present its case. However, after several days of presenting evidence, but before TDFPS rested, all the parties, except for Mother, announced they had reached an agreement. In the agreement, TDFPS and Step-Father would be joint managing conservators, and Mother would be named possessory conservator with no right of possession. Mother objected the agreement, but trial court overruled her. Trial court directed a verdict for TDFPS and Step-Father with the terms of Mother's possession to be determined at a later date. Mother then petitioned for a writ of mandamus complaining that she had been denied her right to a jury trial.

Holding: Mandamus conditionally granted

Opinion: Supreme Court has held that in cases involving child custody, "appeal is frequently inadequate to protect the rights of parents and children" because "[j]ustice demands a speedy resolution." Here, the Children were in foster care, the case had been in the trial court system for about three years, and at the time the petition for writ of mandamus had been filed, no final judgment had been entered. Waiting for final judgment before appealing would have unnecessarily prolonged the case. Therefore, mandamus relief was appropriate.

TFC 105.002 does not permit a court to contravene a jury verdict on an issue of conservatorship. However, a court may enter a directed verdict if the jury had not yet rendered a verdict, and the directed verdict is warranted by the evidence. Here, trial court entered a verdict based on a perceived pleading error, not the evidence. Trial court found that because Mother did not assert any affirmative relief, and because the other parties accepted a settlement agreement, there was no question of fact to take to a jury. In addition, "directed verdict should not be granted against a party before the party has had a full opportunity to present its case and has rested." However, entering a directed verdict may be proper if a defect in the pleadings makes it insufficient to support a judgment. Here, Mother's general denial was sufficient to contest any modification of con-

servatorship. Despite trial court's assertion to the contrary, TFC 102.008(b) does not require a child's only parent who has full parental rights to allege anything more than a general denial. A general denial provided fair notice that Mother wished to retain her rights in the SAPCR filed against her.

There is a rebuttable presumption that a parent should be named sole managing conservator. TDFPS and Step-Father had the burden to "affirmatively prove by a preponderance of the evidence that appointment of the parent as managing conservator would *significantly impair* the child, either physically or emotionally." Mother's general denial was sufficient to require TDFPS and Step-Father to carry this burden. Trial court erred in deciding there was no question of fact remaining in the case.

Finally, "[s]tanding is a component of subject matter jurisdiction and is a constitution prerequisite to maintaining a lawsuit under Texas law." Trial court erred in determining that the standing issue was moot because the parties reached a settlement agreement. The issue of whether Step-Father had standing to seek affirmative relief through a SAPCR is a question that must be resolved by the trier of fact.

COMMENTS MADE BY TRIAL COURT DURING RENDITION ARE NO SUBSTITUTE FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

¶11-5-15. ***In re J.C.,*** -- S.W.3d --, 2011 WL 2802927 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (07/19/11).

Facts: Mother was murdered, and Father was initially suspected of killing Mother. Although the charges were eventually dropped, Father was incarcerated for a couple of years due to other unrelated immigration violations. During Father's detention, paternal grandmother and maternal grandparents had custody of the Child and her brother. After Father was released, he regained custody of the brother. However, maternal grandparents were granted primary possession of the Child. Father was granted possession of the Child two nights a week. At the final hearing, there was testimony from Mother's family that Mother had been seen with bruises and scratches and that Mother had stated that she was afraid that Father would hit her. A psychologist testified that the Child suffered from a separation anxiety disorder and that the child would suffer if she was separated from her maternal grandparents, with whom she had been living primarily since her Mother's murder. Trial judge interviewed the Child in camera off the record. Trial judge stated that based on the testimony and the in camera interview, it would be in the Child's best interest to remain with her maternal grandparents. Father filed a motion for a new trial and a request for findings of fact of conclusions of law. The motion for new trial was overruled by operation of law, and the findings of fact and conclusions of law were never entered. Father argued that trial court abused its discretion by appointing him and maternal grandparents as joint managing conservators and by granting maternal grandparents the right to determine the Child's primary residence. At the final hearing, trial court took judicial notice of testimony from earlier proceedings, and Father did not order a record of these earlier transcripts on appeal.

Holding: Reversed and Remanded

Opinion: A trial court may only take judicial notice of testimony from a prior hearing if the testimony is properly admitted into evidence. Here, transcripts of earlier proceedings on temporary orders were never admitted into evidence, so any judicial notice taken of them was improper.

Trial court did not enter findings of fact and conclusions of law, and comments made during rendition did not provide a substitute for the findings. Further, the absence of a transcript of the Child's in camera interview did not make the record incomplete, so COA did not need to presume that facts arose during the interview supporting trial court's judgment.

TFC 153.131 provides that there is a rebuttable presumption that appointing a parent as managing conservator is in the child's best interest. A non-parent may rebut the presumption either by showing that appointing the parent "would significantly impair the child's physical health or emotional development," or by providing evidence to support "[a] finding of a history of family violence." This is a "heavy burden" on a

non-parent. Here, although a psychologist testified that removing the Child from her maternal grandparents would cause ―some sort of damage," there was no evidence that there would be significant impairment. Additionally, there was no evidence that the Child suffered any impairment when the Child was separated from her grandparents for visitations with Father. Moreover, although there was evidence that Mother had been seen with bruises and scratches, there was no evidence to attribute these injuries to Father. Evidence that Mother may have been afraid of Father was insufficient to support a finding of physical abuse. Maternal grandparents failed to provide sufficient evidence to rebut the parental presumption.

CASE FILED BY TFDPS DID NOT NEED TO BE DISMISSED BECAUSE TRIAL ON THE MERITS COMMENCED BEFORE THE 180-DAY DISMISSAL PERIOD EXPIRED; THERE WAS NO REQUIREMENT THAT TRIAL COURT ENTER JUDGMENT BEFORE THE 180-DAY PERIOD ENDED

¶11-5-16. ***In re K.F.,*** -- S.W.3d --, 2011 WL 3123360 (Tex. App.—San Antonio 2011, no pet. h.) (07/27/11).

Facts: Mother had three children, each with a different father. TDFPS filed suit to terminate Mother's parental rights. Trial court appointed TDFPS as a temporary managing conservator. One Father filed a SAPCR seeking appointment as sole managing conservator for his Child. After a hearing, the associate judge granted a six-month extension of the original trial date, set a new dismissal date, and ordered the Child to be returned to Father. Later, the associate judge referred the parties to the district court to determine final custody of the Child. After a bench trial, court ruled that the parents would be joint managing conservators and granted Father the right to determine the primary residence of the Child. Mother ordered to pay child support and ordered family counseling. The Child's half-siblings were returned to Mother, and trial court signed an order dismissing TDFPS as temporary managing conservator of the Child's half-siblings before the 180-day extension expired. Trial court did not sign the final order addressing the Child's custody until three months later, which was after the dismissal date. Mother appealed, arguing that the trial court's signed order was not a final order because the Child's case was not severed from the other children, and TFDPS remained involved in the case. She argued that because trial court did not issue its final order until after the dismissal date, the case pertaining to the Child should have been dismissed. Mother also argued that not all the parties received notice of the final trial.

Holding: Affirmed

Opinion: A severance of a law suit divides a lawsuit into two or more separate and independent causes. Contrarily, a trial court may order a separate trial in order to hear and determine one or more issues without having to address other aspects of the lawsuit at the same time. Nothing in the record supported a finding that there was a severance of this lawsuit. In all of the court's orders, no distinction was made between the three children. Although a trial on the merits was only necessary to resolve the issue of the Child's conservatorship, the trial on the merits affected the disposition of the case for all three children. This case was not severed.

TFC 263.401 provides that a court must dismiss a termination suit filed by TDFPS on the first Monday after the first anniversary of the rendering of temporary orders. However, a court can extend the time period for 180 days if extraordinary circumstances exist. If a trial on the merits has not commenced before the expiration of the 180-day extension, the suit must be dismissed. Unlike the prior version of this statute, there is no requirement that a court render a final order before the expiration of the 180-day extension. Here, the trial on the merits commenced more than six months prior to the expiration of the 180-day extension. Although trial court did not issue its final disposition until after the 180 days had lapsed, trial court was not required to dismiss the case under TFC 263.401 because it is the date of the commencement of the trial on the merits that matters, not the date of the final order.

Although the Child's step-siblings' fathers were not notified of the hearing regarding the Child, their presence was not necessary. Thus, trial court did not fail to notify any necessary party of the hearing.

TEMPORARY CAREGIVERS HAD STANDING TO FILE ORIGINAL SAPCR BECAUSE THEY SHOWED THAT THEY HAD "ACTUAL CARE, CONTROL, AND POSSESSION" OF THE CHILDREN; THEY DID NOT NEED TO SHOW THEY HAD LEGAL CONTROL OF THE CHILDREN

¶11-5-17. ***Jasek v. Jasek,*** -- S.W.3d --, 2011 WL 3659312 (Tex. App.—Austin 2011, no pet. h.) (08/17/11).

Facts: TDFPS filed a SAPCR against the biological parents of the Children and successfully terminated the parents' rights to the Children. TDFPS then placed the Children with Caregivers pursuant to a "Placement Authorization" agreement. The agreement required Caregivers to provide "daily care, protection, and reasonable discipline" for the Children, enroll the Children in school, and "provide routine transportation." The agreement also stated that TDFPS could remove the Children at any time, subject to court orders. After about a year and a half, one of the Caregivers tested positive for marijuana. TDFPS removed the Children from Caregivers' home. Prior to the drug test, both TDFPS and Caregivers intended the Children to remain with Caregivers permanently. Caregivers filed a "Petition in Intervention in [SAPCR]" under the same cause number as the termination proceedings. TDFPS filed a motion to strike. Trial court found Caregivers lacked standing and granted TDFPS's motion. Caregivers appealed, arguing that they had standing to file an original SAPCR under TFC 102.003(a)(9) and that they and standing to intervene in a termination case under TFC 102.004(b).

Holding: Reversed and Remanded

Opinion: TFC 102.004(b) allows a person who has had substantial contact with a child to intervene in a *pending* suit if it can be shown that appointing the parents as managing conservators would not be in the child's best interest. Here, a final order in the termination suit had been issued, so the case was no longer pending. Caregivers argued that the case would be pending until the Children were placed in a permanent home. While there would be "review hearings" to assess the supervision of the Children, trial court had entered its final order, and there was no pending case in which to intervene.

"A pleading that gives adequate notice will not fail merely because the draftsman named it improperly." In order to provide fair notice to an opposing party, a pleading must state the basis for each claim, providing the opposing party an opportunity to prepare a defense. Here, although styled "Petition in Intervention" in the SAPCR, the Caregivers' pleading asked that they be appointed managing conservators of the Children, and Caregivers asserted standing to bring an original SAPCR. The pleadings provided TDFPS with adequate notice. TDFPS did not file special exceptions to the Caregivers' pleadings, so the pleadings must be construed liberally in favor of the Caregivers. To show they had standing to bring an original SAPCR, Caregivers cited TFC 102.003(a)(9), claiming to have had "actual care, control, and possession of the [Children] for at least six months ending not more than 90 days preceding the date and the filing of the petition." Caregivers' pleading provided TDFPS with adequate notice that Caregivers were seeking a modification of conservatorship.

TDFPS did not dispute that Caregivers could meet the "actual care" and "actual possession" requirements of TFC 102.003(a)(9) for standing. TDFPS contested that Caregivers could not show they had "actual control" of the Children because TDFPS retained legal control over the Children. "Actual" means "existing in fact or reality." The word is often juxtaposed with "constructive." "Actual" indicates something that exists in fact, as opposed to something that is a function of legal duties or imputation. "Control" means the "power or authority to guide or manage: directing or restraining domination." Thus, "'actual . . . control . . . of the child' means the actual power or authority to guide or manage or the actual directing or restricting of the child, as opposed to legal or constructive power or authority to guide or manage the child." Although some courts have indicated otherwise, nothing in TFC 102.003(a)(9) requires that a parent voluntarily relinquish permanent care, control, and possession or that the person seeking standing have legal control over the child. Additionally, the statute does not require the person seeking standing to have the ultimate legal right to the child.

Finally, *Troxel*, 53 U.S. at 65, was not implicated here because the parents' constitutional interests in the "care, custody, and control" was not at issue. Even if *Troxel* was applicable, TFC 102.003(a)(9) is narrowly tailored and gives standing only to persons who have exercised "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." TFC 102.003(a)(9) does not violate a parent's right to make decisions regarding his or her children.

Here, Caregivers had actual control over the Children for the requisite time period. Caregivers provided "daily care, protection, control, and reasonable discipline" for the Children. Caregivers enrolled the Children in school. Caregivers provided "the structure, love and support necessary for [the Children] to be successful." The Children were "very bonded with [Caregivers]" and were "happy in their home." Caregivers had standing under TFC 102.003(a)(9) to bring an original SAPCR.

Editor's comment: *Really? A person seeking standing under section 102.003(a)(9) would have to show legal care, control and possession of the child to have standing? Dividing legal care, control and possession and actual care, control and possession defies reality and common sense. In addition, it would create confusion and ambiguity in otherwise straightforward standing decisions. The COA got it right. (J.A.V.)*

TEXAS LACKED JURISDICTION OVER SAPCR BECAUSE THE CHILD LIVED IN GERMANY, AND THERE WAS AN ONGOING CHILD CUSTODY PROCEEDING IN GERMANY

¶11-5-18. ***In re Green,*** -- S.W.3d --, 2011 WL 3715075 (Tex. App.—San Antonio 2011, orig. proceeding) (08/24/11).

Facts: Mother and Father divorced. Father was in the army. The couple had one Child, who was born in Germany. At the time this suit was filed, Child had been living in Germany for more than a year. Mother filed a SAPCR in Texas, though neither she nor the child had ever lived there. Father filed a similar suit in Germany. In the Texas trial court, Father filed a Second Amended Special Appearance and Subject Thereto, Plea to the Jurisdiction, Motion to Stay and Plea in Abatement. After a hearing on the motions, Judge Arteaga signed orders denying the special appearance, plea to the jurisdiction, and plea in abatement. Judge Nellermoe signed an order granting a stay under the Service Members Civil Relief Act. Father contended that Judge Stryker signed an order granting temporary orders that affected the Child, but this order could not be located in the partial record provided to COA. Father filed a petition for a writ of mandamus, arguing that Texas lacked jurisdiction over the SAPCR, trial court lacked personal jurisdiction under TFC 6.301, Judge Stryker's order affecting the Child violated the stay issued by Judge Nellermoe.

Holding: Writ of mandamus conditionally granted

Opinion: Mandamus relief is appropriate in a jurisdictional dispute in a child custody case. TFC 152.501 provides that a child's home state has primary jurisdiction over child custody proceedings. The home state is the state where the child lived for at least six months prior to the commencement of the custody proceedings. If Texas is not a child's home state, child custody proceedings can only be brought in Texas if another state did not have home state jurisdiction, or the court of the home state declined to exercise jurisdiction. Here, the Child never lived in Texas. Additionally, there was an ongoing child custody proceeding in Germany. Trial court did not have jurisdiction over the SAPCR.

To be entitled to mandamus relief for Father's other complaints, he needed to show that trial court clearly abused its discretion and that he lacked an adequate remedy by appeal. The residency requirement in TFC 6.301 is not jurisdictional, but involves the right to maintain suit. Nothing in the record indicates trial court abused its discretion in denying Father's plea to jurisdiction or plea to abatement.

The record did not contain a temporary order signed by Judge Stryker. The record does include a temporary injunction signed by Judge Nellermoe, but Father did not provide any argument for why the temporary injunction was improper under the stay. Moreover, Father's argument is moot because trial court lacked jurisdiction over the SAPCR, and the alleged order affected the Child.

SAPCR
POSSESSION

TRIAL COURT'S ORDER THAT FATHER SUBMIT TO RANDOM ALCOHOL TESTS EXCEEDED THE RESTRICTIONS NECESSARY TO PROTECT THE BEST INTERESTS OF THE CHILD

¶11-5-19. ***Newell v. Newell,*** -- S.W.3d --, 2011 WL 3672042 (Tex. App.—Fort Worth 2011, no pet. h.) (08/18/11).

Facts: Mother and Father were married and had one Child together. Father began abusing drugs about 5 years into the marriage. Less than 2 years later, Mother filed for divorce. Trial court entered temporary orders that made Father's possession of the child contingent on Father passing drug tests. Mother and Father agreed to joint managing conservatorship and to Father having scheduled possession. The parents went to trial to decide whether Father's drug tests would continue beyond 5 years if he remained unemployed. At trial, evidence was entered regarding Father's use of alcohol. Father admitted that he had abused alcohol in the past, but he stated that he was never addicted to alcohol. Father agreed that it was fair to enjoin both parents from drinking while in possession of the Child and said that he would never drink around the Child. Mother testified that Father had ~~b~~been high" around the Child in the past, that he had ~~a~~an issue with alcohol abuse," and that the Child had told Mother that Father drank alcohol. Trial court ordered random alcohol tests in addition to the drug tests. If the test results showed that Father had consumed alcohol within 80 hours prior to the test, or if Father failed to take a required test, his periods of possession with the Child would be modified. Father filed a motion for new trial arguing the evidence did not support the order for alcohol tests. During the new trial hearing, trial court offered to modify the order if Father agreed to pay for and wear a SCRAM device while in possession of the Child. Father declined the offer, and trial court denied his motion for new trial. Father appealed, arguing trial court abused its discretion by ordering random alcohol tests when the evidence was factually insufficient to support the order.

Holding: Affirmed as modified

Majority Opinion: (J. Walker)

When parents are given joint managing conservatorship, there is a rebuttable presumption that the standard possession order is in the child's best interest. However, if a standard possession order is unworkable or inappropriate, ~~[~~t]he court shall render an order that grants periods of possession of the child as similar as possible to those provided by the standard possession order." Further, an order that restricts or limits a parent's possessory rights may not exceed the terms necessary to protect the best interests of the child. Here, there are few facts relating to Father's past with alcohol, and trial court's order for random alcohol tests is very restrictive. The test results would turn out positive if Father consumed alcohol within 80 hours prior to the test, and under trial court's order, the test could be given up to 12 hours prior to Father's possessory period. Thus, in order to ensure that he would not test positive for alcohol, Father would need to abstain from drinking alcohol for 92 hours prior to taking possession of the Child. There was no evidence that Father had ever been addicted to alcohol, that his drinking had ever endangered the child, or that drinking alcohol within 92 hours of taking possession of the Child would negatively impact the Child. While trial court has authority to order random alcohol tests, in this case, trial court's order exceeded the restrictions required to protect the Child's best interest.

Concurring Opinion: (J. McCoy)

The purpose of the order for random alcohol tests was to ensure that Father did not drink while he was in possession of the Child. While the test could show whether Father had consumed alcohol within 92 hours

prior to taking possession of the child, a negative result would not ensure that Father would not drink once the Child was in his care. Therefore, the timing of the testing would not achieve the desired result.

Dissenting Opinion: (C.J. Livingston)

The majority erred in deleting the requirement that Father submit to random alcohol tests. There was sufficient evidence to support trial court's decision, and even if there had not been sufficient evidence, COA should have remanded the case rather than modify the judgment.

Mother testified that after living with Father, she knew that he had —a issue with alcohol abuse." Mother also testified that the Child had told Mother that Father drank while the Child was with Father. Father testified that he had abused alcohol in the past and that he thought it was fair for the court to enjoin both parents from drinking alcohol while in possession of the Child. Father did not propose an alternative test that would cover a lesser period of time, and he declined to accept trial court's proposed alternative that Father wear a device to monitor alcohol consumption only while he possessed the Child. There was sufficient evidence to support the trial court's order for random alcohol tests.

Even if there was insufficient evidence, COA should have remanded the case instead of modifying the order. COA should have deleted the alcohol testing requirement only if there had been no evidence to support trial court's order. Because there was at least some evidence supporting the order, COA should not have substituted its judgment for the trial court's in weighing the credibility of the evidence.

Editor's comment: *Why was there no remand if father admitted he abused alcohol in the past and it was fair to enjoin both parents from using alcohol while in possession of child? Obviously there is legally sufficient evidence to sustain the random alcohol tests based on father's admissions. If the court believed that there wasn't enough evidence, i.e., factually insufficient evidence, to sustain the order then why no remand? Troubling. (C.N.)*

Editor's comment: *All three opinions (majority, concurring and dissenting) make valid points. Justice Walker (majority) says that the alcohol-testing requirement is too restrictive given the evidence before the trial court. Justice McCoy (concurring) points out that even if the father tested clean prior to possession that would not keep him from drinking during possession, so the restriction accomplished nothing. Chief Justice Livingston (dissenting) argues that the record contained enough evidence of alcohol abuse to find no abuse of discretion, but if the trial court did abuse its discretion, the case should be remanded so that the trial court could rethink how to protect the child given the evidence of alcohol abuse. Because the child's best interest is at stake, perhaps Justice McCoy's reasoning should have led him to concur with Chief Justice Livingston's opinion that the Court should remand the case. (J.V.)*

SAPCR
GRANDPARENT ACCESS AND POSSESSION

THE "LAW OF THE CASE" DOCTRINE APPLIED BECAUSE THE FACTS AND ISSUES ADJUDICATED BY TEX. SUP. COURT WERE SUBSTANTIALLY THE SAME AS THOSE PRESENTED TO TRIAL COURT AT TRIAL ON THE MERITS; GRANDMOTHER COULD NOT RECEIVE GRANDPARENT ACCESS OVER FATHER'S OBJECTIONS BECAUSE SHE FAILED TO SHOW THAT THE CHILDREN'S PHYSICIAL HEALTH OR EMOTIONAL WELL-BEING WOULD BE SIGNIFICANTLY IMPAIRED IN THE ABSENSE OF VISITATION WITH HER

¶11-5-20. ***In re B.G.D.,*** -- S.W.3d --, 2011 WL 3795228 (Tex. App.—Fort Worth 2011, no pet. h.) (08/25/11).

Facts: Mother had one Child before marrying Father. Mother and Father then had two Children together, and Father adopted Mother's first Child. Mother died after a long battle with leukemia. For a few months after

Mother's death, the three Children lived with Maternal Grandmother and Maternal Step-Grandfather (collectively "Grandparents"). When Father reasserted himself as primary caregiver, tensions arose between Father and Grandmother. Grandparents filed an original SAPCR, asking to be appointed sole managing conservators of the Children because they believed Father was unfit and emotionally distant. Grandparents attached affidavits to their petition that alleged Father was an unfit parent and that Father verbally and physically abused the Children. After a hearing, trial court returned the Children to Father's care and dismissed the case without prejudice. Father then cut off all contact between the Children and Grandparents. Grandparents filed a petition for grandparent access. In a temporary order hearing, a court-appointed psychologist testified that the children were "clearly distraught" about losing their relationship with Grandparents. However, he also testified that the Children's "sadness and yearning [did not] rise to a level of significant emotional impairment." Trial court issued a temporary order granting visitation on the first Saturday of each month. Father sought mandamus relief, which Tex. Sup. Court granted. ***In re Derzapf*, 219 S.W.3d 327 (Tex. 2009).** Tex. Sup. Court held that Step-Grandfather lacked standing to seek grandparent access, and Grandmother failed to meet her statutory burden of proving the Children's physical health or emotional well-being would be significantly impaired in the absence of visitation with her. Subsequently, trial court held a trial on the merits, at which the court-appointed psychologist provided an updated report. By the time of the trial, Father and oldest Child's relationship had deteriorated to the point that oldest Child had successfully emancipated himself from Father and moved in with Grandparents. Trial court signed a judgment ordering for the younger Children grandparent visitation with Grandmother on the third Saturday of each month and denying Father's request for attorney's fees. Father appealed, arguing Grandmother lacked standing under TFC 153.433 to seek grandparent access. Father also argued that because "virtually nothing [had] changed" since Tex. Sup. Court issued its mandamus opinion, trial court violated the law of the case. Finally, Father asked for the case to be remanded for consideration of his request for attorney's fees.

Holding: Reversed and Remanded

Opinion: TFC 153.433 allows a court to order possession or access to a grandparent if, among other requirements, the grandparent mush show denial of possession or access to the child. However, this section addresses whether or not a grandparent can prevail in an access suit. This section does not address standing. TFC 153.432(a) grants standing to file a modification suit to biological or adoptive grandparents. Here, it is undisputed that Grandmother is the biological grandparent of the Children. Thus, Grandmother has standing to seek possession or access to the Children.

When an issue has been resolved on the merits in a prior mandamus proceeding, the "law of the case" doctrine applies to govern the issue through subsequent stages of the case. TFC 153.433 sets a high threshold for a grandparent to overcome the presumption that a fit parent acts in his child's best interest. In issuing the mandamus opinion, Tex. Sup. Court found Grandmother failed to overcome that presumption. Thus, if the issues presented in the trial on the merits were substantially the same as the issues presented at the temporary orders hearing, then the law of the case doctrine would apply, and trial court would have abused its discretion in granting Grandmother possession or access against Father's wishes. In both proceedings, the court-appointed psychologist reported that the younger two Children had a "lingering sadness" about losing contact with their Grandparents, but their "sadness and yearning [did not] rise to a level of significant emotional impairment." In both proceedings, the court-appointed psychologist recommended renewing contact between the Children and the Grandfather, then their uncles, and Grandmother only after she received counseling. The psychologist did not recommend renewed contact with Grandmother alone. In the mandamus proceeding, Tex. Sup. Court noted the psychologist did not testify that denying Grandmother access would significantly impair the Children's physical or emotional health, and thus Grandmother did not meet her burden. Because there was no substantive difference between the two proceedings regarding the two younger Children, the law of the case doctrine applies, and trial court abused its discretion in granting Grandmother's petition for grandparent visitation.

COA noted that the circumstances of this case were unfortunate and quoted *Troxel*, 530 U.S. at 70. "In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance."

Because COA reversed trial court's judgment regarding Grandmother's petition, it was appropriate to remand the case to reconsider trial court's award of attorney's fees.

SAPCR
ENFORCEMENT

MOTION FOR ENFORCEMENT MUST CLEARLY AND CONCISELY IDENTIFY THE PROVISION OF THE ORDER ALLEGEDLY VIOLATED, AND ENFORCEMENT ORDER MUST INCLUDE THE LANGUAGE OF THE PROVISIONS OF THE ORDER FOR WHICH ENFORCEMENT WAS REQUESTED

¶11-5-21. ***In re Aslam,*** -- S.W.3d --, 2011 WL 2622374 (Tex. App.—Fort Worth 2011, orig. proceeding) (07/5/11).

Facts: Mother and Father divorced. They were named joint managing conservators of their Child. Each parent had the right to receive health information and to have access to the Child's medical records. Mother was required to provide health insurance for the Child and to provide any forms necessary for the Child's health care. Trial court ordered Mother to execute all necessary releases pursuant to HIPPA to permit Father to obtain the Child's health care. Mother executed a HIPPA release and had it placed in the Child's medical record. Father did not know that Mother did this. When he did not receive a release from Mother, Father filed a motion for enforcement alleging that Mother "wholly failed to execute the necessary HIPPA releases to permit [Father] . . . to obtain health care information." Trial court found Mother in contempt. Trial court noted that Mother admitted that she did not *provide* the HIPPA releases to Father. Mother filed a petition for a writ of mandamus because Father's motion only alleged that she failed to *execute* the release, not that she failed to *deliver* one. Mother argued that the motion did not provide her with notice for why she could be held in contempt. Mother argued that she did not violate the express terms of the provision, and she should not be held in contempt merely because Father interpreted the provision to require delivery of the release.

Holding: Writ of Mandamus Conditionally Granted

Majority Opinion: (C.J. Livingston, J.J. Gardner)

A motion for enforcement must identify, in plain language, the provision that was allegedly violated, the manner in which it was violated, and the relief requested by the movant. For a person to be held in contempt for violating a court decree, "the decree must spell out the details of compliance in clear, specific and unambiguous terms," and interpretation cannot "rest upon implication or conjecture." Due process requires that the alleged contemnor receive full and complete notice of the factual allegations against her. Here, Father alleged that Mother violated a provision in the divorce decree that required Mother to execute a HIPPA release, allowing Father to obtain health-care information. Mother executed the release, and Father presented no evidence indicating that he had been unable to obtain health-care information. Father's motion did not give Mother notice of what act or omission for which trial court eventually held her in contempt. Thus, the contempt order was void.

Editor's comment: *This case gets a double star for its impact on drafting a decree. It's not good enough to require the other side to execute a HIPPA release. You must also require that they deliver it to you or any necessary medical provider. If you require delivery to yourself, it is advisable you require them to appear at a specific time, place, and perhaps fully clothed, recently showered, and with a smile on their face. (C.N.)*

Editor's comment: *If one party wants the other to execute and deliver a document, the parties' divorce decree must require execution and delivery, not just execution. (J.V.)*

SAPCR
CHILD SUPPORT

CHILD SUPPORT MAY NOT BE CONDITIONED ON WHETHER PARENT IS ALLOWED ACCESS TO OR POSSESSION OF THE CHILD

¶11-5-22. ***In re B.F.K.,*** No. 11-10-00217-CV, 2011 WL 2732540 (Tex. App.—Eastland 2011, no pet. h.) (mem. op.) (06/30/11).

Facts: Mother and Father divorced. They were appointed joint managing conservators of their teenage Child. The final decree ordered that the Child would spend alternate weeks with each parent. The decree also required Father to pay alimony, pay for health insurance for the Child, and pay for the Child's private school tuition. Mother later filed a SAPCR because she asserted that the order had become unworkable. Mother requested that Father be allowed visitation only for designated places and times or that Father's visitation periods be supervised. Alternatively, Mother alleged that Father showed signs of child neglect and requested that Father be denied access to the child. Additionally, Mother requested that Father's child support payments be increased. Mother and Father both testified to the relationship between Father and the Child, and trial judge interviewed the Child in chambers. Trial judge was convinced that Child would not have anything to do with Father's new wife even though the Child had not met the new wife. Trial court granted Mother the sole right to determine the primary residence of the Child. Further, trial court ordered that no visitation should be ordered because the Child refused to visit Father and his new wife. Trial court also ordered that Father was not required to pay child support or the Child's private school tuition because there would be no court-ordered visitation and Mother could afford to pay the tuition out of the alimony payments. Mother appealed arguing trial court abused its discretion by not ordering Father to pay child support or tuition.

Holding: Reversed and Remanded

Opinion: TFC 154.011 prohibits a court from conditioning payment of child support on whether a parent is allowed possession or access to a child. Here, trial court essentially denied Father access to the Child by denying Father visitation "until such time [the Child] initiates contact with [Father] and/or expresses the desire to exercise visitation with" him. Further, trial court ordered that Father did not have to pay child support "until such time as visitation resumes." This order violated public policy because it conditioned Father's support of the Child upon his ability to exercise visitation and possession rights.

Editor's comment: *It works both ways! A court cannot deny visitation on the basis that the obligor has failed to pay child support. However, the court cannot deny child support if the court orders no visitation or makes it contingent on the desires of the obligor and the child. (C.N.)*

QDRO DID NOT CHANGE SUBSTANTIVE PROPERTY DIVISION BY NAMING CHILD, INSTEAD OF WIFE, AS ALTERNATE PAYEE FOR RETIREMENT FUNDS BECAUSE BOTH THE DECREE AND THE QDRO CLEARLY STATED THE PAYMENT WAS FOR CHILD SUPPORT; QDRO DID NOT CHANGE SUBSTANTIVE PROPERTY DIVISION BY SPECIFYING WHO WOULD BE REPSONSIBLE FOR TAXES ASSOCIATED WITH LUMP CHILD SUPPORT PAYMENT FROM HUSBAND'S RETIREMENT ACCOUNTS; QDRO DID NOT CHANGE SUBSTANTIVE PROPERTY DIVISION BY INCLUDING PROVISION FOR DISPERSAL OF FUNDS IN THE EVENT OF CHILD'S UNTIMELY DEATH IN THE ABSENCE OF A NAMED BENEFICIARY

¶11-5-23. ***Quijano v. Quijano,*** -- S.W.3d --, 2011 WL 3197709 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (07/28/11).

Facts: Husband and Wife had one child together before Wife filed for divorce. Husband was served with the petition, but he did not file an answer, and a default judgment was entered against him. At the default hearing, Mother entered a proposed division of the property. After the hearing, trial court dissolved the marriage, resolved possession and access issues dealing with their child, and divided the marital estate. In addition to the property division, trial court ordered that the couple file separate tax returns for the previous and current years. Trial court also found that a lump sum award of child support was appropriate and the payment would be taken from Husband's retirement accounts. Trial court issued two QDROs to effect the lump sum child support award. Both stated that the Child and Wife were alternate payees for the accounts. Husband filed a motion for new trial, which was denied. Subsequently, trial court issued amended QDROs to specify that Husband would be responsible for tax liabilities. Husband filed two separate appeals that were later consolidated. Husband challenged trial court's issuance of the amended QDRO because it changed the substantive division of the estate in violation of TFC 9.007.

Holding: Affirmed

Opinion: Once a trial court‘s plenary power expires, it may not alter, amend, or modify a substantive division of property in a final decree. However, a court generally retains its jurisdiction to enforce and clarify a property division. A QRDO is a type of enforcement order. In the final decree, trial court named Wife as the alternate payee for funds from a retirement account for a lump sum child support. In the QRDO, trial court named the Child as the alternate payee. However, this did not change the substantive division because both documents clearly indicated the payment was for child support.

Early distributions from a retirement account may be subject to income tax to be paid by the distributee. If the alternate payee is a spouse or former spouse, then the recipient is liable for any taxes. However, amounts received for child support are nontaxable. If the alternate payee is a child or other dependant, then the plan participant is responsible for taxes. If Wife had been named as the alternative payee, the tax liability would have been unclear since she would ordinarily be liable for taxes as a former spouse, but child support payments are nontaxable. By naming the Child as the alternative payee, any potential confusion was avoided. The QRDO was consistent with the final decree.

Husband did not provide any evidence that anyone had been named as the Child's beneficiary under the QRDO or the retirement plan. Additionally, even if a beneficiary had been named, in the event of the Child's untimely death, Wife would have to repay to Husband one-half of any remaining child support. The QRDO's provision for distribution of funds in the event of the Child's death merely assisted in the implementation of, and did not amend, modify, or change, the division of property in the final divorce decree

SAPCR
CHILD SUPPORT ENFORCEMENT

DEFENSE OF ESTOPPEL IS AVAILABLE IN A CHILD SUPPORT ENFORCEMENT SUIT BROUGHT BY THE OAG

¶11-5-24. ***In re C.E.S.,*** -- S.W.3d --, 2011 WL 2185663 (Tex. App.—Fort Worth 2011, no pet. h.) (06/02/11).

Facts: Mother and Father had a Child and then divorced. Trial court ordered Father to pay child support. After about eight years of making payments, Father became frustrated because he was being denied the opportunity to speak with and visit with the Child. Mother and Father agreed to terminate Father's parental rights and obligations. Father signed "Father's Affidavit for Voluntary Relinquishment of Parental Rights" in front of two witnesses and a notary. The affidavit listed rights, powers, duties, and privileges that were being terminated, including the duty to pay child support. The affidavit also noted that Father waived right to notice of any process in the suit to terminate parental rights. Father stopped paying child support and had no further contact with the Child. Nine years later, the OAG filed a "Motion for Enforcement And Suit For Modification of Support Order." At a hearing on the motion, Mother testified that she had not followed through with the termination, it had not been completed, and that she did not feel that she had a duty to notify Father of this. Trial court found Father was in arrears for $77,875 and that a defense of estoppel was not available to Father. Father appealed trial court's order.

Holding: Reversed and Remanded

Opinion: The OAG is Texas's Title IV-D agency, which means that the OAG may file suit for the enforcement of child support. If child support payments are assigned to the OAG for collection, "the OAG steps into the shoes of the assignor/obligee and take the assigned rights subject to all defenses the opposing party might be able to assert against the assignor/obligee." The defense of estoppel is available in a private child support enforcement suit. Therefore, as the assignee, the OAG is also subject to the defense of estoppel. While it is true that a unit of government that is exercising its governmental powers is not subject to estoppel, the OAG, here, is not exercising governmental powers. The public policy rationale supporting the rule that a governmental unit cannot be estopped from exercising its governmental powers does not apply when the alleged estoppel is based on the actions of an obligee who assigned child support rights to the OAG. COA noted that to hold otherwise would encourage parents to procure an affidavit of relinquishment from the obligor-parent, never file a termination suit, wait for arrearages to accrue, assign collection to the OAG based on an assumption that the defense of estoppel does not apply. Finally, although two other COAs have come to the opposite conclusion, the sister court's opinions are not binding on this COA, and these opinions did not address the fact that the OAG is not performing a state function in collecting child support.

★★★ UNITED STATES SUPREME COURT ★★★

DUE PROCESS CLAUSE DOES NOT AUTOMATICALLY REQUIRE THE APPOINTMENT OF COUNSEL AT CIVIL CONTEMPT PROCEEDINGS TO AN INDIGENT INDIVIDUAL WHO IS SUBJECT TO A CHILD SUPPORT ORDER, EVEN IF THAT INDIVIDUAL FACES INCARCERATION (FOR UP TO A YEAR)

¶11-5-25. ***Turner v. Rogers,*** -- S.Ct. --, 564 U.S. --, 2011 WL 2437010.

Facts: South Carolina relies heavily on contempt proceedings to enforce the payment of past due child support. A parent who is in arrearages is provided an opportunity to "show cause" as to why he should not be held in contempt. If the parent is unable to pay, he is not in contempt.

Father was ordered to pay $51.73 per week in child support to Mother. Over three years, Father frequently failed to pay and was held in contempt on five prior occasions. Twice, Father paid the amount due before being jailed, and twice, he spent two or three days in custody before paying. On the fifth occasion, he did not pay and completed a six-month sentence. After being released, he was still in arrears and was issued a new "show cause" order. After a brief hearing, trial court found Father in contempt and sentenced him to twelve months imprisonment. Trial court did not make an express finding on Father's ability to pay. Father completed his sentence before this case was heard before the U.S. Supreme Court.

The Court granted certiorari to resolve "differences among state courts (and some federal courts) on the applicability of a 'right to counsel' in civil contempt proceedings enforcing child support orders."

Holding: Vacated and Remanded

Opinion of the Court: (J. Breyer)

Although Father had completed his sentence prior to this hearing, this issue is "capable of repetition," while "evading review." Father was only confined for twelve months, which is "too short to be fully litigated," and there was a "reasonable" likelihood that he would be "subjected to the same action" in the future. Thus, the issue was not moot.

The Sixth Amendment (6th Am.) of the U.S. Constitution grants an indigent defendant the right to state appointed counsel in a criminal case. The SA does not extend to civil cases. Although there is a potential for imprisonment, civil contempt cases differ from criminal contempt, because once a civil contemnor complies with the underlying order, he is free. However, even though the SA does not apply to civil cases, the Court has held that the Due Process Clause of the Fourteenth Amendment (DPC) does require states to pay for representation by counsel in a *civil* "juvenile delinquency" proceeding. Further, the Court concluded that there is a "presumption that an indigent litigant has a right to counsel only when, if he loses, he may be deprived of his physical liberty." On the other hand, the Court has also held that there is not ordinarily a right to counsel at a probation revocation hearing. Thus, the Court concluded that while there is a right to counsel only in cases involving incarceration, there is not *always* such a right.

While the Court does not endorse the use of contempt to encourage the payment of past due child support, it does recognize that many states believe the use to be effective. In determining whether an indigent has a right to paid counsel at these child support contempt hearings, the Court considered the nature of the private interest that would be affected, as well as the available alternative procedural safeguards to ensure a fair trial. In a contempt hearing, the interest of the indigent's loss of personal liberty through imprisonment "demands due process protection." The Court further pointed out the need for accuracy in accessing the defendant's "ability to pay." However, the Court pointed to three considerations, which taken together, argue strongly against the DPC requiring the State to provide indigents with counsel in these types of proceedings. First, the question at issue—the defendant's ability to pay—is closely related to the defendant's indigence, and this question must be answered prior to appointing counsel either way. Second, often the custodial parent is unrepresented by counsel, and appointing counsel to the defendant would make the proceedings less fair. Third, there are "substitute procedural safeguards" that can reduce the risk of "erroneous deprivation of liberty," including "(1) notice to the defendant that his 'ability to pay' is a critical issue . . . ; (2) the use of a form . . . to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond . . . about

his financial status . . . ; and (4) an express finding by the court that the defendant has the ability to pay." These and other possible alternatives can assure a "fundamental fairness," despite the lack of appointed counsel. Thus, the Court concluded that a categorical right to counsel in [child support contempt] proceedings is not required by the DPC.

Finally, the Court noted that this opinion did not address proceedings involving unusually complex cases where a defendant "can fairly be represented only by a trained advocate" or proceedings where the underlying child support payment is owed by the state. The latter of which are more comparable to debt-collection proceedings.

Here, Mother was not represented by counsel, and the case was not unusually complex. Father did not receive clear notice that his ability to pay was a critical question. He was not provided with a form to elicit information about his financial circumstances. Trial court did not fill out the "finding" section in the contempt order indicating whether or not Father was able to pay his arrearages. Father's incarceration violated the DPC.

Dissenting Opinion: (J. Thomas joined by J. Scalia; C.J. Roberts and J. Alito join in part)

The four dissenting justices believed that the majority erred in considering an issue not raised by the parties, but by an *amicus* brief. The question presented was whether the Constitution entitled Father to appointed counsel, but the majority took this question further by requiring the analysis to consider whether alternative procedural safeguards where present. It was inappropriate for the majority to review a state court decision on a constitutional matter when the issue was not litigated below. Because the issue was outside the question presented, the parties may not have preserved the issue below, and the record was undeveloped. The majority accepted the Federal Government's suggestions *in toto*, without the issue being briefed by the parties. There was no basis for concluding that the DPC secures a right to counsel in a civil contempt proceeding. While the 6th Am. secures a right to "the Assistance of Counsel," the amendment only applies to criminal proceedings.

Justices Thomas and Scalia believed that an interpretation finding that the DPC provides a right to counsel in all proceedings where a defendant faces incarceration would render the 6th Am.'s right to counsel superfluous. The DPC does not say anything about counsel, and the 6th Am. expressly provides the right to counsel in *specific* circumstances. "Ordinarily, we do not read a general provision to render a specific one superfluous." Additionally, appointed counsel has previously only been required where the 6th Am. required it, regardless of whether liberty was at stake.

Finally, Thomas and Scalia argued that the balancing test introduced by majority failed to take into account the interests of the child and the custodial parent. After pointing out anecdotal evidence supporting a state's decision to use contempt as a method for persuading an obligor to pay child support, the dissent commented that whether a state should use this method was strictly a policy judgment for lawmakers.

SAPCR
TERMINATION OF PARENTAL RIGHTS

MOTHER CONSTRUCTIVELY ABANDONED HER CHILD

¶11-5-26. ***In re J.B.,*** -- S.W.3d --, 2011 WL 2151283 (Tex. App.—Waco 2011, no pet. h.) (06/01/11).

Facts: Mother was in prison when her Child was born. She did not make arrangements for the Child before returning to prison. Five months later, Mother was released to a "transition center." Nearly a year after the Child's birth, Mother began attending bi-weekly visits with the Child. She never brought anything to the visits, and when she called TDFPS about the visits, she never asked about the Child. Prior to the hearing, Mother had been homeless for some time, and within ten days before the hearing, Mother left the state without notifying TDFPS. After a bench trial, Mother's parental rights were terminated. Mother appealed arguing that TDFPS failed to conduct a home study to determine whether her relative would be the most appropriate caregiver, and that there were insufficient facts to support the termination decision.

Holding: Affirmed

Opinion: TFC 262.114 provides that TDFPS must conduct a home study on relatives or other designated individuals identified as potential relatives or designated caregivers, as defined by TFC 264.751. TDFPS "shall evaluate each [of these identified persons] . . . to determine . . . who would be the most appropriate substitute caregiver . . . before the full adversary hearing." TFC 262.114. However, this provision only applies to individuals living in Texas, and courts have held that failure to obtain a home study is not a bar to termination. Here, proceeding with a home study would have delayed the suit, which would not have been in the best interest of the child. Additionally, no authority was presented supporting a statutory or common-law duty on TDFPS to make a placement with a relative before terminating parental rights. Further, the relative on whom Mother wanted a home study completed lived in South Carolina.

A court may terminate the parent-child relationship if the parent committed one or more of the acts enumerated in TFC 161.001(1), and termination is in the best interests of the child. Mother did not contest the jury's finding that termination would be in the best interests of the child; she only contested the sufficiency of the evidence supporting the predicate acts. TFC161.001(1)(N) supports termination if the parent "constructively abandoned the child who has been in the permanent or temporary managing conservatorship of the [TDFPS] or an authorized agency for not less than six months, and: (i) the department or authorized agency has made reasonable efforts to return the child to the parent; (ii) the parent has not regularly visited or maintained significant contact with the child; and (iii) the parent has demonstrated an inability to provide the child with a safe environment." Here, Mother regularly visited the Child, but "she did not maintain *significant* contact with him." She arrived at the visits empty-handed, and she when she called TDFPS, she did not ask how the Child was doing. At some point in the ten days before the final hearing, Mother left the State without notifying TDFPS. Finally, Mother had been homeless, which could lead a jury to reasonably conclude that Mother could not provide the Child with a safe environment. Because there was sufficient evidence to support the jury's finding that Mother constructively abandoned the Child, there was no need for COA to address whether there was sufficient evidence to support other predicate acts enumerated in TFC 161.001(1).

TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS PROPER BECAUSE MOTHER WAS PHYSICALLY ABUSED BY FATHER ON MULTIPLE OCCASIONS, CPS DID NOT BELIEVE MOTHER WOULD REMOVE HERSELF FROM THE ABUSIVE SITUATION, AND MOTHER SHOWED NO IDICATION THAT SHE COULD PROTECT HERSELF OR THE CHILD FROM ABUSE

¶11-5-27. ***In re M.V.,*** -- S.W.3d --, 2011 WL 2163724 (Tex. App.—Dallas 2011, no pet. h.) (06/03/11).

Facts: Mother and Father married in India and moved to the U.S. that same year. Mother became pregnant before their first wedding anniversary and gave birth to the Child. Father began abusing Mother physically and verbally before the Child was born, and the abuse continued after the Child's birth. After fracturing Mother's jaw, Father was charged with aggravated assault. CPS got involved and offered Mother shelter. Mother was pressured by her parents to return to India, so she signed an affidavit of voluntary relinquishment as to the Child, despite CPS advice not to sign. Collin County DFPS filed a SAPCR seeking appointment as the Child's managing conservatory, and the Child was placed in foster care. Mother's parents and Father convinced Mother to sign an affidavit of non-prosecution against Father. Later, Mother returned to the U.S. and moved back in with Father. DFPS filed a petition seeking termination of both parents' rights to the Child. A jury found that termination of Mother's rights was in the best interests of the child, and trial court appointed DFPS as permanent managing conservator of the Child. Mother appealed arguing the evidence was insufficient to support the order for termination.

Holding: Affirmed

Opinion: TFC 161.001(1)(D) supports termination if the parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the

child." In finding a child is —endangered," it is sufficient to show the child has been exposed to loss or injury, it is not necessary to show an actual injury. Here, Father hit Mother in the head with his fists, kicked Mother in the stomach, punched her in the mouth, grabbed her by the throat to shove her against the wall, slapped Mother while she was feeding the Child, and hit her with a telephone, knocking out two teeth and fracturing her jaw. After the first incident of physical abuse, Father forced Mother to write an affidavit of non-prosecution. Later, Mother signed an affidavit of voluntary relinquishment after CPS had explained that there could be no assurance that the Child could be kept out of Father's care. Mother testified —Yes to the question, —And do you do everything your husband tells you to do?" TFC 161.001(1)(K) supports termination if the parent —executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter." Mother signed an affidavit of voluntary relinquishment, and there was no evidence that she attempted to revoke the affidavit. TFC 161.001(1)(O) supports termination if the parent —failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the TDFPS for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child." Mother agreed to court-ordered plans requiring the completion of counseling and domestic violence classes, and Mother did not complete the requirements.

The Child had been in foster care for 10 months: from the time he was eight months old until the time of trial. Evidence was presented showing that a child could be harmed by being held by a mother who is being abused by a father or by crawling or walking into a room where the parents are distracted by domestic violence. Evidence also showed that children model observed domestic violence. Mother agreed to a safety plan, but there was testimony that Mother could not protect herself from harm. Father initially refused to attend BIPP, and when he did, he acknowledged some, but not all of the incidents of physical abuse. Although Mother accepted shelter from CPS, CPS testified that it was not confident Mother would not return to Father.

MOTHER'S PARENTAL RIGHTS TERMINATED BECAUSE HER BELIEF THAT FATHER SEXUALLY ABUSED THEIR CHILD WAS NOT BASED ON REALITY, AND MOTHER'S CONDUCT EMOTIONALLY ENDANGERED THE CHILD'S WELL-BEING

¶11-5-28. ***In re J.K.F.,*** -- S.W.3d --, 2011 WL 2716779 (Tex. App.—Dallas 2011, no pet. h.) (07/14/11).

Facts: Mother and Father divorced. Subsequently, the Child made an outcry of alleged sexual abuse against Father. Following investigation and a trial, Father was acquitted of all charges against him. After the acquittal, Father attempted to renew contact with the Child. Mother filed a motion for a protective order. Father filed a motion to remove the Child from Mother's possession. Trial court appointed an amicus attorney for the Child and ordered supervised visits between Father and the Child. Mother interfered with the supervised visits. Trial court signed orders removing the Child from Mother's home and placing the Child with family friends. Mother filed a SAPCR based on her allegations of child abuse against Father. Trial court later ordered that the Child be placed with Father, and Mother's visitations with the Child be supervised. Father filed a motion to terminate Mother's parent-child relationship with the Child. After a jury trial, Mother's parental rights were terminated. Mother appealed.

Holding: Affirmed

Opinion: At trial, Mother testified that she was convinced that Father had molested the Child. Mother took the Child to five different doctors and therapists to address her concerns. Mother did not report the abuse, but one of the doctors did. Father was acquitted of all of the charges. Mother claimed to have documents to prove Father abused the Child, but these documents were not admitted into evidence. A court-appointed therapist testified that she believed Mother and maternal grandmother told the Child to run away when it was time for Father's visitation and to call grandmother to come pick her up. The Child ran away crying when taken to Father's car. Later, after being brought back to where she was to meet Father, she calmed down once the therapist told Mother to leave so Father and the Child could have their visitation. After this event, the Child was removed from the Mother's home to be placed with family friends, and visitations between Mother and the

Child had to be supervised by the therapist. Mother refused to visit the Child on her birthday because she did not want to pay the supervisor fee in order to visit her Child. Mother sent emails to the Child's school and the Child's friends' parents accusing Father of being a pedophile. A clinical psychologist, who had been treating the Child, testified that Mother's thoughts were not based in reality. The psychologist also testified that Mother upset the Child by speaking meanly about Father in front of the Child. The psychologist explained the long-term damaging effects to a child that can be caused by one parent demonizing the other. The headmaster of the Child's school testified that the Child was doing well in school. The headmaster also testified that Mother visited the school to see what could be done to prevent Father's visitations. The school had to hire additional security to handle Mother because she was so upset and volatile. A reasonable factfinder could have formed a firm belief or conviction that Mother engaged in conduct which endangered the emotional well-being of the Child.

When determining whether termination is in the best interests of a child, a court may consider a number of factors, including the present and future physical and emotional needs of the child, the parental abilities of the person seeking custody, plans for the child by the person seeking custody, and acts or omission of the parent that may indicate the existing parent-child relationship is not appropriate. Even after the acquittal, Mother continued to believe Father molested the Child. Mother interfered with the Child's supervised visits with Father. Mother's behavior upset the child and caused serious security concerns at the Child's school. The Child felt abandoned when Mother stopped visiting her. Mother's only plan for the Child's future was to get a new therapist who would help the Child to "find her voice" to accuse father of abuse. Mother did not consider the emotional harm caused to the Child when Mother contacted school administrators and faculty, parents of the Child's friends, and the media regarding her allegations against Father. Mother's demonization of Father could cause confusion, anxiety, insecurity, depression, and isolation in the Child. A jury could reasonably conclude that Mother created an emotional danger to the Child and that Mother lacked the parenting abilities to retain her parental rights to the Child.

TFC 161.004 WAS NOT THE ONLY WAY MOTHER'S PARENTAL RIGHTS COULD BE TERMINATED IN SECOND PETITION FILED BY TFDPS; 161.004 ONLY LIMITED WHAT EVIDENCE COULD BE INTRODUCED AT THE SECOND TERMINATION HEARING

¶11-5-29. ***In re K.G.,*** -- S.W.3d --, 2011 WL 3211210 (Tex. App.—Fort Worth 2011, no pet. h.) (07/28/11).

Facts: TFDPS received a referral about negligent supervision of the Child. Mother had a problem with drugs and a tendency to disappear. TFDPS filed a petition to terminate Mother's parental rights so the Child could be adopted by her foster family. Trial court denied this petition but appointed TDFPS as the Child's permanent managing conservator. Trial court ordered Mother to pay child support, to maintain reasonable visitation, and to complete a drug test and psychological evaluation. Mother did not maintain regular visitation and did not take the court ordered drug test. She completed the psychological evaluation, which revealed that Mother was in the borderline range of intellectual functioning and had difficulty learning. She was also classified with schizoaffective disorder, bipolar type, and cannabis dependence. The ongoing CPS caseworker suggested classes and mental health treatment to help Mother become a more suitable parent. The caseworker also allowed the Child to pick places for visitation to encourage good visits. Because Mother failed to complete services, TFDPS filed a second petition to terminate Mother's parental rights. At the hearing, testimony was heard from the Child's therapist, a CPS investigator, the ongoing CPS caseworker, and the Child's foster mother. Trial judge heard from the Child in camera. Trial court granted termination of Mother's parental rights based on an endangerment finding and failure to support the Child. Trial court also found that Mother had constructively abandoned the Child, had failed to comply with the provisions of a court order, and termination was in the Child's best interest. Mother appealed arguing that TFDPS failed to prove the grounds required for termination under TFC 161.004. Mother also argued that there was insufficient evidence to support a finding of constructive abandonment.

Holding: Affirmed

Opinion: TFC 161.001 allows a court to terminate a parent's rights if the parent has violated one of the subsections of 161.001(1) and termination is in the best interests of the child. A parent constructively abandons a child when (1) the child has been in the permanent or temporary managing conservatorship of the State or an authorized agency for not less than six months, (2) the State or authorized agency has made reasonable efforts to return the child to the parent, (3) the parent has not regularly visited or maintained significant contact with the child, and (4) the parent has demonstrated an inability to provide the child with a safe environment. Mother did not challenge trial court's finding that termination was in the Child's best interest nor that the Child had been in foster care for much longer than six months. Each of the petitions stated that "[i]f reunification with the mother could not be achieved, . . ." which indicated that TFDPS's first goal was reunification. Further, the ongoing CPS caseworker testified that she had tried to facilitate the Child and Mother's reunification. Trial court could have reasonably found that TFDPS made reasonable efforts to return the Child to Mother. Mother stopped attending visits with the Child before she waived service of the second petition. Mother dropped out of contact for more than two months. Mother said she could not attend visits because of her work schedule and community service obligations, but Mother refused to accept CPS's proposed alternate visitation schedule. Trial court could have reasonably found Mother did not regularly visit or maintain significant contact with the Child. One of Mother's other children was born with marijuana in its system. Mother had mental health issues for which she had not been treated, and she denied needing medication. Mother drifted from place to place, and did not stay in contact with CPS. Trial court could have reasonably found that Mother demonstrated an inability to provide the Child with a safe environment. Thus, the evidence was legally and factually sufficient to support termination of Mother's parental rights o the ground of constructive abandonment.

TRIAL COURT NOT PERMITTED TO ISSUE A MONITORED RETURN ORDER AFTER DISMISSAL DATE HAS PASSED. MANDAMUS RELIEF NOT AVAILABLE FROM ASSOCIATE JUDGE'S ORDER.

¶11-5-30. ***In re TDFPS,*** __ S.W.3d ___, 2011 WL 3546590 (Tex. App.—Fort Worth 2011, orig. proceeding) (08/11/11).

Facts: TDFPS filed a termination suit against the Child's parents. Associate judge ordered a monitored return of the Child to Mother. However, a few months later, associate judge found Mother was no longer able to provide the Child with a safe environment. Associate judge issued a monitored return disruption order and set a new dismissal date. Subsequently, a final bench trial on the termination commenced. Five days after the dismissal date, associate judge ordered a monitored return of the Child and stated that she would give the parties an opportunity to reopen the evidence at the conclusion of the monitored return. Associate judge stated that she had "conferred with some sources around the State," and she believed that she was "within [her] grounds to do this." Associate judge then scheduled a new dismissal date. TDFPS appealed to county court, which adopted associate judge's order but granted TDFPS's motion to stay the ruling pending COA's review. TDFPS petitioned for a writ of mandamus against both the county court and the associate judge.

Holding: Petition for writ of mandamus conditionally granted in part and denied in part

Opinion: A COA does not have mandamus jurisdiction over an associate judge. Thus, TDFPS's claims against the associate judge were dismissed.

TFC 263.403(c) states that if a child is moved from his home by TDFPS before the dismissal of a suit, trial court shall schedule a new date for dismissal, "unless a trial on the merits has commenced." This section is plain and unambiguous, and it clearly does not permit a trial court to order a monitored return after the dismissal date has passed. To construe the section otherwise would conflict with the purpose of setting a date certain for dismissal of the suit. Here, the final termination trial had commenced, and after the dismissal date passed, associate judge ordered a monitored return of the Child to Mother. County court erred in adopting this order.

Associate judge did not render judgment because she believed the case was ongoing. Mandamus relief

generally requires a request for an action and a refusal of that request. Associate judge did not issue a final ruling merely because she believed the case was not yet ripe for judgment. COA declined to order trial court to do something it had not yet refused to do.

TERMINATION OF FATHER'S PARENTAL RIGHTS NOT SUPPORTED BY PLEADINGS BECAUSE TDPFS ABANDONED ITS PLEADING; TDFPS CONDITIONED ITS PLEADING ON THE TERMINATION OF MOTHER'S PARENTAL RIGHTS, WHICH TRIAL COURT DENIED TO GRANT

¶11-4-31. ***In re J.M.,*** -- S.W.3d --, 2011 WL 3847235 (Tex. App.—San Antonio 2011, no pet. h.) (08/31/11).

Facts: Mother had three Children, each by a different father. TDFPS sought termination of the parental rights of Mother and all three fathers. TDFPS primarily wanted to strip Mother of her rights. In order to keep the Children together, TDFPS also wanted to terminate the fathers' rights, so the Children could stay with the foster parent who had been caring for them. TDFPS told trial court that if Mother's parental rights were not terminated, it would ask for Father to keep his parental rights as well. After closing arguments, trial court ruled that it would not terminate Mother's or the two other fathers' parental rights, but it would terminate Father's parental rights. Trial court did not articulate statutory grounds for the termination, and it did not make an oral finding that termination was in the Child's best interest. Father filed a motion for new trial and statement of appellate points. At the hearing on the motion for new trial, neither TDFPS nor the attorney ad litem opposed Father's motion. However, trial court denied the motion. Father appealed the termination order, and COA abated the appeal and remanded the case to the trial court for written findings on whether Father's appeal was frivolous. Trial court held a hearing and found Father's appellate points frivolous. COA held that Father's appellate points were not frivolous and remanded to trial court for supplemental findings and conclusions specifying the statutory grounds supporting the termination. Trial court issued findings that the termination was based on failure to support, failure to comply with a court order, and constructive abandonment. Rather than challenging the sufficiency of the findings, Father appealed arguing trial court erred in terminating his rights because TDFPS abandoned its pleading requesting termination.

Holding: Reversed and Remanded

Opinion: An abandonment of a pleading does not require a formal amendment. A pleading may be abandoned by stipulation. The parties' intent must be determined from factors such as the language of the agreement and surrounding circumstances. Here, TDFPS unambiguously stated that it was only seeking termination of Father's rights if Mother's rights were also terminated. Counsel for both TDFPS and Father, as well as the Child's attorney ad litem, agreed that termination of Father's rights was to be conditional on termination of Mother's rights. In fact, trial court directly asked TDFPS counsel, "Did you abandon your pleadings . . . ?," and TDFPS counsel replied, "Yes . ." Trial court did not terminate Mother's rights, and TDFPS abandoned its pleadings. TDFPS's pleading did not support the judgment.

MISCELLANEOUS

FATHER LIMITED TO ISSUES RAISED IN HIS NOTICE OF LIMITED APPEAL BECAUSE HE REQUESTED ONLY A PARTIAL REPORTER'S RECORD FOR THE APPEAL; COA COULD NOT CONSIDER NEW ISSUES RAISED BY FATHER IN SUBSEQUENT APPELLATE BRIEF

¶11-5-32. ***Milton v. Toomey,*** -- S.W.3d --, 2011 WL 2150362 (Tex. App.—San Antonio 2011, no pet. h.) (06/01/11).

Facts: After Mother and Father divorced, Mother was not required to pay any child support, and Father was required to maintain health insurance for the Child. Subsequently, Father filed a motion to modify. After a jury trial, trial court ordered that conservatorship of the Child should not be modified and ordered Father to pay child support and health insurance. Father filed a limited appeal with a statement of issues and ordered a partial reporter's record for the appeal. Subsequently, Father filed his appellate brief, which raised six issues for appeal.

Holding: Affirmed

Opinion: Tex. R. App. P. 34.6(c) states that, "[i]f the appellant requests a partial reporter's record, the appellant must include in the request a statement of the points or issues to be presented on appeal and will then be limited to those points or issues." Additionally, if a partial reporter's record is properly requested, the appellate court must presume that the partial record constitutes the entire record for purposes of appellate review. Here, Father filed "Petitioner's Notice of Limited Appeal," appealing trial court's order requiring Father to pay child support and health insurance. Father's statement of issues was sufficient to invoke the presumption of 34.6(c). Thus, COA is required to presume the partial record constitutes the entire record for the purposes of appellate review, and Father is limited on appeal to the issues presented in his notice of appeal. Thus, despite the fact Father raised six issues in his appellate brief, COA may only consider the child support and medical support issues raised in his notice of appeal.

A court may only modify a child support order if the circumstances of the child or parent have materially and substantially changed since the previous order. In order for the court to determine whether there has been a material and substantial change, the court must compare the financial circumstances at the time the modification is sought with the financial circumstances at the time of the previous order. The burden to show a material and substantial changes is on the movant. Here, there was a presumption that the partial record constituted the entire record for the purposes of the appeal, and there was insufficient evidence within the record to support a claim that there had been a material and substantial change. Father argued that Mother's income should be included in the calculations, but there was no evidence presented to support the amount of the income. Further, there was no evidence regarding Mother's expenses. Finally, testimony alluded to a couple surgeries that Wife underwent in the months leading up to the hearing, but there was no evidence in the transcript providing the details of the surgeries or how they affected Mother's financial circumstances.

Finally, TFC 154.064 notes there is an "assumption that the court will order the obligor to provide medical support for the child in addition to the amount of child support calculated in accordance with those guidelines." COA held that this provision merely states that an obligation to pay medical support is in addition to any amount of required child support; it does not support Father's contention that Mother should be required to pay for medical support. Further, even if trial court was to consider a modification of medical support, it would need to consider information not available in the partial record, including the "actual cost of health insurance," "reasonable cost to the obligor," and the obligor's annual resources.

TRIAL JUDGE DID NOT NEED TO REFER A RECUSAL MOTION TO ANOTHER JUDGE BECAUSE FATHER FAILED TO FILE A WRITTEN MOTION STATING THE GROUNDS WHY TRIAL JUDGE SHOULD NOT SIT

¶11-5-33. ***In re A.V.,*** -- S.W.3d --, 2011 WL 2712746 (Tex. App.—San Antonio 2011, no pet. h.) (07/13/11).

Facts: After a bench trial, trial court signed an order terminating Father's parental rights and named TDFPS as permanent managing conservator of the Child. Father filed a motion for new trial and statement of appellate points. Trial court found Father's appeal to be frivolous and denied his motion for new trial. Trial court also denied Father was indigent. Father appealed challenging trial court's jurisdiction on his motion because the hearing was held more than thirty days after trial court had signed the final order. Father also contended that trial judge should have recused himself because the judge was related to the TDFPS caseworker on this case. Father argued trial judge should have referred the recusal motion to another judge.

Holding: Affirmed

Opinion: A trial court will generally retain jurisdiction for thirty days after signing a final judgment. The filing of a motion for new trial extends the court plenary power for up to an addition seventy-five days. Here, Father filed a motion for new trial, extending trial court's plenary power. Thus, trial court had jurisdiction to find Father's appeal frivolous despite the fact that the hearing was not held within thirty days as required by TFC 263.405

A judge must disqualify himself if he might be related to one of the parties by affinity or consanguinity within the third degree. Here, trial judge was a second cousin of the TDFPS caseworker. Because the caseworker was not a party or related to trial judge by affinity or consanguinity within the third degree, trial court did not abuse its discretion in finding Father's disqualification issue on appeal would be frivolous.

Tex. R. Civ. P. 18a states that if a party wants the trial judge to refer a recusal motion to another judge, the party must file a verified motion at least ten days before trial stating with particularity why the judge before whom the case is pending should not sit. Here, there was no written motion or other record of Father's basis for the motion to recuse.

BECAUSE ONLY A PARTIAL REPORTER'S RECORD HAD BEEN TRANSCRIBED, HUSBAND COULD NOT APPEAL BASED ON THE LEGAL AND FACTUAL SUFFICIENCY OF THE EVIDENCE

¶11-5-34. ***Sareen v. Sareen,*** -- S.W.3d --, 2011 WL 2712743 (Tex. App.—San Antonio 2011, no pet. h.) (07/13/11).

Facts: Husband and Wife divorced after twenty-eight years of marriage. Trial court granted the divorce and named the parents joint managing conservators of their minor child. Trial court granted Wife the right to determine the Child's primary residence and granted Husband standard possession. Trial court ordered Husband to pay child support, spousal maintenance, and Wife's attorney's fees. Husband appealed, challenging the legal and factual sufficiency of the evidence to support the awards of spousal maintenance and attorney's fees, or to support the amount of the monthly child support obligation.

Holding: Affirmed

Opinion: Tex. R. App. P. 34.6(c) addresses appeals using partial reporter's records. This rule did not apply because portions of the reporter's record were simply not transcribed. This was not a case in which appellant merely requested a partial reporter's record. The COAs are split as to who bears the burden to ensure a court reporter transcribes the record. Tex. R. App. P. 13.1 states that a court reporter must make a full record, unless the parties agree otherwise. Tex. Gov't Code 52.046(a) states that a reporter shall transcribe the record *on request*. However, Husband did not raise an error based on court reporter's alleged failure to record the testimo-

ny of two witnesses, and he did not object to trial court's failure to comply with Tex. R. App. P. 13.1. Thus, the issue did not need to be resolved by this COA.

Because Tex. R. App. P. 34.6(c) did not apply, COA had to presume that the evidence in the record was legally and factually sufficient to support the order or judgment. Further, when an appellant complains that evidence is legally or factually insufficient, he must submit a complete record or an agreed statement of facts. Here, Husband's only complaints were based on alleged insufficiency of evidence. He did not submit a complete reporter's record. Thus, COA was required to assume that the evidence was legally and factually sufficient and overrule Husband's issues.

ORDER STRIKING A PARTY'S PLEADINGS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS MAY ONLY BE GRANTED IN EXTREME CIRCUMSTANCES; TRIAL COURT MUST CONSIDER WHETHER LESSER SANCTIONS ARE AVAILABLE

¶11-5-35. ***Olmos v. Olmos,*** -- S.W.3d --, 2011 WL 3240533 (Tex. App.—El Paso 2011, no pet. h.) (07/29/11).

Facts: Husband and Wife separated, and Wife filed for divorce. Trial court issued temporary orders requiring Husband to pay child support and temporary spousal maintenance. Later, associate judge signed an order finding Husband in contempt for failure to pay child support and spousal maintenance. Subsequently, Wife filed a motion to compel discovery, and associate judge ordered Husband to comply with Wife's discovery requests. Asserting that Husband had still not complied with the discovery order, Wife filed a second motion to compel discovery. Associate judge conditionally ordered that if Husband did not comply with discovery requests, Husband's pleadings would be struck. The record does not show that associate judge held a hearing to determine whether Husband had complied. Husband filed a counter-petition for divorce. Associate judge entered a default judgment when Husband and his attorney failed to appear at a hearing due to attorney's illness. The default judgment recited that Husband's counter petition was stricken in accordance with the discovery sanctions. Husband filed a motion for trial de novo and a motion to set aside the default judgment. Referring court orally granted the motion for new trial but no written order for a new trial was signed. At the de novo hearing, referring court struck Husband's pleadings and entered a final decree of divorce. Husband appealed, arguing that trial court abused its discretion in considering associate judge's sanctions after granting a new trial. Husband argued that when the new trial was granted, the previous orders were vacated. Further, Husband contended that the referring court abused its discretion in striking his counter-petition.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 329b(c) requires a written notice to grant a new trial. An oral pronouncement is not enough to satisfy this rule, even if the pronouncement is accompanied by written scheduling orders. Here, trial court never signed a written order granting a new trial, so Husband's motion was overruled by operation of law seventy-five days after the judgment was signed. Husband's argument that the associate judge's orders had been vacated was without merit because no new trial had been granted. However, trial court had the authority to review the case de novo because Husband timely filed a request pursuant to TFC 201.015.

Tex. R. Civ. P. 215.2 permits a court to sanction a party for failure to comply with discovery orders. An order that strikes pleadings is an available sanction. However, Tex. Sup. Court has held that striking pleadings is a —death penalty sanction" that should only be used under extreme circumstances. Tex. Sup. Court has set out a two-part test in *TransAmerican*, 811 S.W.2d 913, to determine whether a particular sanction is just. First, there must be a direct relationship between the conduct and the sanction. Second, the sanction must not be excessive; it must not be more severe than necessary to serve its legitimate purpose. Here, associate judge did not consider either part of the *TransAmerican* test. Associate judge did not consider whether lesser sanctions were available. Associate judge did not hold a compliance hearing and did not make a finding of noncompliance with discovery orders. Additionally, the record did not show that referring court held a compliance hearing or considered the *TransAmerican* test. Referring court abused its discretion in applying the sanctions order striking Husband's counter-petition.

SANCTIONS AGAINST ATTORNEY WERE NOT PROPERLY ORDERED UNDER TRIAL COURT'S INHERENT AUTHORITY, CHAPTER 10 OF THE CIVIL PRACTICES AND REMEDIES CODE, OR TEX. R. CIV. P. 21b

¶11-5-36. ***Ezeoke v. Tracy,*** -- S.W.3d --, 2011 WL 3359659 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (08/04/11).

Facts: Husband and Wife divorced. Husband filed a SAPCR and a Motion to Confirm Child Support Arrears. Wife filed a Motion to Deny Relief in the SAPCR. Trial court scheduled a trial setting and required that the parties attend mediation before a trial on the merits. Husband's attorney unsuccessfully attempted to schedule mediation and eventually filed a Motion to Compel Mediation. Wife's attorney filed a Motion seeking a continuance, which was supplemented with an affidavit stating that Husband's attorney was unprofessional and had a "megalomaniacal attitude" that was impairing the parties' progress. Wife's attorney also noted that he would be out of the country and retained an attorney to appear on his behalf at the hearing on the motion for continuance. Husband's attorney filed a motion for sanctions claiming that Wife's attorney failed to serve and respond to the motion for continuance. Husband's attorney also requested sanctions because of the personal attacks in an affidavit attached to Wife's motion for continuance. Trial court denied the continuance and directed the parties to attend mediation. Trial court conducted a hearing on the motions for sanctions, and Wife's attorney did not appear because he was out of the country. Trial court ordered sanctions against Wife's attorney for failing to comply with local rules, failing to appear at mediation, making misrepresentations to the court about having a vacation letter on file, failing to serve the motion to deny relief on Husband, and filing a meritless motion for continuance that included "unfounded accusations, misrepresentation, and name-calling." Wife's attorney filed a motion for a new hearing arguing that the sanctions were not warranted. A different judge presided over the hearing on the motion for rehearing. Reconsideration was denied, and Wife's attorney appealed.

Holding: Reversed and Remanded

Opinion: A trial court may grant sanctions under its inherent authority, Chapter 10 of the Civ. Prac. & Rem. Code, or Tex. R. Civ. P. 21b. Trial courts have inherent power to impose sanctions for bad faith abuse of the judicial process, which includes impairing the court's ability to hear evidence and to decide issues of facts and law. Sanctions under Chapter 10 may be granted against an attorney who submits a pleading for improper purposes. Rule 21b sanctions may be imposed for a failure to serve pleadings. Here, trial court imposed sanctions on Wife's attorney because he failed to comply with local rules and made oral misrepresentations to the court. Chapter 10 and Rule 21b did not apply because there was no improper pleadings or service of pleadings. Further, trial court made no finding that the conduct significantly interfered with trial court's exercise of its core functions. Without such findings, the order could not be affirmed. Additionally, trial court ordered sanctions because Wife's attorney failed to serve a copy of Wife's Motion to Deny Relief. Trial court relied on Rule 21b for this order; however, there was no nexus between Wife's attorney's conduct and the award of attorney's fees and expenses. Finally, trial court invoked Chapter 10 in awarding sanctions because Wife's attorney filed a motion for continuance that included "unfounded accusations, misrepresentation, and name-calling" and was "without merit." However, section 10.003 requires that the party who is the subject of a motion for sanctions be afforded a "reasonable opportunity respond." Here, the record established that Wife's attorney had given notice of his absence from the country, and the sanctions hearing was held during that time period. There was no indication that Wife's attorney purposefully evaded the hearing. Because Wife's attorney did not have a "reasonable opportunity to respond," the order could not be upheld.

(Tex. App.—San Antonio 2011, pet. filed) ¶ (Tex. App. – El Paso 1996, writ denied) (Tex. App.—San Antonio 2011, pet. filed) (06/20/11)