SECTION REPORT

FAMILY LAW

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MESSAGE FROM THE CHAIR

The Family Law Section which was created in 1960 is one of the most active and successful sections of the State Bar of Texas, as well as one of the largest sections with over 5,000 members. It is an honor to work with the Section leadership, the Family Law Council, which consists of five officers and twenty-five directors who have a long tradition of being dedicated and committed to improving Family Law in Texas for not only family law attorneys, but also their clients and families.

The Section regularly co-sponsors the annual Advanced Family Law, New Frontiers, Ultimate Trial Notebook, and Marriage Dissolution courses. This year's Advanced Family Law Seminar is scheduled for August 1st – 4th in San Antonio where a record number of attorneys are expected to attend. Cindy Tisdale and I are privileged to be this year's course directors and have planned an exceptional seminar with a complete overview of Texas Family Law and practice tips for both beginning and seasoned family law practioners. I think you will be professionally and personally rewarded and hope you will join us in San Antonio.
Additional upcoming CLE seminars include:

- NEW FRONTIERS IN MARITAL PROPERTY LAW: October 13 – 14, 2011 at the U.S. Grant Hotel in San Diego, California, led by course directors Janet McCullar and Brian Webb.
- THE ULTIMATE TRIAL NOTEBOOK: December 8 – 9, 2011 at the Dallas Fairmont with course director to be announced at a later date.
- MARRIAGE DISSOLUTION: April 28 – 29, 2012 with details to be posted on the website at a later date.

By being a member in the Section, you are entitled to a number of enhancements to your practice. For example, the Section Report, a timely digest of every family law case that is decided by our Courts of Appeals and the Texas Supreme Court, is published four times a year, along with an annual Bibliography and a Special Legislative Edition that is published after each session of the Texas Legislature. Every Section member also receives, free of additional charge, the current edition of the Tool Kit which is a quick reference that can be taken to court and depositions and includes such subjects as current child support tables, calendars, objections, predicates, expert witness testimony, contempt and other relevant subjects.

As this 2011 session of the Texas Legislature ends, I thank Gary Nicholson, chair of the Family Law Foundation, and his team for a successful session. His Legislative Action Update follows:

> The 2011 Regular Session of the Texas Legislature expired at midnight May 30th. Whew! That was a lot of work by a lot of people.
>
> It's great that 10 of the 11 bills of the Family Law Section of the State Bar of Texas have passed both houses. Of those, 6 have already been signed into law by Governor Rick Perry. Here are those bills and their effective dates:
>
> - HB 841 - State agency name updated to DFPS - effective immediately
> - HB 905 - Admissibility of child hearsay - effective September 1, 2011
> - HB 906 - Indigent client appeals in SAPCRs - effective September 1, 2011
> - HB 1404 - Military deployments and kids - effective September 1, 2011
> - SB 785 - Mistaken paternity - effective May 12, 2011
> - SB 820 - Possession of very young kids - effective September 1, 2011

Regarding the other four bills, the Governor has until midnight June 19th to sign, veto or allow to them to go into effect without his signature. Those bills and their effective dates - if they become law - are:

- HB 901 - Spousal maintenance update - effective September 1, 2011
- HB 908 - Remedy for fraud on the community - effective September 1, 2011
- SB 789 - Extended protective orders - effective September 1, 2011
- SB 819 - Dating/family violence protective orders - effective September 1, 2011

We regret losing HB 910, which allows single people to use gestational agreements. We made headway again, but we're just not there - yet.

Membership in the section is essential to attorneys who handle the occasional family law matter, as well as to those attorneys who practice family law extensively or make family law their sole area of practice. Please join us and enrich your practice!

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

EDITOR'S NOTE

As you may have noticed, the section report has a new look. The report will continue to evolve over the next several editions. In late June or early July, depending on how fast the Governor signs the legislation, the Legislative Report will be issued. The Family Law Foundation and many dedicated fellow family law attorneys have worked all Spring to work on getting bills favorable to our practices passed and preventing other bills that could have created chaos in many of our practices defeated. Volunteers to assist with the process are always needed and welcomed. I have a new law clerk, Elizabeth Hearn, who will be helping me with summarizing the case law. Beth is a third-year law student at Texas Wesleyan School of Law. She will also be writing an article for a future section report and has contributed an article for our paralegals for this edition. I am always on the lookout for articles, so the writers among you, please send me an email so I can reserve your spot in a future report. Happy almost 4th of July, and I look forward to seeing all of you at Advanced Family in San Antonio in August.

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

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"*We Can Work It Out": Using Cooperative Mediation – a Blend of Collaborative Law and Traditional Mediation – to Resolve Divorce Disputes*, Elena B. **Langan**, 30 REV. LITIG. 245 (2011)

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Ask the editor

Dear Editor*:** I represent grandparents, who are trying to get conservatorship of their grandchild. I served Mother and Father with citation, but they have never filed an answer. Both Mother and Father appeared at the temporary order hearing, Mother testified, and Father just sat at counsel table. The court named grandparents temporary sole managing conservators. My clients are not wealthy, and Mother and Father have yet to retain a lawyer and probably will not do so. Can I move for a default judgment against Mother and Father and, if so, do I need to give them notice of the hearing? ***Concerned in Corsicana

***Dear Concerned in Corsicana*:** Yes, a plaintiff may take a default judgment against a defendant at any time after a defendant is required to answer if the defendant has not previously answered and the return of citation is on file with the clerk for ten days. TRCP 107, 239; *R.T.A. Int'l, Inc. v. Cano*, 915 S.W.2d 149, 151 (Tex. App.—Corpus Christi 1996, writ denied). A default judgment may not be rendered after the defendant has filed an answer. *Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989) (per curiam).

A party makes a general appearance when "it invokes the judgment of the court on any question other than the court's jurisdiction; if a defendant's act recognizes that an action is properly pending or seeks affirmative action from the court...." *Dawson-Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998). If a party has made an appearance, he must be given "notice of the trial setting as a matter of due process under the Fourteenth

Amendment....” *LBL Oil Co. v. Int'l Power Serv.*, 777 S.W.2d 390, 391 (Tex. 1989) (per curiam). A defendant may enter an appearance in open court—attending the temporary hearing and giving testimony. Such appearance shall be noted by the judge upon his docket and entered in the minutes and shall have same force and effect as if the citation had been duly issues and served as provided by law. TRCP 120. Here, it is questionable whether Father entered an appearance, but him just showing up may be enough. I suggest that you check the court’s docket statement to see if Father’s appearance was noted. In any case, if you move forward with the default judgment, Mother and Father may be able to get it aside after the fact for your failure to give notice.

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 a divorce case that’s gone south on me. I mean way down south. When my client first came to see me, he was already a little crazy. He admitted it right to my face. He says he got back from serving with the Army in Afghanistan and went nuts the first time something made him mad. Smashed up a lamp, put his fist through the wall. Kicked a friend out of his house because he was convinced the friend was sleeping with his wife. And then he completely broke down. Sobbing like a kid. The wife put up with repeated cycles like this as long as she could but filed for divorce six months after he stepped off the plane from the Middle East. This is all stuff he tells me in our first meeting.

So I call the other lawyer, who gets the wife and kids into therapy and also makes sure the (former) friend steers clear, at least until everything’s settled. I’m thinking at this point that things will calm down. They’ve gotten worse. My client has spent the last month screaming at everything that moves. His kids. His wife. His dog. And of course, me. (I can take it, but I do feel sorry for his family and his dog.) His reactions to little irritations are completely over the top. He looks terrible. He’s lost weight. He says he’s not getting any sleep at all and when he does sleep, he dreams he’s back in Afghanistan shooting up a burning house. I’m afraid he’s going to blow.

I’ve heard about soldiers and PTSD. I always thought it was mamby-pamby-can’t-take-the-heat whining. What do you think?

Thanks,
A concerned patriot

Dear C-PAT,

Let me assure you that your client is not a mamby-pamby-can’t-take-the-heat whiner. In fact the temperature in Afghanistan routinely reaches 120 in the summertime. My guess is he’s taken more heat than most of us will ever know.

He’s also coming apart at the seams and doesn’t have the first clue what to do about it.

You might want to ask your client about the nature of his service in Afghanistan. Buy yourself a big box of Kleenex before you do, though, because he’s liable to break down talking about it. Get the kind with the lotion. It’s easier on the nose. There will be a lot of nose-blowing.

Did he work with locals and watch them try to make a life out of rubble and buckets instead of houses with faucets and toilets? Did he kill anyone? Did anyone try to kill him? How many of his friends died? Was he afraid all the time but couldn't show it? Was he sad looking at all that tragedy all the time?

What this guy is expressing is rage, not anger. Most people think the two things are differentiated only by intensity, but actually, rage is a combination of many emotions–all of which come out at once. Think of a drainpipe that everything washes into, but the pipe gets narrower and narrower. At the other end, you end up with fire hose pressure instead of garden hose pressure.

I think your client is carrying around a multitude of emotions – pain, fear, guilt, loneliness, frustration, anger –all of which turn into rage at the slightest little thing. I also think you've got a classic case of PTSD on your hands. PTSD manifests in a few different ways: intrusive recollection of the trauma; avoidance of any reminder of the trauma; and/or hyper-vigilance and exaggerated emotions to normal stimuli. The symptom list is long, but a few that apply to your client are

1. Difficulty falling or staying asleep
2. Irritability or outbursts of anger
3. Hyper-vigilance
4. Exaggerated startle response

He has also reported intrusive violent dreams, which recall and re-enact his trauma.

Here's the thing with trauma. The symptoms of trauma are remarkably persistent. Childhood abuse carries way into adulthood. Someone who has lost a house to a fire will be hyper-vigilant about leaving candles burning. Someone who lived through the Depression will save scraps of food and avoid waste or extravagance no matter how much money they have. And soldiers will often sleep with their guns under their pillows, convinced that danger is imminent and inevitable.

People with PTSD often live as though they are in danger even though they are not.

And they sometimes scream at everything that moves.

This may seem like terrible news, but actually, trauma can be treated successfully with the right combination of therapies. Your client should be in individual therapy (I wouldn't do any family therapy for now) with someone who specializes in trauma. A good trauma therapist will be empathetic but not pitying, will help your client cultivate respect for the trauma and the feelings he's carrying around because of it, while drawing attention to his strengths and resilience. The therapist should also have extensive knowledge of current techniques used to treat trauma.

One of these, for example, is EMDR–Eye Movement Desensitization Reprocessing. EMDR is a structured form of therapy that utilizes a specific set of techniques, done in order, until the symptoms of trauma abate or resolve. The therapist uses relaxation techniques, visualization, therapeutic focus on the trauma, and repetitive left-right stimulation of eye movements or other body-focused methods (tapping left, then right, etc.) to reprocess traumatic memories so that the memories are stored in more appropriate and adaptive ways. I realize this sounds a little wacky. Actually, it is a little wacky. I will tell you, however, that the science behind it is sound and that it is extremely effective. Many trauma survivors experience complete relief of PTSD symptoms after EMDR therapy.

Talk therapy, EMDR and other techniques like hypnosis, guided imagery–even yoga–can all help even a severely traumatized person process the trauma and move on to a healthy and productive life.

Your client is going through what I call a "reluctant divorce." If he could recover from his PTSD and function normally, my guess is that his wife would rather stay married to him than put the family through a divorce. Even if they do choose to divorce, I'd suggest they wait until he's had trauma therapy and has also participat-

ed in marital and family therapy before they proceed with the divorce. The process will go more smoothly and everyone will be able to move on without the trauma of an unusually traumatic divorce.

A side note: there has been a lot in the news recently about the military's insufficient response to PTSD. Let me encourage your client to seek help elsewhere if he can't get timely and effective treatment through the VA. Many counseling centers, including mine, will see military families at a greatly reduced rate. He should call several reputable counseling centers until he finds the help he needs at a price he can afford.

Finally, C-Pat, I do commend you for your concern for your client. Most people react to anger with anger. Kudos to you for whipping out your concern instead. Would that we were all more like you. But then you and I would be unemployed. And we'd have no need to be in Afghanistan in the first place. I could quote the great poet John Lennon here, but then you'd just say I'm a dreamer.

*If you want to help a soldier with PTSD today, visit www.pawsandstripes.org. This organization, founded by a soldier with PTSD, gives trained service dogs - rescued from shelters - to soldiers with PTSD. The dogs have an amazing effect. They help with stress, fear, paranoia (they'll check around the corner for you to see if anyone is lurking), anger, you name it. As the founding soldier has said, "When I met a service dog, it was the first time I'd felt at peace." Tell a friend.

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

In brief

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Agreements: The North Dakota Supreme Court held a premarital agreement unenforceable against a husband when he had no lawyer, the wife's lawyer prepared the agreement, no changes were made to the agreement and "in the span of less than five hours, the parties were pressed to execute an entire premarital agreement from scratch, go through a wedding ceremony with the justice of the peace, eat lunch, and get to the bank before it closed at 1:00." *Pember v. Shapiro*, 794 N.W.2d 435 (N.D. 2011). The Connecticut Supreme Court held that postnuptial agreements are valid and enforceable in that state, provided that they are "both fair and equitable at the time of execution and not unconscionable at the time of dissolution," but the court refused to enforce a prenuptial agreement for unconscionability at the time of dissolution when the agreement awarded the wife only $75,000 of a marital estate valued at $927,123. *Bedrick v. Bedrick*, 300 Conn. 691.

Characterization: A man who incorporated his sole proprietorship business prior to marriage did not convert his shares of stock in the company into marital property merely by reincorporating the business in Florida after the parties married and moved there. *Orloff v. Orloff*, ___ So. 3d ___, 2011 WL 1136434, No. 2D09-3059 (Fla. App. Mar. 30, 2011). Inheritances, in Oregon, are marital assets that are subject to a rebuttable presumption of equal contribution if both spouses influenced the acquisition of the inherited property, a presumption that the husband rebutted in this case because neither party could have influenced an inheritance that passed to

the husband as a result of intestacy. *In the Matter of the Marriage of Finear*, 240 Ore. App. 755, 247 P.3d 1238 (2011).

Child Support: The Rhode Island Supreme Court held that a trial court abused its discretion in setting child support when the trial court did not count the father's National Guard "locality adjustment payments" as income because they are not taxable as income. *Tamayo v. Arroyo*, 15 A.3d 1031 (R.I. 2011. A New York trial court did not abuse its discretion in setting child support when it refused to take into account support and college expenses of the obligor's children from a prior marriage because "there was neither a court order nor a written agreement with respect to the support of those children." *Jelfo v. Jelfo*, 81 A.D.3d 1255, 916 N.Y.S.2d 427 (2011).

Falling values: An Indiana appellate court ruled that a husband was entitled to an evidentiary hearing on his post-divorce petition for extraordinary relief when, as a result of plummeting real estate values, the husband claimed that the parties' house and vacation home could not be sold for the minimum price set forth in the divorce settlement agreement. *Ryan v. Ryan*, ___ N.E.2d ___, 2011 WL 1119011, No. 71A03-1009-DR-453 (Ind. App. Mar. 28, 2011). Faced with an ex-husband's claim that the former marital home could not be refinanced because of a drop in its value, a Florida appellate court nevertheless refused to relieve the ex-husband of his obligation to refinance the house and pay his ex-wife the $185,000 he had promised, "[b]ased upon the bedrock principle of contract law - applicable as well to marital settlement agreements - that bad deals are as enforceable in the law as good deals." *Ferguson v. Ferguson*, 54 So.3d 553 (Fla. App. 2011).

Imputing income: A New York appellate court reversed a trial court for failing to grant a motion to modify child support when, in effect, the trial court imputed annual income of $80,000 to an obligor who lost that job and made only $26,000 per annum. *In the Matter of Shvetsova v. Paderno*, ___ N.Y.S.2d ___, 2011 WL 1902199, No. F-30024-04 (N.Y. App. Div. May 17, 2011). A Florida trial court did not abuse its discretion by imputing income to a wife for alimony purposes because federal law permitted her to withdraw funds without penalty from an IRA awarded to her in the divorce if she received "substantially equal payments over a period of time of at least five years based on the life expectancy of the participant and a reasonable rate of return." *Niederman v. Niederman*, ___ So.3d ___, 2011 WL 1661073, Nos. 4D08-1731 & 4D08-4147 (Fla. App. May 4, 2011) (*See* IRC § 72(t)).

Parentage: The Mississippi Supreme Court held that a mother who allowed her parents to adopt her child did not enjoy the natural parent presumption in custody litigation with the child's paternal grandparents after the maternal grandparents died. *D.M. & M.M. v. D.R.*, ___ So.3d ___, 2011 WL 1168187, No. 2010-IA-01217-SCT (Miss. Mar. 31, 2011). The Oklahoma Supreme Court held a man entitled to a post-divorce declaratory judgment that he was a child's presumptive father when the child was born during the parties' marriage, the child's birth certificate identified the man as the child's father and the man paid child support and exercised visitation with the child for several years, even though a genetic test showed that the man was not the child's father and both the mother's divorce petition and divorce decree stated that there were no children of the marriage. *Clark v. Edens*, ___ P.3d ___, 2011 OK 28 (2011), 2011 WL 1365005.

Relocation: The Alaska Supreme Court reversed a trial court's decision to allow a custodial father to relocate to Arizona from Alaska, rejecting the rationale that there was no change of circumstances because the parents already lived hundreds of miles apart and holding that as a matter of law, moving out of state is a substantial change in circumstances. *Bagby v. Bagby*, ___ P.3d ___, 2011 WL 1814244, No. S-13785 (Alaska May 13, 2011). A New York father's evidence that the mother was emotionally volatile was not relevant and should not have been admitted because the issues in a relocation case are whether the parent who proposes the move has "a good faith reason for the move" and whether the child will suffer from the move. *Morgan v. Morgan*, 205 N.J. 50.

Valid cultural marriage: A stepfather's attempt to claim a presumption of paternity upon divorce rested on his contention that his wife was not married when he married her, but the attempt failed when a Washington Court of Appeals affirmed the "cultural validity" of the first, Sudanese marriage, noting that there was an in-

tent to marry, the local Sultan approved the marriage, the parties consummated the marriage, and the groom substantially paid the dowry of fifty cows by delivering thirty-five of them before civil war swept their village. *In the Matter of the Marriage of Akon & Awan*, 160 Wash. App. 48, 248 P.3d 94 (2011).

columns

HONING YOUR B(AD) S(CIENCE) DETECTOR
by John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Assessing the reliability or quality of psychological testimony is often difficult. Questions raised of a psychological evaluation report illustrate the point: Did the evaluator's methodology adequately address the referral question? Did the evaluator properly interpret test results? Did the evaluator's language—traumatized; emotionally abused; demoralized—accurately describe the examinee's emotional state? Are the evaluator's opinions "based on information and techniques sufficient to provide appropriate substantiation for each finding?"

To help lawyers and judges address these questions adequately, *Daubert*/*Robinson* caselaw offers several scientific-oriented "considerations" or factors. Nevertheless, the task remains difficult. The factors are "non-exhaustive": others may apply, and not every factor named may apply to a given opinion or its supporting materials. Further, research indicates that judges shy away from the more complex factors (e.g., the known or potential error rate; whether the theory or technique has been or can be tested—falsifiability) and tend to rely more on the traditional general acceptance and peer review and publication factors to assess the reliability or quality of psychological testimony and materials.

As a result, lawyers and judges may understandably focus on an evaluation's test results, viewed as "objective" scientific data, to address the evaluation's reliability or quality—continuing legal education sessions offering sophisticated test construction principles and scale-by-scale interpretation information to distinguish good from bad tests are quite popular. Nevertheless, lawyers still find themselves in unfamiliar territory when questioning experts on testing issues. After all, psychologists, not lawyers, were trained in test construction, administration, and interpretation. Further, social study evaluations—usually conducted by non-psychologists—do not generally include psychological testing, resulting in opinions that are mainly supported by clinical interviews of the examinees and by collateral contacts, methods vulnerable to examiner biases.

Concerns about the abilities of judges and lawyers to test the evidentiary reliability of expert testimony through science's prism are not new. In his *Daubert* dissent, then-Chief Justice Rehnquist noted that he did not believe that judges' evidentiary gatekeeping responsibilities imposed on judges "either the obligation or the authority to become amateur scientists in order to perform that role." As an example, Rehnquist wrote that he was "at a loss to know what is meant when it is said that the scientific status of a theory depends on its 'falsifiability' …." The confusion that lawyers and judges often experience when planning and conducting *Daubert*/*Robinson* hearings attests to Rehnquist's concerns.

Nevertheless, *Daubert*-based rules for testing the legal reliability and admissibility of expert evidence are required in Texas and federal courts. How, then, should lawyers and judges approach their assessments of the

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legal reliability and quality of mental health testimony? Must they become amateur scientists to manage such testimony competently?

Developing effective direct- or cross-examinations to test the legal reliability, admissibility, and quality of expert testimony can be a significant challenge, depending on the complexity of the testimony and its underlying supporting materials. Retaining a consulting expert to assist with this task can be very helpful. Even so, lawyers and judges should adopt a mindset that challenges each assertion by an expert—in a report or in testimony—for the assertion's validity. To get to the heart of the reliability of expert testimony, demand of the expert—on direct- or cross-examination—answers to the following question: "How do you know what you say you know?" This question-by-question mindset strips the expert's testimony, layer by layer, and exposes the quality (good or poor) of the methods and reasoning that support the expert's testimony.

In a recent *Newsweek* column, science writer Sharon Begley lamented the teaching of "Bad Science—BS, if you will." Her column's title illustrated her concern: *Wanted: BS Detectors: What science ed should really teach.* Begley faulted teachers who cram children's heads with science facts and fail to teach simple statistical principles. She emphasized that science is a systematic approach to understanding what counts as evidence rather than merely an accumulation of scientific facts. Begley asserted, as a result, that the most useful skill to teach is the habit of asking oneself and others, *How do you know? Daubert* and *Robinson* caselaw emphasize the same B(ad) S(cience)-detecting approach that requires experts to support their assertions: "Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* (unproven assertion) of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

Hone your BS-detector by challenging each expert assertion with the question, *How do you know what you say you know?* It makes scientific sense and legal sense. And it will shed light on the quality of the methods and reasoning that support each of the expert's assertions.

THE SANDWICH GENERATION: TAKING CARE OF YOUR PARENTS AND YOUR CHILDREN WHILE PLANNING FOR RETIREMENT

by Christy Adamcik Gammill, CDFA[1]

Many women today find themselves in the challenging position of caring for aging parents while also raising their children. According to the 2008 U.S. Census Report 42 million women in America fall into this category – coined the Sandwich Generation.

In this role, women are often stressed by the needs of their parents and children while also allocating energy to marriage, retirement planning and other important issues. Like many domestic responsibilities, women often bear more weight when it comes to caring for parents and children. To ensure you achieve your own goals, it is important to be clear about your expectations and needs while accommodating others.

Creating balance

As a mother and a daughter, it is natural for you to want to do everything you can to care for your children and your aging parents. The important thing to remember is not to do it at the expense of your own well-being. Your family will benefit from your own health and financial independence, so it is important that you make yourself a priority.

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

Caring for elderly parents while also providing for your children is an expensive proposition. While you may have to meet certain financial obligations, it is important that you keep your own financial objectives in mind. Here are some things you can do to help balance your needs with those of your family.

Preserve your retirement fund. Your children can apply for loans and financial aid for college—there are no loans for retirement. Your parents probably have assets that can be used toward care and medical benefits.

Keep saving. Even if you have to use your current income to help supplement your parents' care while running your own household, don't stop saving for retirement. By saving for retirement, you are helping to ensure your own financial future will put you, and your children, in a better financial position when you get older.

Communicate. Talk to your parents about their own retirement planning and discuss the possibility of having them obtain long-term care insurance. Long-term care insurance can help secure your parents' choices without putting a financial burden on you.

Talk with your children. If you have younger children approaching college, explain to them that they may need to take on more of the financial responsibility of funding their education. For adult children who have moved back home because of their own financial struggles, set parameters around how much you are willing to support them financially and a timeline for them to find a place of their own.

Plan ahead. Having a plan in place for your own retirement as well as your children's education may help to alleviate how tightly your needs are squeezed in between your parents' and children. Your plan should include a way to grow your assets while saving for retirement and protect your assets when you retire. Don't forget to take into account your own potential medical needs in retirement and the possibility that you, too, may someday need long-term care.

If you are part of the growing sandwich generation, you face unique challenges to your retirement and your planning needs may be more complicated. To help keep your retirement plans on track, consult with a financial professional.

AXA Equitable Life Insurance Company (NY, NY) and its affiliates do not provide tax or legal advice.

EVIDENCE BYTES: TRANSLATIONS

By Jeff Coen[2]

A private termination suit has been filed by the mother based on a history of abuse by the father. The father's paternity was previously litigated in a VI-D action, but he has since returned to his native Brazil. You are representing the mother on a reduced fee basis (pro bono) and want to save costs. She has the father's contact information, but tells you he only speaks Portuguese. How do you contact him to find out if he will contest the case?

You will need to contact the father to find out if he is in agreement to sign a standard affidavit of relinquishment in accordance with TFC §161.103. A quick way to communicate with the father is by email or written letter. Formal translations are expensive as most translation services charge by the page. You may actually find an individual who will informally translate for you, but what if the language is Swahili? There are several free internet translation programs. Chief among them is Yahoo's Babelfish (http://babelfish.yahoo.com/). It is a machine translation program. Developed by AltaVista, the application is

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named after the fictional animal used for instantaneous language translation in Douglas Adams's series *The Hitchhiker's Guide to the Galaxy*. The fish name is a reference to the biblical account of the city of Babel and the various languages said to have arisen there.

You simply compose the body of your email or letter, then cut and paste it on to the translation webpage. Select the languages to translate, such as English into Portuguese, and the written translation appears in the lower block. Cut and paste the new language into your email or letter and you're ready to send.

Early complaints of machine translations were that they were too general and could convey the wrong information where words and sentence structure had many different meanings and nuances. But, the machine language programs actually learn as more and more translations are added to their data base. Just as the Dragon voice recognition programs are constantly evolving and improving so is Babelfish.

Computer translation helps you communicate with clients and parties in a foreign language at no cost, but to date are not a substitute for an official translation if you want to introduce the writing and translation into evidence. Texas Rule of Evidence 1009, a little known and rarely quoted rule, is the exclusive manner in which to introduce foreign language documents. Essentially you must provide the foreign language document, a certified English translation by a qualified interpreter no later than 45 days before trial with one caveat. Rule 1009 (c) allows unsworn or defective translations into evidence if no objection has been made or an alternative translation is provided:

> *(c)* ***Effect of Failure to Object or Offer Conflicting Translation****. If no conflicting translation or objection is timely served, the court shall admit a translation submitted under paragraph (a) without need of proof, provided however that the underlying foreign language documents are otherwise admissible under the Texas Rules of Evidence. Failure to serve a conflicting translation under paragraph (a) or failure to timely and properly object to the accuracy of a translation under paragraph (b) shall preclude a party from attacking or offering evidence contradicting the accuracy of such translation at trial.*

Since even a "rough translation" is admissible[3] barring an objection, it would follow that a computer generated (machine translation) would suffice.

Want to know more about legal translations? Check out http://www.translationforlawyers.com
"Everything you ever wanted to know about foreign languages and cultures in the practice of law"

(Next time -How to get the father's affidavit of relinquishment executed in a foreign country or have him served if he refuses to sign.)

WHAT YOU SHOULD MAKE SURE YOUR LAWYER KNOWS ABOUT PROVING UP PARALEGAL FEES

By Elizabeth Hearn[4]

To be able for your attorney to recover attorney's fees for work performed by a legal assistant/paralegal, "the evidence must establish:

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[3] *San Pedro Impulsora De Inmuebles Especiales, S.A. De C.V. v. Villarreal*, 330 S.W.3d 27 (Tex. App. Corpus Christi 2010, no pet.). Interestingly, even if a timely objection is made and sustained, the original foreign language document if entered to evidence without objection has probative weight. *Onwuteaka v. Comm'n for Lawyer Discipline*, 2009 WL 620253 (Tex. App.—Houston [14th Dist.] Jan. 20, 2009, no pet)

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1) the qualifications of the legal assistant to perform substantive legal work;
2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney;
3) the nature of the legal work performed;
4) the legal assistant's hourly rate; and
5) the number of hours expended by the legal assistant."

Multi-Moto Corp. v. ITT Commercial Fin. Corp., 806 S.W.2d 560, 570, *see* *Gill Sav. Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697, 704-05.

These fees can only be recovered if the work done by the legal assistant is work that "has traditionally been done by an attorney." *Clary Corp. v. Smith*, 949 S.W.2d 452, 469. Evidence of each of these requirements must be presented to the court by the party seeking the recovery. *All Seasons Window & Door Mfg., Inc. v. Red Dot Corp.*, 181 S.W.3d 490, 504 (Tex. App.—Texarkana 2005, no pet.). Evidence that a legal assistant is qualified to perform substantive legal work can be shown with education, training, or work experience. *Clary Corp.*, 949 S.W.2d at 469. The remaining requirements must be presented clearly and with sufficient detail. *See* *McAlester Fuel Co. v. Carpenter*, No. 01-07-00653-CV, 2009 WL 417301 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (mem. op.).

Missing any requirement will mean a court cannot permit recovery of those fees attributed to work done by a paralegal. For example, without evidence of the hourly rate or of the hours expended, the court cannot determine whether the attorney's fees are reasonable. *All Seasons Window & Door Mfg., Inc.*, 181 S.W.3d at 504. Simply indicating that the legal-assistant put in a "considerable amount of time in going through documents and in document production," is not sufficient. *Clary Corp.*, 949 S.W.2d at 470. The court will not award attorney's fees for work performed by a legal assistance if the specific tasks performed by the legal assistant are not identified. *Gill Sav. Ass'n*, 759 S.W.2d at 705. If the only evidence presented is the total costs for unspecified services by a legal assistant, the trial court may not award fees for those services. *Moody v. EMC Services, Inc.*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Further, it is not sufficient to merely provide the hourly rate and number of hours expended. *Another Attic, Ltd. v. Plains Builders, Inc.*, No. 07-08-0312-CV, 2010 WL 4941694 (Tex. App.—Amarillo 2010, no pet.) (mem. op.).

As a paralegal or legal assistant, you must always remember to provide sufficient detail to your supervising attorney when you turn in your hours. Details matter. In addition to providing your hours, you need to include detailed information about what exactly you did during those hours.

articles

UNDERSTANDING CHARACTERIZATION PRINCIPLES AS APPLIED TO PROPRIETORSHIPS

By
Jim Wingate[5]

A. Introduction. The sole proprietorship is the most basic form of a closely held business interest. There are no documents that are required to be filed with the Secretary of State's office, and no separate tax return to be filed with the Internal Revenue Service.[6] If an assumed name is used, it is registered in the county records office of the county in which the business is located (or in which the services are provided if there is no of-

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[6] Sole Proprietorships are reported on Schedule C of Form 1040 (U. S. Individual Income Tax Return).

fice).[7] A sole proprietorship has no existence separate and apart from its owner, and it is not a domestic entity (i.e., a Texas entity) as that term is defined by the Texas Business and Organizations Code ("TBOC").[8]

Spouses are ordinarily allowed to trace the mutations in form of their separate property to establish the separate character of marital assets on hand at time of divorce.[9] For example, when shares of stock that are the wife's separate property are sold and the proceeds reinvested in other shares, then the new shares are considered a mutation in form of the original shares if the wife can show by clear and convincing evidence that the proceeds from the sale of the old shares were used to purchase the new. Mutations in form typically involve some form of cash held in a financial account at some point in the tracing trail.[10]

As discussed below, however, the tracing and characterization of sole proprietorship assets do not follow the typical tracing rules. The principal of mutation in form will not apply to the sale of inventory held for sale by a sole proprietor. Gain on the sale of each item of inventory can never be characterized as a separate property mutation in form, regardless of the fact that the inventory sold may have been held by the proprietorship on the date of marriage.

B. The 19th Century Origins of 20th Century Case Law. *Wallace & Company v. Finberg* is one of the earliest Texas Supreme Court cases in which the character of sole proprietorship assets was considered.[11] In that procedurally convoluted case, the plaintiff, Wallace & Co., sued the husband to recover on three notes signed by both the husband and the wife, and obtained an attachment on the merchandise of the proprietorship.

The wife alleged that the property attached was her separate property by virtue of an instrument executed by her husband and hand filed of record in Louisiana, giving her a lien on $1,500 of future merchandise to be acquired by her husband. The lien arose as a result of funds loaned by wife's separate estate to husband, and the wife alleged that the merchandise levied upon was her separate property as a result of repayment of the debt owed her separate estate by her husband. The husband and wife in effect claimed that the husband ran the business as his proprietorship but that the property attached was his wife's separate property.

In its analysis, the Texas Supreme Court observed that, because of coveture, the wife would not be liable on the notes unless it was shown that the goods for which the notes were given were "for the use of herself or child, or the benefit of her separate property."[12] The Texas Supreme Court held that merchandise purchased to replenish her separate property merchandise that had been sold during the course of her husband's business could not have possibly been for the benefit of her separate estate, and the wife therefore was not liable on the notes.

The Court reasoned that the goods purchased from the plaintiff Wallace & Co. could not be for the benefit of the wife's separate estate because, if this were the case, "the wife's separate property could be invested in a stock of goods for trade and she and her husband could carry on the business of merchandising as a means of increasing her separate property." In other words, the Texas Supreme Court was not going to allow a wife to increase her separate estate by the efforts of her husband to sell merchandise for profit that was then reinvested in new merchandise in a continually expanding separate property estate of the wife.

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[7] *See* TEX. BUS. & COM. CODE § 71.054.
[8] *See* TBOC § 1.001(18).
[9] *See, e.g., Le-Grand Brock v. Brock*, 246 S.W.3d 318, 320("… separate property that merely undergoes mutations or changes in form remains separate property.") (citing *Harris v. Harris*, 765 S.W.2d 798, 802 (Tex .App.—Houston [14th Dist.] 1989, writ denied).
[10] The most common exception to this would be mutations in the form of a business entity which obviously would not involve the tracing of cash. For example, a corporation undergoing a divisive reorganization drops assets into a new corporation and a shareholder of the previously existing corporation receives shares of the new corporation in exchange for his shares of the previously existing company.
[11] 46 Tex. 35 (1876).
[12] *Id*. at 5.

Note that, at that time, Texas did not have a class of protected separate property for husbands.[13] Also, wives were generally not running businesses in the 19th century because of the limitations on both their right to contract and their roles in society. At one point in its decision, the Texas Supreme Court noted that the marital relationship was already sufficiently complicated without adding to it the concept of a mercantile partnership between husband and wife. Little did the Texas Supreme Court realize how complicated marital property law would become during the next century.

The Texas Supreme Court again addressed the issue of characterization of property in the context of the collection of a debt owed by a "mercantile business" in a second debt collection case: *Green v. Ferguson*, 62 Tex. 525 (1884). Quoting from *Wallace*, the Court held that:

> In consideration of the relationship of husband and wife, together with the statutes declaring what shall be considered community property, and what contracts a married woman might make, would seem to lead to the conclusion that she cannot thus engage in trade, and thereby convert into her separate estate that which the law declares shall constitute community property ….[14]

The Texas Supreme Court reached the same result in *Epperson v. Jones*, in which it held that profits from the sale of the wife's separate property goods in a mercantile business were community property.[15]

Smith v. Bailey is yet another Texas Supreme Court case to consider the character of proprietorship assets.[16] In that case, the wife, Mrs. Bailey, was the sole proprietor of a mercantile store at the time of her marriage, and she held the inventory of that store as her separate property. During her marriage to Mr. Bailey, she bought and sold inventory "in the usual course of trade, and with the proceeds of the goods replenished her stock."[17] The inventory of her store was levied upon by a creditor of her husband. The wife claimed that the inventory was her separate property, and was not subject to execution for her husband's debts. The Texas Supreme Court began its analysis by noting that "profits arising from an investment of a married woman's property become the community estate of herself and husband."[18] Therefore, the Supreme Court held that "the gross gains arising from any sales made of the stock, at a price over and above what it cost, must be held to constitute part of the community estate …."[19]

The holding in a later case heard by the Texas Supreme Court in 1889 has created some confusion regarding the characterization of proprietorship assets. In *Schmidt v. Huppman*, the husband held a stock of goods in his business valued at $2,000 at the time of his marriage to his wife.[20] After the death of his wife, the husband charged the community estate for the $2,000 stock of goods, which was challenged in court by several of the beneficiaries of the wife's estate. In its decision, the Texas Supreme Court observed that, although none of the original stock of goods was on hand at the date of the wife's death, at no time during the marriage was the stock of goods reduced below the value held at the date of marriage. The Supreme Court then appears to hold that even though the original merchandise had been sold, the character of the replacement merchandise was separate to the extent of the value of the merchandise that existed as of the date of the parties' marriage. However, in spite of seeming to hold that a portion of the inventory on hand at the time of the wife's death was the husband's separate property, the Texas Supreme Court nevertheless goes on to hold that the husband's separate estate was entitled to reimbursement for the value of the merchandise on hand at the date of the parties' marriage.[21] There was no finding that the husband had proved a currently existing separate property interest in the inventory.

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[13] *See* JOSEPH W. MCKNIGHT & WILLIAM A. REPPY, JR., TEXAS MATRIMONIAL PROPERTY LAW at 4 (2004).
[14] *Id*. at 2.
[15] 65 Tex. 425 (1886).
[16] 1 S.W. 627 (Tex. 1886).
[17] *Id*. at 629.
[18] Citing *Braden* v. *Gose*, 57 Tex. 41; *Green* v. *Ferguson*, 62 Tex. 529; *Epperson* v. *Jones*, 6 Tex. Law Rev. 86; *Cleveland* v. *Cole*, (Galveston term, 1886.)
[19] Smith, 1 S.W. at 628
[20] 11 S.W. 175 (Tex. 1889).
[21] *Id*. at 176.

C. Modern Cases. In *Hardee v. Vincent*, another debt collection case, the wife alleged that the stock of goods and fixtures in her store were her separate property.[22] The husband had conveyed all interest in the parties' store, including merchandise and trade fixtures, to his wife two years before a creditor attempted to attach the merchandise in satisfaction of debts owed for its purchase. The wife claimed that the merchandise was her separate property due to the conveyance of the business to her by her husband. Observing that the trial record showed that goods had been both bought and sold during the years subsequent to the conveyance, the Texas Supreme Court stated that the controlling fact was whether funds used to purchase additional goods and fixtures were from profits or from capital investment. Because the wife could not demonstrate that the goods purchased came from her capital investment and not profits, the Court held that the subject goods were community property.[23]

In more recent times, the Texas Supreme Court has considered the effect that the expenditure of community funds and efforts has upon the character of sole proprietorship assets.[24] In *Norris*, the husband held a lease on seven gas producing wells. The husband's stepdaughter alleged in a probate action that community funds ($9,146) and efforts were expended by the husband in making repairs on the wells, and therefore a community character was impressed upon the gas. The Texas Supreme Court recognized the validity of her argument, but held that the record did not show a sufficient expenditure of community funds or effort to impress a community character on the gas produced.[25] In its opinion, the Texas Supreme Court expressed its approval of earlier cases in which bricks formed from clay removed from separate property land were considered community property and lumber processed from timber harvested from separate land was also community.

In *Moss*, the wife received several gifts of cattle, which she bred and sold for profit and then reinvested the profits in additional cattle. Observing that it was undisputed that the wife was "in the business of buying, feeding and selling cattle," the court held that the revenues from her business were community property.[26]

The decisions of the courts of appeals have for the most part followed the rule that to prove that the assets of a sole proprietorship on hand at the time of divorce are separate property, a spouse must prove that they were acquired with capital investment and not purchased with profits. For example, in *Gibson v. Gibson*, the San Antonio court of appeals relied on *Hardee* in holding that the husband, who acquired a sole proprietorship immediately prior to the parties' marriage, failed to prove which assets on hand at the time of divorce were purchased with profits versus capital, and therefore had not proved his separate property interest in the merchandise.[27]

D. Application to Marital Property Cases. As discussed above, the tracing of assets in a sole proprietorship is an exception to the general tracing rules. Therefore, whether a spouse is engaged in a trade or business can alter the normal tracing rules. For example, if a spouse sits at home all day engaged in day trading, he or she is presumably "in the business" of day trading.[28] As a result, any gains realized from trading constitute profits of his or her business, and hence would be community property notwithstanding the fact that the securities held in the account at time of divorce can be traced to securities held at time of marriage. This treatment of profits arising from a business is analogous to the distinction that the Internal Revenue Code of 1986 draws between the sale of a capital asset versus the sale of assets in the ordinary course of business. The former is accorded capital gain or loss treatment and the latter is treated as ordinary income or loss.

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[22] 147 S.W.2d 1072 (Tex. 1941).
[23] *Id.* at 102-103.
[24] *See Norris v. Vaughn*, 260 S.W.2d 676 (Tex. 1953), and *Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963).
[25] *Norris*, 260 S.W.2d at 498.
[26] *Moss*, 370 S.W.2d at 454; *see also Matter of Marriage of York*, 613 S.W.2d 764 (Tex. Civ. App.—Amarillo 1981, no writ) (profits are community even if capital is separate).
[27] 202 S.W.2d 288 (Tex. Civ. App.—San Antonio 1947, no writ); *see also, Waheed v. Waheed*, 423 S.W.2d 159 (Tex. Civ. App.—Eastland 1967, no writ) (failure to prove whether sole proprietorship funds were from profit or capital); *Blumer v. Kallison*, 297 S.W.2d 898 (Tex. Civ. App.—San Antonio 1957, writ refused n.r.e.)(wife kept records distinguishing capital from profits).
[28] *See Moss*, 370 S.W.2d at 454.

Since any profits arising from the activities of a spouse's sole proprietorship are community property, it is virtually impossible for the separate property component of a sole proprietorship to increase in value during the parties' marriage, absent an infusion of additional separate property funds during the marriage. To the extent that assets are bought with profits, they will be community, and, to the extent purchased on credit, they will also be community. The author suspects that very few merchants pay cash upon delivery of inventory. However, any furniture, fixtures and equipment on hand at the time of marriage that are still held by the proprietorship at the time of divorce would be separate property as part of the capital invested at time of marriage.

E. Comparison of Proprietorship Profits to Corporate Profits. It is worth noting the different treatments accorded profits earned by an entity and profits earned by a proprietorship. Assume that there are two retail stores, Store I and Store P. Store I is owned by I, Inc., and Store P is owned by Proprietorship P. Both I, Inc. and Proprietorship P are engaged in the business of selling gemstones. Both are owned by the wife prior to her marriage, and both held in inventory twenty gemstones with a total value of $500,000 on the date of marriage. Assume further that both I, Inc. and Proprietorship P purchased additional inventory during the marriage using only cash generated from the sale of gemstones. During her short marriage, both Proprietorship P and I, Inc. each generated net profits of $300,000, which came from the sale of forty gems by both the proprietorship and the corporation.

The entire $300,000 of profits generated by I, Inc., because it is held in corporate solution, constitutes neither a community asset nor a separate asset.[29] The profits generated by Proprietorship P, on the other hand, would be community property, even if it could be shown that each and every gemstone purchased could be traced back to the proceeds of sale from the original 20 gems owned by the proprietorship at date of marriage. The principle of mutation in form simply does not apply to the characterization of transactions within a proprietorship to the extent of the profit element in each transaction.

F. Formation of a New Entity from a Proprietorship. If a spouse can prove that he or she contributed the separate property assets of his or her sole proprietorship to form an entity, then that spouse will hold a separate property interest in the entity in proportion to the value of separate property assets contributed to the value of total assets contributed in formation of the entity.[30] The spouse claiming separate property must prove by clear and convincing evidence that the assets were contributed in return for an ownership interest, not just that they were contributed.[31]

In *Vallone*, the husband was able to prove that assets of his sole proprietorship restaurant were contributed to Tony's Restaurant, Inc. upon its incorporation in return for shares of stock in that corporation. However, because he was only able to prove by clear and convincing evidence that 47% of the assets he contributed came from his separate property proprietorship, only 47% of the shares were received by him as his separate property.[32]

In *Hunt*, a factually simpler case, the husband was a partner with his father in a separate property partnership that owned and operated two helicopters.[33] The partnership in *Hunt* was terminated upon the death of the husband's father, and the helicopters were distributed to the husband. The husband subsequently capitalized a new corporation, contributing the helicopters in return for shares in the company. The trial court confirmed the new corporation as the husband's separate property. Noting that there was nothing in the record to show that the husband either used community assets or incurred community debt to form the corporation, the Eastland court of appeals upheld the characterization of the corporation as husband's separate property as a

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[29] *See* *Mandell v. Mandell*, 310 S.W.3d 531, 539.
[30] *See, e.g.*, *Vallone v. Vallone*, 618 S.W.2d 820, 822 (Tex. Civ. App.—Houston [1st Dist.] 1981, rev'd on other grounds, 644 S.W.2d 455 (Tex. 1982)).
[31] *See* *Vallone*, 618 S.W.2d at 822.
[32] *See also* *Koss v. Koss*, 2005 WL 1488070(unreported) (shares capitalized entirely with separate property are separate property).
[33] 952 S.W.2d 564 (Tex. App.—Eastland 1997, no pet.).

mutation in form of the helicopters.

Frequently in divorce cases in which a spouse has transferred proprietorship assets to an entity, an issue arises as to whether those assets were contributed in return for an ownership interest. This issue can arise with respect to the formation of virtually any entity. On occasion, corporations are formed by a contribution of sole proprietorship assets to form the corporation. Sometimes the incorporation is accomplished without any written acknowledgment that the assets of a previously existing sole proprietorship are being contributed to the formation of the corporation. The owner of the business simply has an attorney prepare articles of incorporation, and the attorney uses his or her standard form, which frequently recites that the corporation was formed by the contribution of $1,000 of funds or services.[34] This recitation creates an issue as to whether the former proprietor received shares of the newly-formed corporation in return for the contribution of $1,000, or in return for the contribution of his or her proprietorship assets to the corporation, or in exchange for $1,000 plus the contribution of proprietorship assets.

Another example of a formation issue occurs in the context of a sole proprietorship incorporated as a limited liability company ("LLC"). It is not unusual for the operating agreement of a newly-formed LLC to recite the respective percentage ownership interests that are allocated to each member, without indicating what, if anything, was contributed by the member(s) in return for that interest. For example, assume that a husband owns a sole proprietorship that holds mineral leases, all of which were owned prior to his marriage. Assume further that he wants to develop the leases, and he also wants to avoid personal liability for any accidents that might occur during the drilling of wells on the leases. Therefore, for purposes of avoiding personal liability, he forms an LLC, and contributes his leases to it. The husband has a business associate who will also contribute mineral leases to the LLC in return for a membership interest.

The operating agreement provides that the husband and his associate each hold a 50% interest in the LLC. There is no recitation in the LLC's operating agreement that the husband is contributing his leases in return for his interest in the LLC. On the same day that the husband forms the LLC, he also executes assignments conveying his interest in each of the leases to the LLC. Does the failure of the operating agreement to recite that the husband is receiving his one-half interest in the LLC in return for the contribution of his leases result in his interest in the LLC being characterized as community property? If an inquiry regarding the characterization of an interest in an LLC is limited solely to an examination of an operating agreement that does not identify the capital contributed, then this would be the case because the interest received is not tied to the contribution of the separate property.

Some attorneys and forensic CPAs believe that if articles of incorporation recite that the initial capitalization is $1,000, shares received upon incorporation of a proprietorship are community property absent clear and convincing evidence that the $1,000 initial capital that is identified in the articles of incorporation is separate property, in spite of the fact that there was clearly an incorporation of an existing proprietorship. The basis for their belief is that, based upon the inception of title rule, a recitation in the articles of incorporation that $1,000 was contributed to the corporation conclusively determines the character of the shares received; i.e., the character of the $1,000 determines the character of the ownership interest in the corporation.

The author does not believe that there are any Texas cases that hold that an inquiry as to the character of shares received upon incorporation is limited exclusively to an examination of the character of the $1,000 that may be stated as the initial capital in the articles of incorporation. The Fort Worth court of appeals is clearly of the opinion that a recitation in the articles of incorporation that certain funds were contributed in formation of the corporation does not prevent a spouse from giving evidence that separate property assets of a proprietorship were also contributed in return for shares.[35]

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[34] Incorporation in Texas previously required that a corporation could not commence business until it had received at least $1,000 in value as consideration for its shares. The composition of the $,1000 consideration could at various times be cash, or cash and services or property. *See* TEX. REV. CIV. STAT. ANN. ART. 3.05 (Vernon 1956, 1980 and 2003 Supplement). This requirement was repealed effective September 1, 2003. *See* Acts 2003 78th Leg., ch. 238, § 44(2).

[35] *See* *Allen v. Allen*, 704 S.W.2d 600 (Tex. App.—Fort Worth 1986, no writ).

In *Allen*, the wife owned a beauty salon prior to her marriage, and she incorporated the business during the marriage. The court of appeals' opinion states that $1,000 was required for initial capitalization, and, in the absence of evidence to the contrary, this was presumptively community property. The proprietorship had no tangible assets. However, the wife provided evidence that the management, employees and clientele were the same for the corporation as for the proprietorship, and asserted that she contributed her separate property commercial goodwill to the corporation. The Fort Worth court of appeals accepted the wife's theory that separate property commercial goodwill contributed to a corporation upon formation could be the basis for separate property ownership in shares received in spite of a recitation (presumably in the articles of incorporation) that there was only $1,000 of initial capital contributed to form the corporation. However, because the wife put on no testimony regarding the value of the goodwill, she failed to prove her separate property interest in the shares. The difficulty with determining the views of the courts of appeals on this issue is that the cases typically do not discuss what recitations were contained in the articles of incorporation regarding initial capital, but instead describe the assets contributed and the character of those assets.

The Houston court of appeals considered a somewhat analogous situation in a case involving the gifting of shares by the husband's father.[36] In *Rusk*, the husband's father transferred all shares of a corporation to him during the parties' marriage, and the share certificates recited that they were transferred for value received. The husband testified that no consideration was exchanged in return for the shares and that all income generated by the corporation was distributed to him from the time it was incorporated five years prior to the marriage. Additionally, the wife presented no controverting evidence that the shares were obtained in return for either funds or the efforts of the spouses. The trial court had found that the shares were community property.

In spite of the recitation on the face of the shares that they were issued in return for consideration, the Houston court of appeals held that the shares were the husband's separate property. In reaching its decision, the court of appeals held that "[t]he major consideration in determining the characterization of property as community or separate is the intention of spouses shown by the circumstances surrounding the inception of title."[37] The Fort Worth and El Paso courts of appeal also have adopted this approach.[38]

There is also another basis for extending the characterization inquiry beyond a mere examination of the formation documents. In construing contracts, separate documents that are executed "at the same time, for the same purpose, and in the course of the same transaction are to be construed together."[39] The Texas Supreme Court has held that three documents, all executed on the same day, constituted the entire contract.[40] Likewise, the Fort Worth court of appeals construed a merger agreement with a shareholder agreement in concluding that seven controlling shareholders were third party beneficiaries of the merger agreement.[41]The Fort Worth court of appeals also noted that the application of this rule of construction applies to instruments that are executed at different times and that do not refer to each other.[42]

To the extent that an entity's formation document can be considered a contract, this rule of construction would apply, and all related documents should be read together. For example, an LLC is formed upon the fil-

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[36] *See Rusk v. Rusk*, 5 S.W.3d 299 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

[37] *Rusk*, 5 S.W.3d at 303. However, mere intention alone, without supporting facts, will not affect the character of property. *See Matter of Marriage of York*, 613 S.W.2d 764 (Tex. Civ. App.—Amarillo 1981, no writ); *see also, Holloway v. Holloway*, 671 S.W.2d 51 (unilateral intention of spouse insufficient to establish separate character of borrowed funds).

[38] *See Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.); *Scott v. Estate of Scott*, 973 S.W.2d 694, 695 (Tex. App.—El Paso 1998, no pet.). These cases support an inquiry into the full circumstances under which a spouse received an interest in an entity.

[39] *Jim Walter Homes, Inc. v. Schuenemann*, 668 S.W.2d 324, 327 (Tex. 1984).

[40] *Id. See also Frost National Bank v. Burge*, 29 S.W.3d 580 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Bristol-Myers Squibb Co. v. Barner*, 964 S.W.2d 299, 302 (Tex. App.—Corpus Christi 1998, no pet.) (construing documents together even though not signed contemporaneously).

[41] *Bush v. Brunswick Corp.*, 783 S.W.2d 724.

[42] *Id.* at 728 – 729.

ing of a certificate of formation, as is true for all entities governed by the TBOC.[43] The operations of the company are governed by an operating agreement and, to the extent the operating agreement does not otherwise provide, are also governed by Title 3 (Limited Liability Companies) of the TBOC and by the provisions of Title 1 (General Provisions) that are applicable to limited liability companies.[44] Generally, the operating agreement will state the relative ownership interests of the various members. If the operating agreement does not identify the assets contributed by each member, then the rule of construction that allows separate documents to be construed together if they deal with the same transaction would permit consideration of related documents such as assignments and other transfer documents to determine the character of the interest acquired by each member. If formation documents cannot be considered a contract, then those cases that permit an examination of the circumstances of the formation of the entity would apply.

G. Conclusion. Characterizing and tracing proprietorship sales does not follow the same principles as sales by an individual not engaged in business, and it is virtually impossible to increase the separate property component of a proprietorship during marriage. Unlike sales that are not made while conducting a trade or business, all gains are considered community property because they result from the time, toil and effort of a spouse. Attorneys should understand this difference, and, if they want to expand the size of the community estate, be alert to the possibility that activities of a spouse may constitute activities of a proprietorship.

Additionally, if your client in a divorce case is the owner of a corporation or other entity that was derived from a sole proprietorship, you should be ready to look beyond the recitations contained in formation documents to determine the source of the original capital of the new entity. It would not be unusual for the recitations contained in formation documents to not agree with the economic substance of the transactions involved in the formation of an entity. Given that there is legal precedent that would allow you to look beyond the recitations in the formation documents in characterizing an entity, a failure to understand the economic substance of the transactions could result in the mischaracterization of the newly formed entity.

"Scope of Agreement and Scope of Review" — How the Draft of an Arbitration Agreement Can Affect the Arbitrability of a Dispute as well as the Judicial Review of an Arbitration Award.

By Steven Morris[45]

INTRODUCTION

For over a century, courts and legislatures have encouraged arbitration as an efficient and inexpensive means for settling disputes.[46] Initially, parties who engaged in arbitration were sophisticated businesses involved in complex commercial or trade disputes.[47] However, due to federal and state policies favoring arbitration, pre-dispute arbitration agreements are now prevalent in many contexts including family disputes.[48] "The number of judicial decisions upholding, invalidating, or construing provisions for the arbitration of disputes involving alimony or support payments, or child visitation or custody matters, have more than doubled since 1950."[49]

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[43] *See* TBOC § 3.001(c).

[44] See TBOC § 101.052(a) and (b). An operating agreement (referred to in the TBOC as a "company agreement") can either be in writing or can be oral. The fact that there is only one member of an LLC does not cause the operating agreement to be unenforceable. *See* TBOC § 101.001(1). Any provision permitted in an operating agreement can alternatively be included in the certificate of formation of an LLC. *See* TBOC § 101.051(a).

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[46] Elizabeth K. Stanley, *Parties' Defenses to Binding Arbitration Agreements in the Health Care Field & the Operation of the Mccarran-Ferguson Act*, 38 St. MARY'S L.J. 591, 592 (2007).

[47] *Id.*

[48] *See id.*

[49] Andre R. Imbrogno, *Arbitration As an Alternative to Divorce Litigation: Redefining the Judicial Role*, 31 CAP. U. L. REV. 413 (2003) (quoting Elizabeth A. Jenkins, Annotation, *Validity and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters*, 38 A.L.R. FED. 5th 69, 78-79 (1996)).

Like arbitration in commercial disputes, arbitration in family disputes often benefit one party to the detriment of the other. Thus, the benefited party may request a court to compel arbitration while the other party seeks to avoid arbitration. Whether a court compels arbitration is likely governed by the scope of the arbitration agreement. The scope of the arbitration agreement determines the arbitrability of a future dispute. Similarly, assuming a court has compelled the parties to arbitrate, and after the arbitrator has rendered an award, the benefitted party will likely request the court to confirm the award whereas the other party may seek judicial modification or vacatur of the award. The availability of judicial review of an arbitration award is largely determined by statute or by case law. In either event, a party's challenge to the arbitrability of a dispute, or the party's ability to obtain judicial review of an arbitration award, depends in large part on the draft of the arbitration agreement.

THE FAMILY CODE PERMITS ARBITRATION IN FAMILY LAW MATTERS

Because arbitration is a less expensive avenue for parties to settle disputes, Texas courts and the legislature prefer parties to arbitrate. "Texas strongly encourages alternative dispute resolution such as arbitration, particularly in family law matters."[50] Section 6.601 of the Family Code provides that "[o]n written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or nonbinding."[51] Further, parties may also agree to arbitrate future disputes involving parent-child relationships.[52]

THE SCOPE OF THE ARBITRATION AGREEMENT

When a dispute arises, one party to an arbitration agreement may move the court to compel arbitration while the other party may challenge whether the arbitration agreement covers the disputed issue, i.e. whether the issue is within the scope of the agreement. This section should highlight the flexibility parties have in drafting an arbitration agreement to include or exclude disputes from the arbitration agreement. Texas's policy preferring parties to settle disputes by arbitration makes it very important for parties to carefully consider the scope of the agreement during the negotiating and drafting process. Once a dispute arises, it becomes difficult for either party to successfully challenge the agreement's scope. Although the party moving to compel arbitration bears the burden of establishing that the disputed issue falls within the scope of the arbitration agreement,[53] "[t]he strong presumption favoring arbitration generally requires that [courts] resolve doubts as to the scope of the agreements in favor of coverage."[54]

Because arbitration agreements are creatures of contract, they are interpreted under traditional contract principles.[55] Further, because the question of arbitrability is a gateway issue, generally "[c]ourts, rather than arbitrators, decide whether and what issues a party can be compelled to arbitrate."[56] In determining whether a claim falls within the scope of an arbitration agreement, trial courts court must focus on the factual allegations of the underlying suit and resolve any doubts in favor of coverage.[57] The nature of the parties' relationship is critical to the court's determination of arbitrability.[58] If the sole relationship between the parties is established and governed by an agreement with an arbitration provision, their disputes are more likely to fall within the scope of the arbitration agreement.[59] However, if the relationship between the parties "extends beyond the agreement or is governed by separate and independent agreements, arbitration is less likely."[60] Thus, in a fam-

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[50] Mason v. Mason, 256 S.W.3d 716, 717 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also* In re Provine, 312 S.W.3d 824, 828 (Tex. App.—Houston [1st Dist.] 2009, no pet.).
[51] Tex. Fam. Code Ann. § 6.601 (2010).
[52] *Id.* § 153.0071.
[53] In re Provine, 312 S.W.3d at 828.
[54] In re D. Wilson Const. Co., 196 S.W.3d 774, 782 (Tex. 2006).
[55] J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 227 (Tex. 2003)
[56] In re Great W. Drilling, Ltd., 211 S.W.3d 828, 834 (Tex. App.—Eastland 2006, no pet.). *But see* Saxa Inc. v. DFD Architecture Inc., 312 S.W.3d 224, 229 (Tex. App.—Dallas 2010, pet. denied) (noting that parties may however "agree to submit matters of substantive arbitrability to arbitration.").
[57] Stieren v. McBroom, 103 S.W.3d 602, 605 (Tex. App.—San Antonio 2003, no pet.).
[58] *Id.*
[59] *Id.*
[60] *Id.*

ily law dispute, the fact that the parties' relationship extends well beyond the arbitration agreement may provide greater opportunity for successful challenges to the scope of the agreement.

An Unsuccessful Challenge to the Scope of an Arbitration Agreement

The Houston First Court of Appeals recently addressed the issue of the scope of an arbitration agreement within the context of a family law dispute. In *Provine v. Provine*, a husband and wife resolved their divorce dispute through a mediated agreement that the trial court subsumed into the final divorce decree.[61] The agreement contained an arbitration clause providing that, "Any disputes arising from the drafting of the decree … [to the] performance of this agreement … shall be decided by binding arbitration."[62] Following the couple's divorce, several disputes arose over the court ordered division of property.[63] Bypassing the divorce decree's arbitration clause, the wife moved the trial court to enforce the divorce decree contending that the husband failed to surrender assets and pay community expenses.[64]

The husband responded with a motion to compel arbitration.[65] In denying the husband's motion, the trial court reasoned that disputes occurring after the divorce did not fall under the decree's arbitration clause, thus post-divorce matters were to be settled by the trial court.[66] Accordingly, husband's alleged failure to surrender assets, which occurred after the divorce, was not subject to arbitration.[67]

Highlighting Texas's policy favoring coverage, the appellate court disagreed, and reasoned that a trial court's determination of whether a claim falls under an arbitration agreement turns on the factual allegations of the underlying suit.[68] The court observed that the arbitration agreement expressly covered any disputes arising from the drafting of the decree to the performance of the agreement.[69] Thus, husband's alleged failure to turnover assets, as required by the divorce decree, related to the performance of the agreement.[70] As a result, the court held the disputed issue plainly fell within the scope of the arbitration agreement.[71]

A Successful Challenge to the Scope of an Arbitration Agreement

The Austin Court of Appeals decision in *Mitchell v. Mitchell*, demonstrates a successful challenge to the scope a divorce decree's arbitration agreement in a family law dispute. In *Mitchell*, the mother and father agreed to a mediated settlement that the trial court incorporated into the final divorce decree.[72] The divorce decree provided for the couple's joint conservatorship of the child and with mother's exclusive right to establish the child's primary residence.[73] Additionally, the divorce decree contained the following arbitration clauses:

> [E]ither party may, at any time, propose a change in the residence of the child. The proposed change shall be determined by binding arbitration. … [A]ny disagreements between the parties relating to a jointly-shared right or duty, and/or periods of possession of and access to the child, shall be resolved through binding arbitration.[74]

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[61] In re Provine 312 S.W.3d at 326-27.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 827.
[65] *Id.* at 827-28.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 831.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Mitchell v. Mitchell*, 03-01-00361-CV, 2001 WL 855583, at *2 (Tex. App.—Austin July 31, 2001, no pet.) (mem. op., not designated for publication).
[73] *Id.*
[74] *Id.*

Later, the father petitioned the trial court replace him as the child's sole managing conservator.[75] The mother then filed a motion to compel arbitration contending that the divorce decree's arbitration clause covered the dispute.[76] The trial court denied mother's request to compel arbitration.[77]

On appeal, the mother argued that father's request to be appointed the sole managing conservator concerned a change in the child's residence and related to a jointly shared right or duty. Accordingly the mother asserted that father's request fell within the scope of the divorce decree's arbitration clause.[78]

To begin its analysis, the court observed that the arbitration clause addressed only specific issues within the framework of the parties' joint managing conservatorship agreement; specifically, residency of the child and disputes regarding shared rights or duties and periods of possession.[79] The court reasoned that the decree's arbitration clauses addressed only changes in the terms and conditions under the joint conservatorship, but did not encompass a request to change the type of conservatorship.[80] The court reasoned further that because there was not a specific agreement to arbitrate a change in conservatorship, the trial court would have had no authority to require parties to arbitrate that issue.[81] Accordingly, the father was free to pursue his change in conservatorship request in the trial court.[82]

Suggestion

As these two cases demonstrate, parties in a divorce dispute have the flexibility to design an arbitration agreement to suit their needs. In *Provine*, the parties inserted a broad arbitration clause encompassing all disputes related to the performance and enforcement of the divorce decree. In contrast, the arbitration provisions discussed in *Mitchell*, demonstrate a more limited arbitration provision to a specific set of disputes related to possession of a child. With sufficient forethought and planning, a party fearful of arbitration in specific circumstances should limit the scope of the arbitration agreement to specific disputes or perhaps the specific law or laws to be applied. Alternatively, a party more concerned with the costs of future litigation, should contract with broader language in order to capture a larger number of future disputes.

THE SCOPE OF JUDICIAL REVIEW OF ARBITRATION AWARDS

Unlike a party's challenge to the scope of an arbitration agreement, which typically occurs before arbitration of a dispute, judicial review of an arbitration award occurs much later on the time line, after the parties have arbitrated their dispute and the arbitrator renders an award. A party's challenge to the arbitrator's award, however, is an uphill battle. "Because Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow."[83] The Texas Supreme Court has "long held that 'an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort.'"[84] A trial court "may not substitute its judgment for the arbitrator's merely because it would have reached a different decision."[85] Moreover, trial courts should indulge "[e]very reasonable presumption . . . to uphold an arbitrator's decision."[86] Thus, review of an arbitration award is typically "so limited that [the] award may not be vacated even if there is a mistake of fact or law."[87]

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[75] *Id.* at *3.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at *4.
[80] *Id.* at *5.
[81] *Id.*
[82] *Id.*
[83] E. Tex. Salt Water Disposal Co. v. Werline, 307 S.W.3d 267, 271 (Tex. 2010)
[84] CVN Group, Inc. v. Delgado, 95 S.W.3d 234, 238 (Tex. 2002) (quoting City of San Antonio v. McKenzie Constr. Co., 136 Tex. 315, 150 S.W.2d 989, 996 (1941)).
[85] Stieren, 103 S.W.3d at 605.
[86] CVN Group, 95 S.W.3d at 245 (citing McKenzie, 150 S.W.2d at 996; Johnson v. Korn, 117 S.W.2d 514, 519 (Tex. Civ. App.—El Paso 1938, writ ref'd)).
[87] Stieren, 103 S.W.3d at 605.

Nevertheless, grounds for judicial review do exist and like an arbitration agreement's scope, the scope of judicial review can be determined by the draft of the agreement, although to a much more limited extent. The scope of judicial review of an arbitration award depends in large part on which body of law the arbitration agreement is based, and to a lesser extent, on the contract language providing for arbitration. As discussed below, the parties to the arbitration agreement have the power to select which law they wish to arbitrate under.

What Body of Law are You Arbitrating Under?

In Texas, an arbitration agreement may be governed by any one of three bodies of law: (1) The Federal Arbitration Act (FAA);[88] (2) the Texas Arbitration Act (TAA);[89] or under common law principles.[90] The FAA may apply by default. Section two of the FAA permits the enforcement of an arbitration agreement in "any maritime transaction or a contract evidencing a transaction involving commerce."[91] The FAA contains no express pre-emption provision, nor does it reflect congressional intent to occupy the entire arbitration field.[92] However, the FAA can preempt applicable state laws, including the TAA.[93] The FAA preempts the TAA only if "(1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses [under state law], and (4) state law affects the enforceability of the agreement."[94] Accordingly, an arbitration agreement could be enforceable under the FAA or the TAA or under both statutes concurrently.[95]

In Texas, parties may opt in or opt out of the FAA by clear and unambiguous contract language.[96] If parties fail to specify the law governing their agreement to arbitrate, "they will find themselves under the FAA—if applicable—and the TAA by default."[97] Additionally, in Texas, parties may choose to opt out of both the FAA and the TAA and use common law principles to govern their arbitration agreements.[98] "Statutory arbitration and common law arbitration exist side-by-side in Texas, and a dispute not arbitrable under the Texas statute can nevertheless be arbitrated under common law rules."[99] Common law arbitration can come into play in Texas when parties either clearly and unambiguously reference it in their agreement to arbitrate, or if their agreement falls outside the limits of the TAA.[100]

Review Under the FAA

Because arbitration agreements are creatures of contract, Congress enacted the FAA's judicial review process largely to ensure the enforceability of arbitration agreements.[101] Sections 9 through 11 of the FAA govern judicial review of arbitration awards. Section 9 provides that once an arbitrator renders and an award, any party can then move the court for confirmation and "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."[102] Sections 10 and 11 enumerate a fairly limited list of judicial review purposes including where: (1) the award was procured by fraud, corruption, or undue means; (2) there was evidence of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct that prejudiced the rights of a party; (4) the arbitrators exceeded their

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[88] *See* 9 U.S.C. §§ 9-16 (2010).
[89] *See* Tex. Civ. Prac. & Rem. Code. §§ 171.001 – 171.098 (2010).
[90] *See* In re D. Wilson Const. Co., 196 S.W.3d at 778; Blue Cross Blue Shield of Tex. v. Juneau, 114 S.W.3d 126, 134 n.5 (Tex. App.—Austin 2003, no pet.).
[91] 9 U.S.C. § 2 (2010).
[92] Judge Gray H. Miller & Emily Buchanan Buckles, *Reviewing Arbitration Awards in Texas*, 45 HOUS. L. REV. 939, 941 (2008).
[93] *See* Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 272, (1995).
[94] *In re D. Wilson Constr. Co.*, 196 S.W.3d at 780.
[95] *Id.*
[96] Miller, *supra note* 48, at 941; *see also* Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P., 105 S.W.3d 244, 252 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
[97] *Id.* (citing In re D. Wilson Constr. 196 S.W.3d at 778-80).
[98] *Id.* at 955; *see also* Juneau, 114 S.W.3d at 134 n.5.
[99] Monday v. Cox, 881 S.W.2d 381, 385 n.1 (Tex. App.—San Antonio 1994, writ denied).
[100] Miller, *supra note* 48, at 955 (citing Owens v. Withee, 3 Tex. 161, 166 (1848)).
[101] *Id.* at 943-44 (citing Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); H.R. Rep. No. 68-96, at 1 (1924)).
[102] 9 U.S.C. § 9 (2010).

powers;[103] or there was an evident miscalculation or mistake in the award.[104] Notably, the FAA does not provide for judicial review of an award based on an arbitrator's misapplication of the law or a mistake of law or fact.[105]

Recently, in *Hall Street Associates., L.L.P. v. Mattel*, the United States Supreme Court held that "the grounds for vacatur and modification [of an arbitration award] provided by §§ 10 and 11 of the FAA are exclusive."[106] The Court based its holding on a policy favoring expediency, stating that, "it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[107] Previously, Texas courts and the United States Court of Appeals for the Fifth Circuit held that parties may contractually modify the scope of review for an arbitration award made under the FAA.[108] The Supreme Court's decision in *Hall Street*, however, potentially overrules these previous decisions, casting doubt on the viability of contractually negotiated arbitration review under the FAA. Although the Court expressly limited judicial review of arbitration awards to the enumerated provisions in the statute, the court also stated in dicta:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[109]

Consequently, the Court left open the possibility that an expanded scope of review could exist concurrently with the FAA under a State's statutory framework.[110] In fact, although *Hall Street* constituted a divided six to three split opinion, in his dissent, Justice Breyer noted that based on the majority's quotation above, and upon Justice Steven's dissent, that all nine justices agreed that the FAA does not preclude expanded judicial review under alternative legal frameworks.[111] Thus, as discussed below, parties can contract for expanded judicial review of arbitration awards under the TAA.

Review Under the TAA

The TAA, like the FAA, contains a list of grounds for judicial review and vacatur. Section 171.088 of the TAA tracks the language of the FAA and enumerates the grounds for vacating an arbitration award that primarily encompass fraud, corruption, and evident partiality by the arbitrator.[112]

1. Initial Confusion Regarding the Scope of Review Under the TAA

Prior to the United States Supreme Court's decision in *Hall Street*, the Texas Supreme Court assumed, without deciding, that common law grounds for vacating an award had not been preempted by statute.[113] In the wake of *Hall Street*, however, Texas intermediate appellate courts split over whether common law

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[103] *Id.* at § 10.
[104] *Id.* at §11.
[105] *See id.* §§ 10-11.
[106] Hall St. Associates, L.L.C. v.
[107] *Id.* at 588.
[108] *See* Bison Bldg. Materials, Ltd. v. Aldridge, 263 S.W.3d 69, 78 (Tex. App—Houston [1st Dist.] 2006, no pet.) (citing Tanox, 105 S.W.3d at 251; Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 793 (5th Cir. 2002); Gateway Techs., Inc. v. MCI Telecomms. Corp., 64 F.3d 993, 996 (5th Cir.1995)).
[109] Hall St., 552 U.S. at 590.
[110] Miller, *supra note* 48, at 948.
[111] Hall St., 552 U.S. at 596 (Breyer, J., dissenting).
[112] Tex. Civ. Prac. & Rem. Code Ann. §171.088 (2010).
[113] In re Cantu de Villarreal, 13-08-00708-CV, 2010 WL 4655870, at *6 (Tex. App.—Corpus Christi Nov. 18, 2010, no pet.). Common law grounds for modification or vacatur of an arbitration award are slightly expanded over the statutory models to include review for gross mistake and manifest disregard of the law. *See* Xtria L.L.C. v. Intern. Ins. Alliance Inc., 286 S.W.3d 583, 592-93 (citations omitted). These common law grounds for review are more adequately discussed in section D below.

grounds remained available for arbitration award vacatur. Relying on the parallel structures of the FAA and the TAA, some courts held that the TAA's statutory provisions for vacating an arbitration award were exclusive, and as such, "[foreclosed] the application of common law grounds for vacatur."[114] Other courts continued to apply common law principles as grounds for vacating an award.[115]

2. Texas Supreme Court Holds that Arbitration Parties May Contract for Expanded Review under the TAA

Very recently, however, in *Nafta Traders, Inc. v. Quinn*, the Texas Supreme Court took critical aim at the United States Supreme Court's holding in *Halls Street*.[116] *Nafta Traders* involved an employment dispute subject to resolution by arbitration.[117] The agreement contained a provision stating that "[t]he arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."[118] Following a dispute, the arbitrator rendered an award in favor of the ex-employee.[119] The employer appealed the award, arguing that the arbitrator improperly applied the FAA when he should have applied the TAA, thus the "arbitrator had exceeded his power by issuing an erroneous award when the arbitration agreement denied him the authority to commit reversible error…"[120] The Dallas Court of Appeals rejected the employer's argument, noting that in light of *Hall Street*, the "similarities between the [FAA and the TAA] weighed heavily in favor of construing the TAA as *Hall Street* had construed the FAA."[121] Accordingly, the Dallas court held that under the TAA, parties cannot agree to expand the scope of arbitration review beyond those grounds enumerated in the statute.[122]

In reversing the Dallas court's holding, the Texas Supreme Court noted that section 171.088(a)(3)(A) of the TAA, like section 10(a)(4) of the FAA, provides for judicial vacatur of an arbitration award where "where the arbitrators exceeded their powers."[123] The Court also noted that the Supreme Court in *Hall Street* did not discuss section 10(a)(4), an omission the Court felt "undercut the Supreme Court's textual analysis" of the FAA.[124] The Court noted that *Hall Street* classified legal error as conduct unlike the "egregious departures from the parties' agreed-upon arbitration" as provided by the statutory grounds for vacatur.[125] In contrast, the Court framed legal error as a power delegated to or restricted from the arbitrator by the text of the arbitration agreement.[126] Thus, the parties to arbitration may grant an arbitrator powers beyond those held by a judge, including the power to make legal errors.[127] Alternatively the parties may decide to limit an arbitrator's power such that "an arbitrator has no more power than a judge, so that his decision is subject to review, the same as a judicial decision."[128] The Court concluded that it must follow *Hall Street* when applying the FAA, however, as for the TAA, parties can now expressly agree to limit "the authority of an arbitrator in deciding a matter and thus [allow] for judicial review of an arbitration award for reversible error."[129]

3. Pending Legislation for Expansion of Judicial Review of Arbitration Awards

As a side note, the Texas Legislature has considered a bill that would expand the scope of judicial review of an arbitration award. SB 1782 and HB 3885 would append Section 171.092 to include the following subsection: "Notwithstanding a limitation in … this code, the court may also vacate, modify, or correct an award

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[114] *Id.* (citing Age Indus. v. Edwards, 318 S.W.3d 461, 463; Quinn v. Nafta Traders, Inc., 257 S.W.3d 795, 799 (Tex. App.—Dallas 2008), *rev'd* No. 08-0613, 2011 WL 1820875 (Tex. May 13, 2011)).
[115] *Id.* (citing Graham-Rutledge & Co. v. Nadia Corp., 281 S.W.3d 683, 688 (Tex. App.—Dallas 2009, no pet.)).
[116] *See* Nafta Traders, Inc. v. Quinn, No. 08-0613, 2011 WL 1820875 (Tex. May 13, 2011).
[117] *Id.* at *1.
[118] *Id.*
[119] *Id.*
[120] *Id.* at *1.
[121] *Id.* at *2.
[122] *Id.*
[123] *Id.* at *4 (quoting simultaneously 9 U.S.C. 10(a)(4); Tex. Civ. Prac. & Rem. Code Ann. 171.088(a)(3)(A) (2011)).
[124] *Id.*
[125] *Id.* (quoting *Hall Street*, 522 U.S. at 586.).
[126] *Id.*
[127] *Id.* at *6.
[128] *Id.*
[129] *Id.* at *3, 6.

as if the award was a judgment entered by a court sitting without a jury."[130] If this change is enacted, judicial review of an arbitration award would "become much broader and, courts may change or modify awards to correct errors of law."[131] Currently, however, SB 3885 has been left pending in House Committee on Civil Practices since April 18, 2007.[132]

4. The Family Code's Expanded Review for "Best Interest of Child"

As previously stated, review of arbitration awards is typically "so limited that an arbitration award may not be vacated even if there is a mistake of law or fact."[133] However, in the context of a child conservatorship or possession dispute, the Family Code provides an expanded ground for judicial review of an arbitrator's award.[134] When the dispute involves child conservatorship or possession "a trial court may vacate an arbitrator's award under only two circumstances: (1) as allowed by the TAA or (2) as allowed by the Family Code."[135] Under Section 153.0071(b) of the Family Code, when parties agree to binding arbitration, the trial court "shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child."[136] Essentially, in disputes involving the parent-child relationship "the Texas Legislature has specifically granted the trial court the ability to substitute its judgment for that of the arbitrator when determining the best interest of a child."[137]

Section 153.0071(b) stems from the Family Code's strong policy ensuring that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.[138] Nevertheless, Texas's strong policy favoring arbitration permits a party to contractually waive known rights including grounds for judicial review provided by the TAA and the Family Code.[139] "It is [Texas's] policy to encourage peaceful resolution of disputes, particularly those involving the parent-child relationship, including mediation of issues involving conservatorship, possession and child support."[140] Thus, a parent who is a party to an arbitration agreement can waive his or her right to judicial review on grounds that the arbitrator's award is not in a child's best interest.[141] This is a stark demonstration of how the draft of the arbitration agreement can effect the scope of judicial review.

Review Under Common Law Doctrine

Under the common law, a trial court may set aside an arbitration award not only for fraud, corruption, and evident partiality, but also for gross mistake,[142] or manifest disregard of the law.[143] Nevertheless, these grounds for vacatur are quite narrow. Gross mistake implies "bad faith and failure to exercise honest judgment."[144] Manifest disregard of the law, on the other hand, "is more than a 'mere error or misunderstanding with respect to the law' … [r]ather, the record must show the arbitrator clearly recognized the applicable law but chose to ignore it."[145] "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."[146] Further, "review for manifest disregard of the law does not open the door to extensive judicial review."[147] Although common law judicial review is

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[130] Tex. S.B. 1782, 80th Leg., R.S. (2007) (as passed by the Senate, Apr. 27, 2007); Tex. H.B. 3885, 80th Leg., R.S. (2007) (as referred to House Comm. on Civil Practices, Apr. 18, 2007).
[131] Miller, *supra note* 48, at 953.
[132] Texas Legislature Online, http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=80R&Bill=HB3885 (last visited Feb. 11, 2011).
[133] Stieren, 103 S.W.3d at 605.
[134] *See* Tex. Fam. Code Ann. § 153.0071(b) (2010).
[135] Stieren, 103 S.W.3d. at 605.
[136] Tex. Fam. Code Ann. § 153.0071(b) (2010) (emphasis added).
[137] Stieren, 103 S.W.3d at 605.
[138] *See* In re J.F.C., 96 S.W.3d 256, 293 (Tex. 2002).
[139] *See* In re C.A.K., 155 S.W.3d 554, 560.
[140] *Id.*
[141] *Id.*
[142] Teleometrics Intern., Inc. v. Hall, 922 S.W.2d 189, 193 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
[143] Home Owners Mgmt. Enterprises, Inc. v. Dean, 230 S.W.3d 766, 768 (Tex. App.—Dallas 2007, no pet.)
[144] Teleometrics Intern., 230 S.W.3d at 193.
[145] *Home Owners Mgmt.*, 230 S.W. 3d at 768 (quoting Perry Homes v. Cull, 173 S.W.3d 565, 572 (Tex. App.—Fort Worth 2005) *rev'd*, 258 S.W.3d 580 (Tex. 2008)).
[146] Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Intern., Ltd., 888 F.2d 260, 265 (2d Cir. 1989).
[147] Tanox, 105 S.W.3d at 253.

somewhat expanded, Texas's arbitration policy limits their applicability. "To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties."[148]

Despite the limited opportunity for judicial review of arbitration award, some suggest that, in the light of the U.S. Supreme Court's decision in Hall Street, common law arbitration agreements offer the another possible solution for a party to shape its own judicial review process.[149] Texas Courts have long recognized that common law arbitration awards are governed by the law of contracts.[150] Further, Texas courts have allowed parties to specify their own arbitration rules, and permitted parties to contractually waive their right to appeal altogether.[151] These contractual modifications highlight the willingness of courts to allow parties to shape their own arbitration agreements.[152] Thus, common law arbitration agreements could permit parties to include errors of law or facts within the scope of judicial review.[153] Given the Texas Supreme Court's decision in Nafta Traders, this suggestion is not as bold as it may have seemed following the United States Supreme Court's Halls Street decision. Nevertheless, until a party includes a judicial review for error of law provision into its agreement, and then convinces an appellate court to uphold a trial court's modification or vacatur on that ground, the idea that parties can contract for judicial review for of legal errors under common-law principles will remain merely theoretical.

Suggestion

Although the scope of judicial review of an arbitration award is fairly narrow, drafting attorneys should be cognizant of the three bodies of law under which an arbitration agreement may be based in Texas. Additionally, drafting attorneys should consult the appropriate statutory or case law text to ensure the agreements scope of judicial review conforms to a client's needs in the event of a future dispute.

Client's wary of the costs of future litigation should consider opting out of the TAA altogether and basing agreements exclusively on the FAA. This will ensure that judicial review of an arbitration award will be limited to the statutory grounds for review which under *Hall Street*, does not allow for review for legal errors. The client may also consider negotiating an express waiver of any or all of the statutory grounds for review.

Alternatively, clients concerned with an arbitrator's award based on erroneous conclusions of law should consider opting out of the FAA entirely and base their agreement exclusively on the TAA or perhaps on common-law arbitration. In doing so, parties and their drafters seeking review under the TAA should ensure that the agreement provides that arbitrator's will not have the authority to make legal errors. Although common-law arbitration currently does not provide for review based on an arbitrator's mistake of law or facts, at least with the slightly expanded scope of review, the party can make a more forceful argument down the line. One caveat to providing for expanded review under the TAA is that the arbitral record must be complete and accurate. In *Nafta Traders*, the Court noted that "[a]n arbitration award is not susceptible to full judicial review merely because the parties have agreed."[154] A court reviewing an arbitration award "must have a sufficient record of the arbitral proceedings, and complaints must have been preserved, all as if the award were a court judgment on appeal."[155] Consequently, parties hoping for reduced dispute resolution costs during arbitration, but also preferring judicial review, may find that the mere possibility of review increases the overall arbitration costs as the parties attempt to comply with more court-like procedures.

Given the limited nature of judicial review of arbitration awards, an alternative approach the parties should consider is to provide for review by an arbitration panel.[156] "This solution bypasses 'judicial review' prohibitions since such review would be outside the realm of the courts, and within the parties' right to con-

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[148] Carte Blanche (Singapore) Pte., Ltd., 888 F.2d at 265.
[149] Miller, *supra note* 48, at 958.
[150] Ferguson v. Ferguson, 93 S.W.2d 513, 516 (Tex. Civ. App.—Eastland 1936, writ dism'd).
[151] Miller, *supra note* 48 at 958. (citing Aguilar v. Abraham, 588 S.W.2d 599, 601 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.)).
[152] *Id.*
[153] *Id.*
[154] Nafta Traders Inc., 2011 WL 1820875.
[155] *Id.*
[156] Scott D. Marrs & Sean P. Milligan, *What You Always Wanted to Know About Arbitration: Five Arbitration Issues Recently Decided by the Courts*, 73 TEX. B.J. 634, 636 (2010).

tract for arbitration."[157] Because an arbitration panel resides exclusively within the arbitration system, the parties could easily contract for expanded review to include errors of law and fact.[158]

CONCLUSION

So long as arbitration remains a cost effective and efficient means for settling disputes, adverse parties, especially in the family law context, will continue to use arbitration to settle anticipated future disputes. Additionally, Texas courts and the legislature will continue to refine Texas law and policy to favor arbitration. Due to the contractual nature of arbitration agreements, parties can specify exactly what they want to arbitrate, and to some extent, how they want a court to review an arbitration award. As such, it is the drafting attorneys' job to shape the arbitration agreement so that its scope adequately covers the parties' intended disputes, and so that the parties can reasonably predict how a court will review an arbitration award. Finally, practitioners at all levels should be cognizant of the scope of arbitration agreements as well as the extent to which a court can review an arbitration award, so that when a dispute arises, the practitioner can thoroughly protect the interests of his or her clients.

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[157] *Id.*

[158] *Id.* The authors also provide a preformed "appeals" provision approved by the American Arbitration Association which provides for appeal to an arbitral panel. *See id.*

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

DIVORCE

DIVISION OF PROPERTY

TRIAL COURT PROPERLY AWARDED EX-WIFE ONE-HALF OF THE CORPUS OF HUSBAND'S EMPLOYEE SAVINGS PLAN FOLLOWING HIS DEATH BECAUSE THE DIVORCE DECREE FAILED TO DIVIDE CORPUS, LEAVING IT AS UNDIVIDED COMMUNITY PROPERTY.

¶11-3-01. ***Maddox v. Maddox,*** No. 06-10-00055-CV, 2011 WL 808930 (Tex. App.—Texarkana 2011, no pet. h.) (mem. op.) (03/09/11).

Facts: Husband and ex-wife divorced after forty years of marriage. The divorce decree awarded husband and ex-wife each one-half of the yearly payments from husband's employee savings plan. Following the divorce, husband met and married second wife. After husband's death ten years later, the corpus remaining in the employee savings plan was paid to second wife. Ex-wife filed suit against second wife claiming that, pursuant to the divorce decree, one-half of the plan's corpus was rightfully hers. Trial court agreed and awarded ex-wife one-half of the plan's corpus. Wife appealed, arguing the divorce decree left the retirement account's corpus to husband and therefore, after husband died, the entire corpus was rightfully hers.

Holding: Affirmed

Opinion: The COA began its analysis by observing that the forty-year-old divorce decree awarded husband one-half of the yearly payments from the savings plan and ordered him to pay the remaining one-half of each yearly payment to ex-wife. Also, although the decree distributed the retirement plan's yearly payments, it did not provide for the plan's corpus. Thus, the effect of the decree's language left the corpus as undivided community property. As a result, ex-wife became a cotenant of her one-half share of the undivided corpus, and rightfully sued second wife to obtain her half of the property.

Editor's Comment: *A critical fact in this case is that the defendant did not raise ERISA preemption in the trial court. Accordingly, the defendant waived that issue on appeal. Had the defendant raised ERISA, the court of appeals might well have reversed. See Barnett v. Barnett, 67 S.W.3d 107 (Tex. 2001). (J.V.)*

Editor's Comment: *The parties had apparently attempted to address the corpus of the savings plan in the decree. They included an employment-benefit catch-all provision that awarded husband any and all "other benefits existing by reason of [husband's] past, present, or future employment except the Champion Savings Plan pin number 3336 as set forth above." However, there was no specific distribution of, or reference to, the savings plan's corpus. This result emphasizes the importance of careful drafting and review of decrees. (J.A.V.)*

Editor's Comment: *You have to understand the asset so you can properly divide it upon divorce. The decree that caused the problems here missed the point; dividing the yearly payments from the employee savings plan but failing to award the entire asset. (A.B.R.)*

TRIAL COURT DID NOT ERR BY RENDERING A DIVORCE DECREE THAT DIVIDED REAL PROPERTY BASED ON MEDIATOR'S DECISION BECAUSE THE MSA BETWEEN HUSBAND AND WIFE GAVE MEDIATOR AUTHORITY TO DECIDE DISPUTES RELATED TO THE PARTIES' INTENT IN THE MSA.

¶11-3-02. ***In re Marriage of Allen,*** -- S.W.3d --, 2011 WL 1167643 (Tex. App.—Texarkana 2011, no pet. h.) (03/25/11).

Facts: During divorce proceedings, husband and wife entered into a mediated settlement agreement (MSA) regarding the division of a fifty-nine-acre tract of land. The MSA purportedly partitioned the property amongst the parties. The MSA also provided that "[mediator] … would be the sole arbiter of any disagreement with regard to the drafting and intent of the [MSA]." After the parties executed the MSA, a dispute arose regarding some of the property not specifically designated as the property of either party. Mediator decided the dispute by extending the boundaries provided in the MSA through the undesignated property. Additionally, mediator submitted a report stating her belief that the parties understood that the boundary lines as represented in the MSA were, in fact, the correct boundary lines.

Afterward, husband filed a motion to vacate the "arbitration award." At a hearing, trial court determined that the MSA included arbitration by mediator to be binding; therefore, trial court entered an award reflecting mediator's decision. Afterward, husband moved trial court to enter a final decree of divorce. Husband appealed.

Holding: Affirmed

Opinion: Husband argued that trial court erred in concluding that the parties entered into binding arbitration because the MSA did not provide for binding arbitration by the same mediator for any issues other than drafting disputes. The COA began its analysis by noting that the parties did not participate in binding arbitration. Rather, the parties had entered into a binding MSA pursuant to TFC 6.602. The COA noted that trial court did not order arbitration, and the record contained no order returning the parties to mediator to resolve the dispute over the fifty-nine acres. The COA observed further, that although the MSA provided that mediator would be the "sole arbiter of any disagreement" regarding the drafting and intent of the MSA, this did not equate with binding arbitration because trial court was free to find the disputed property was not included within the MSA, and therefore, could have rejected mediator's finding that it was. Thus, mediator's determination was by no means binding.

Accordingly, the real issue concerned the scope of the MSA. The COA noted that the parties had no factual dispute in the case. In fact, both husband and wife testified the MSA was intended to dispose of the fifty-nine acres, and both believed that the MSA had divided the property. Both parties acknowledged that division of the fifty-nine acres had been discussed during the mediation, as evidenced in mediator's "arbitration" ruling. The COA reasoned that mediator's arbitration report recognized the limitations of her role which stated that she could resolve the fifty-nine-acre tract issue as it involved the intent of the MSA. Mediator's decision was based on the discussions at the mediation and the representations of the parties. In essence, mediator found the division of the fifty-nine acres was a part of the MSA reached by the parties during the mediation session. Accordingly, the COA concluded trial court did not err in finding that mediator was authorized to decide the issue, to determine the intent of the mediation document and to determine the manner in which the parties intended to divide the fifty-nine acres.

Editor's Comment: *Here is a good case that addresses head-on the problem created when an MSA does not address all of the community estate's assets and liabilities. This case just so happens to have a provision making the mediator the final arbiter of disputes about the MSA language and intent. However, regardless of that provision, if the MSA leaves out assets or liabilities then they remain undivided and a separate agreement must be reached or the issue must be tried by the court. (C.N.)*

Editor's Comment: *What a confusing mess. The mediated settlement agreement provided "that the mediator...would be the "sole arbiter of any disagreement with regard to the drafting and intent of the final documents to effectuate this Agreement." The COA determined that this does not equate with binding arbitration. The COA essentially concluded that no arbitration occurred, but that pursuant to the mediated settlement agreement, the mediator could resolve a factual dispute concerning the scope of the mediation. Although the arbitration provision in the mediated settlement agreement could have been more explicit, I disagree that the provision did not equate to binding arbitration. There are several critical concepts to include in an arbitration provision in a mediated settlement agreement: (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.)*

Editor's Comment: *This case doesn't sit well with me. The Court bases much of its opinion on the fact that the MSA stated that the mediator would be the sole arbiter of "drafting and intent of the final documents." However, the mediator's decision rested on her interpretation of the intent of* ***the MSA****, not a final document, and indeed the mediator's decision states as much. Furthermore, I would argue that if the intent of the parties regarding this one provision of the MSA is so disparate, the entire MSA should be thrown out for a lack of a meeting of the minds. See Milner v. Milner, 2010 WL 2243558 (Tex. App.-Fort Worth 2010, pet. filed) (mem. op.). (R.T.)*

Editor's Comment: *Be careful to read the introductory language for any mediation agreement. Many mediators are including this language in an effort to reduce quabbles over drafting of orders. But, be cautious as to what type of alternative dispute resolution you choose to resolve those disputes and know the rules. (M.M.O.)*

Editor's Comment: *Division of an asset that is not awarded to either party in an MSA seems like a bit of a stretch from the decisions of "drafting and intent" allowed in the arbitration clause – especially when the entire issue is decided based upon the mediator/arbitrator's recollection of discussions and representations made at mediation. (A.B.R.)*

TRIAL COURT ERRED IN DISTRIBUTING PROPERTY CONTRARY TO A RULE 11 AGREEMENT BETWEEN HUSBAND AND WIFE AND IN DISTRIBUTING PROPERTY WHICH WAS NOT PART OF THE MARITAL ESTATE

¶11-3-03. ***Collins v. Collins,*** -- S.W.3d --, 2011 WL 1648240 (Tex. App.—Dallas 2011, no pet.) (05/03/11).

Facts: Husband and Wife acquired substantial assets during their marriage. The source of the assets came under investigation in the U.S. and Liechtenstein. Husband was incarcerated in 1986, but he escaped from federal prison. The couple fled to Europe, where they created three entities—Royman Foundation, Silverado Foundation, and Profunda Establissement—under Liechtenstein law. Husband and Wife each had two types of interests in the three Liechtenstein entities: founder's rights and beneficial rights. The holder of a founder's right had the right to transfer property, while the holder of only a beneficial right did not.

Subsequently, Husband and Wife returned to the U.S., and Husband turned himself into the authorities. In 1997, he entered a plea agreement with the DOJ, in which he had to distribute $6 million in cash. Three million dollars was to be distributed to the DOJ, and the remaining $3 million was to be divided amongst Husband's family, including Wife. Wife filed for divorce before the funds were distributed. After Wife filed, the federal government seized the $6 million under the Patriot Act. Husband entered a settlement with the DOJ relinquishing the $3 million it was supposed to get ten years prior.

At trial, Wife requested certain contents of some safe deposit boxes in Liechtenstein. Wife testified that the contents included gifts to her from Husband, as well as some separate property belonging to her and other separate property belonging to Husband. Husband controlled access to the boxes and would not permit an in-

ventory or appraisal of the boxes' contents. During trial, it was established that the property within the safe deposit boxes was owned by Profunda.

At trial, a Rule 11 Agreement was admitted into evidence. The agreement was between and signed by Husband, Wife, and the three Liechtenstein entities and divided the remaining $3 million. In addition to divvying up the cash, the agreement also included certain provision that stated,

6. [Wife] . . . [s]hall irrevocably waive [her] position as beneficiar[y] of Royman Foundation, Vaduz.
7. [Wife] . . . shall irrevocably waive any claims [she] might have against Etablissement Profunda, Vaduz.
8. [Wife] . . . shall irrevocably waiver her position as beneficiary of Silverado Foundation, Vaduz.
9. [Wife] shall receive from the assets of Etablissement Profunda the . . . watch and earrings.

After hearing the evidence, trial court awarded Wife the cash distribution allotted to her in the agreement, as well as half the proceeds of the sale of the safe deposit boxes' contents. Further, trial court ordered Husband to turn over half of all founders' and beneficial rights to Wife. Husband appealed, arguing trial court erred in dividing the property contrary to the rule 11 agreement.

Holding: Reversed and Remanded

Opinion: Rule 11 Agreement is valid because it was in writing, signed by the parties, and admitted into evidence. Trial court erred in dividing the property contrary to the rule 11 agreement. Further, evidence showed the assets within the safe deposit box were property of the third entity, namely Profunda. "Assets belonging to a third party are not part of the marital estate," so trial court erred in including the safe deposit assets in its division of the estate. Finally, because wife waived her beneficial interests in the first two entities, trial court erred in ordering Husband to turn over any portion of the interest to Wife.

Editor's Comment: *The court concluded that the trial court "divided assets with potential substantial value that were not a part of the marital estate." Yet the court stated that "the evidence suggested" that neither Silverado nor Royman "had any assets." Must an appellant show merely that there might be undivided property to obtain a reversal? J.V.*

Editor's Comment: *If you discover that the parties have a written agreement to divide their assets and liabilities, then the first step is to figure out if the written agreement complies with Rule 11 of the TRCP. The next step is to figure out what it means. Did it divide all of the community estate's assets and liabilities, or just part? If it divides just part of the community estate, then a trial will be required if the case cannot be settled. However, no matter what, it is advisable to bring the issues relating to the interpretation of the agreement and its enforceability to the trial court sooner rather than later. (C.N.)*

Editor's Comment: *This opinion stands for the proposition that an agreement between the husband, wife and third parties, reached before the divorce was ever filed, served to partition assets between them under Rule 11, with no regard to the statutory regulations for a partition and exchange agreement. (Disclosure: I represented Wife in this appeal.) (M.M.O.)*

SAPCR

STANDING AND PROCEDURE

TRIAL COURT ERRED BY ENTERING A DEFAULT JUDGMENT ADJUDICATING FATHER AS BIOLOGICAL FATHER OF CHILD BECAUSE FATHER TIMELY FILED AN ANSWER BUT DID NOT RECEIVE NOTICE OF THE SUBSEQUENT HEARING TO ESTABLISH THE PARENT-CHILD RELATIONSHIP.

¶11-3-04. ***In re I.L.S.,*** -- S.W.3d --, 2011 WL 711633 (Tex. App.—Dallas 2011, no pet. h.) (03/02/11).

Facts: OAG filed a petition to establish the parent-child relationship between father and child. Father was served with citation and a copy of the petition. At time of service, father was incarcerated and proceeded pro se. After being served, father filed a document titled "Objections And Request For A Stay of The Proceedings" in which he claimed he had not been properly served because the copy of the petition accompanying the citation was missing a page. Father requested trial court to stay proceedings pending proper service. Afterward, trial court ordered parentage testing, but father refused to sign the consent or submit to testing. Following a hearing on OAG's petition, which father did not attend, trial court signed a default order declaring father to be child's biological father. Father appealed, arguing trial court erred by not allowing him the opportunity to participate in the proceedings to establish the parent-child relationship.

Holding: Reversed and remanded

Opinion: The COA began its analysis by observing that although father's objection was not in the standard form of an answer, the document he filed gave trial court a timely response acknowledging receipt of citation. Because father appeared by answer, he was entitled to notice of any subsequent proceedings. The record demonstrated that father was not given notice of the hearing on the petition to establish the parent-child relationship. Accordingly, trial court erred in entering the no-answer default judgment.

Editor's Comment: *Almost any written submission counts as an answer. Thus, it's very simple. No notice of trial to an answering defendant, means no valid judgment. (C.N.)*

Editor's Comment: *The COA got it right. Almost anything filed with the Clerk by the respondent should be considered an "answer" entitling the respondent to notice of trial. When in doubt, send a notice of hearing. (J.A.V.)*

Editor's Comment: *Notice... duh... part 1. (M.M.O.)*

TRIAL COURT ABUSED ITS DISCRETION BY APPOINTING AUNT AND UNCLE AS NON-PARENT JOINT MANAGING CONSERVATORS BECAUSE THEY NEITHER FILED A PETITION IN INTERVENTION NOR SOUGHT LEAVE OF COURT TO INTERVENE.

¶11-3-05. ***In re C.A.H.,*** No. 11-10-00040-CV, 2011 WL 947082 (Tex. App.—Eastland 2011, no pet. h.) (mem. op) (03/03/11).

Facts: In 2004, trial court granted mother the right to designate child's primary residence. In 2008, father filed a SAPCR requesting managing conservatorship of child. At a hearing, father called aunt and uncle (father's sister and her husband) as witnesses. During the course of proceedings, trial court expressed a preference that aunt and uncle should be caretakers of child rather than mother or father. Although aunt and uncle

had not filed a petition in intervention, trial court referred to them as intervenors at the hearing. Following a hearing, trial court appointed mother and father as parent joint managing conservators and aunt and uncle as nonparent joint managing conservators. Mother appealed arguing aunt and uncle did not have standing to intervene.

Holding: Reversed and rendered in part, reversed and remanded in part

Opinion: TFC 102.004(b) governs standing for grandparents or other persons seeking intervention into a suit involving conservatorship. Here, aunt and uncle did not attempt to satisfy TFC 102.004(b)'s requirements for intervention. They did not seek leave to intervene nor did they file a petition in intervention. Thus, aunt and uncle never alleged any facts to support a claim that they had standing to intervene. Accordingly, trial court abused its discretion in appointing aunt and uncle as child's joint managing conservators.

Editor's Comment: *Because standing is a component of subject matter jurisdiction the failure of either M or F to object to the aunt and uncle's participation in trial was probably not waived. I would imagine on remand that aunt and uncle will now file pleadings and the same judge that thought they should get primary custody will likely find a basis upon which to grant them standing. (S.S.)*

Editor's Comment: *At trial, the court presciently stated, "I'm going to go out on a limb here." (J.V.)*

Editor's Comment: *There is no rule more fundamental than the rule that a judgment must be supported by the pleadings. It is reversible error for a trial court to grant relief which is not authorized by the pleadings. As a result: no pleadings, no relief. It's that simple. (C.N.)*

Editor's Comment: *When confronted with a choice between two unappealing parent conservators, you can't blame a judge for wishing there was another option. Here, the judge did just that and, with a little help from the "intervenors", it might have worked. Aunt and uncle probably could have fixed the issues that led to the COA's reversal by filing a petition in intervention and establishing standing, if not before being appointed conservators, then at least some time before the final trial a year-and-a-half later. (A.B.R.)*

TRIAL COURT ERRED BY ACTING ON GRANDPARENTS' PETITION IN INTERVENTION SEEKING CONSERVATORSHIP BECAUSE THEY FAILED TO SERVE MOTHER WITH CITATION AND A COPY OF THE PETITION.

¶11-3-06. ***In re C.T.F.,*** -- S.W.3d --, 2011 WL 806012 (Tex. App.—Texarkana 2011, no pet. h.) (03/09/11).

Facts: Father served mother with a petition for divorce. Mother did not respond. Afterward, child's paternal grandparents filed a petition in intervention seeking conservatorship of child. Grandparents did not serve mother with citation or a copy of their petition nor did mother attend a later hearing on grandparents' petition. Trial court awarded joint managing conservatorship to father and grandparents and granted grandparents the exclusive right to designate child's residence. Mother appealed.

Holding: Reversed and remanded

Opinion: The Texas Supreme Court has held that citation is necessary when an intervenor requests affirmative relief against a defendant who has not appeared pursuant to the intervention or taken any action subsequent to the intervention. Thus, grandparents were required to serve mother with citation and a copy of their petition in intervention. Further, Mother was permitted to raise defective service for the first time on appeal. Accordingly, trial court was without authority to act on the grandparent's petition in intervention in the absence of service of process on mother.

Editor's Comment: *Notice... duh... part 2. (M.M.O.)*

TEXAS TRIAL COURT, RATHER THAN LOUISIANA TRIAL COURT, PROPERLY EXERCISED JURISDICTION IN DIVORCE CASE BECAUSE NO STATE HAD JURISDICTION OVER CHILDREN, AND FATHER FILED DIVORCE PETITION IN TEXAS BEFORE WIFE FILED IN LOUISIANA.

¶11-3-07. ***Marsalis v. Marsalis,*** -- S.W.3d --, 2011 WL 923941 (Tex. App.—Texarkana 2011, no pet. h.) (03/18/11).

Facts: Mother, father, and children lived in Louisiana for several years where they owned a home. Father began working in Texas where paternal grandparents lived. After some temporary moves back and forth and visits with paternal grandparents, in order to maintain a more stable marriage, the family moved from Louisiana to Texas in 2009. When the effort to achieve marital stability by moving to Texas failed, father filed for divorce on July 29, 2009 in Texas. After father filed for divorce in Texas, mother filed for divorce in Louisiana and attached a copy of father's Texas divorce petition. Mother also filed a special appearance in Texas arguing Texas trial court lacked subject-matter jurisdiction over the children because the children had not lived in Texas for six consecutive months prior to the filing of the divorce.

Father did not appear at the Louisiana hearing on mother's divorce action although his counsel objected to the form of the proposed decree. Louisiana trial court rejected father's objections and entered a divorce decree. (Father eventually appealed the Louisiana divorce decree which the Louisiana COA affirmed.) After Louisiana trial court rendered a divorce decree, wife filed the decree in Texas trial court. Afterward, Texas trial court entered an order overruling mother's special appearance finding that it had subject-matter jurisdiction over the parties and all matters in controversy. Ultimately, Texas trial court rendered a divorce decree dissolving the couple's marriage and adjudicating the custody of the children. Wife appealed, arguing trial court erred by denying her special appearance, maintaining that Louisiana, not Texas, was the children's home state and, therefore, Texas trial court lacked subject-matter jurisdiction to adjudicate custody.

Holding: Affirmed

Opinion: Under the UCCJEA, a Texas court obtains jurisdiction to conduct a custody determination by four separate methods: 1) Home State Jurisdiction – if Texas is the "home state" of the children; or 2) Significant Connection Jurisdiction – If the home state court of the children has declined to exercise jurisdiction and the child and at least one parent has a significant connection with Texas other than mere physical presence; or 3) More Appropriate Forum Jurisdiction - if all courts having jurisdiction under (1) or (2) above have declined to exercise jurisdiction; or 4) Default Jurisdiction – if no court of any other state would have jurisdiction under (1), (2), or (3) above.

Here, father filed his Texas petition for divorce on July 29, 2009. Father, mother, and the children visited grandparents in January 2009 and considered moving to Texas at that time. However, the children did not move to Texas until March 31, 2009. The children moved back to Louisiana in August 2009. Thus, at the commencement of the Texas case, the children neither lived in Texas for six consecutive months nor did any member of the family (either the parents or the children) live in Louisiana. Therefore, Louisiana could not have been the children's home state. On the other hand, the record establishes that the children were not physically present in Texas for six *consecutive* months before July 29, 2009. As a result, neither Texas nor Louisiana was the "home state" of the children at the date of commencement. Texas could not have obtained jurisdiction by the home state method mentioned above.

Further, the record indicates that the children lived in Texas for about four months, and that paternal grandparents also lived in Texas, but no evidence was presented that this family relationship had a great impact on the children. These circumstances do provide evidence of the children's care, protection, training, and personal relationships while in Texas. Therefore, Texas cannot exercise jurisdiction under the significant con-

nection provision. Moreover, there is no evidence that all courts having jurisdiction have declined to exercise jurisdiction or found that Texas courts are the more appropriate forum. This leaves only Default Jurisdiction as the method for Texas to obtain jurisdiction under the UCCJEA.

After father filed for divorce in Texas, mother, filed a divorce and custody action of her own in, Louisiana. Louisiana trial court held a hearing in which mother testified and father did not appear nor participate. Based on the evidence before it, Louisiana trial court ruled that Louisiana was the children's home state. On appeal, rather than finding that Louisiana possessed home state jurisdiction, Louisiana appellate court held that Louisiana had jurisdiction based upon significant connections. Importantly, however, the Louisiana courts only had evidence presented by mother, whereas Texas trial court had the advantage of hearing testimony and evidence regarding the children from both mother and father. Louisiana thus improperly determined it had jurisdiction.

As discussed above, on the date father filed his petition in Texas, neither parent nor any of the children lived in Louisiana and no state other than Texas would have had jurisdiction under the UCCJEA. Because there were no courts of any other states having jurisdiction in this case, when father filed for divorce, the Texas trial court properly exercised subject-matter jurisdiction to adjudicate custody of the children under the default provisions of the UCCJEA. Therefore, at the time mother filed her petition in Louisiana, Texas already had had jurisdiction. Because Texas already had jurisdiction at the time mother filed the Louisiana suit, the Louisiana trial court could not exercise jurisdiction over the case.

Concurring: Texas and Louisiana trial courts should have avoided this result. Some issues can best be resolved by a negotiated resolution, and this statute gives the trial judges the opportunity to do just that. Trial courts in different jurisdictions should communicate when it is known that custody matters are filed in more than one state. After that conference, a trial court may decline to exercise jurisdiction if it finds that another state is the more appropriate forum. No conference took place between the trial courts in this case.

TRIAL COURT ERRED BY RENDERING A DEFAULT JUDGMENT AGAINST MOTHER IN THE ABSENCE OF ANY EVIDENCE THAT MOTHER RECEIVED NOTICE OF HEARING.

¶11-3-08. ***In re P.C.,*** -- S.W.3d --, 2011 WL 1157635 (Tex. App.—El Paso 2011, no pet. h.) (03/30/11).

Facts: Mother filed a motion to modify her child support obligation. Father filed a cross motion seeking modification of mother's visitation with children. In February 2009, trial court held a hearing on mother's motion for child support modification. During the hearing, trial court orally set a hearing for father's cross-motion to modify visitation for March 2, 2009. Mother did not appear for the March 2, 2009 hearing. At that time, trial court recognized that there was no notice of setting contained in its file and indicated that it did not "want to waste time doing this twice." However, trial court proceeded with the hearing because a witness was waiting by phone to testify. Following the hearing, trial court granted father's motion to modify visitation. Mother appealed, arguing trial court erred by rendering a default judgment modifying visitation without establishing that mother received notice of the hearing.

Holding: Reversed and remanded

Opinion: The COA began its analysis by noting that although oral notice of a hearing may be sufficient in certain situations, oral notice was not sufficient in this case. First even though trial court orally set the father's motion to modify visitation for March 2, 2009, and that mother was present when trial court orally set the hearing, the record did not show that mother understood the nature of the proceeding. When trial court asked mother if she understood that the motion was set for March 2, 2009, mother, who spoke Spanish and was using an interpreter, answered no. Further, although mother's counsel stated that he would explain it to her, the discussion between mother and her counsel was not on the record, and counsel never filed anything with the court, stating that he explained that the motion was set for March 2, 2009.

Additionally, trial court expressly instructed father's attorney to reduce the oral setting to a written order. However, father's attorney never reduced the oral setting to a written order per trial court's instruction. In sum, the COA concluded that because the record contained no written notice of the hearing it could not determine that mother had notice of the hearing. As a result, mother was deprived of her constitutional right to be present at the hearing and to voice her objections, which resulted in a violation of due process.

Editor's Comment: *Bad facts make bad law: This case suggests that a trial court should never set a hearing orally but always should require a written order, even if there is a record showing that both parties and their counsel were in attendance when the court set the hearing. (J.V.)*

Editor's Comment: *Ugghh…..again….no notice, no valid judgment. (C.N.)*

Editor's Comment: *Procedures for default judgments in family law cases continue to be a trap for the unwary. However, this is a different wrinkle. Although it is unclear in the COA opinion, apparently mother's attorney was permitted to withdraw after the first hearing and apparently no written notice of the second hearing was sent to the mother. It definitely emphasizes the importance of sending notices of hearings. (J.A.V.)*

Editor's Comment: *Notice... duh... part 3. (M.M.O.)*

BECAUSE A HEARING ON A REQUEST FOR TEMPORARY ORDERS IS NEITHER A "SUIT" NOR A "TRIAL," A LEGISLATIVE CONTINUANCE IS MANDATORY RATHER THAN DISCRETIONARY EVEN IF A PARTY RETAINS A LEGISLATOR-ATTORNEY AS COUNSEL WITHIN THIRTY DAYS OF THE HEARING.

¶11-3-09. ***In re I.E.F.,*** -- S.W.3d --, 2011 WL 1402841 (Tex. App.—San Antonio 2011, orig. proceeding) (04/13/11).

Facts: Father filed a petition to modify a 2002 SAPCR order that appointed mother as managing conservator and father as possessory conservator. Mother filed a competing petition to modify the 2002 SAPCR. Additionally, because mother's attorney was a member of the Texas legislature, mother filed a motion for legislative continuance. Trial court denied mother's motion for a legislative continuance.

Holding: Petition for writ of mandamus denied

Opinion: Under TCPRC 30.003(e) and TRCP 254 (legislative continuance statutes), a member of the legislature that is acting as attorney for a party in a case must file a declaration stating that "the attorney has not taken the case for the purpose of obtaining a continuance under this section." Mother's attorney failed to include the declaration as required. Thus, the COA necessarily denied mother's petition for writ of mandamus. Nevertheless, in the event mother's attorney filed a second motion for legislative continuance, the COA considered the merits of the father's objection.

Father argued mother retained her attorney on January 4, 2011, which is within the 30-day discretionary period of the initial January 6, 2011 setting of the temporary orders hearing. TFC 105.001(a) provides that temporary orders, which are entered "before a final order," may be made "in a suit." The COA construed the term "suit" to mean the "actual trial," which is ordinarily understood by the legal profession, as the hearing in open court leading up to the rendition of judgment, on the questions of law. Thus, the COA reasoned that temporary orders are not final judgments. By extension, a hearing on a request for temporary orders is neither a "suit" nor a "trial" as those words are used in the legislative continuance statutes.

Here, the parties' competing petitions to modify the 2002 SAPCR order is what constituted the "suit" for purposes of the legislative continuance. Because the suit had not yet been set for trial, mother's attorney filed the motion for a legislative continuance within the time period in which a continuance is mandatory.

Editor's Comment: *This case was correctly decided, but the law underlying the result is bad public policy. Mother hired the legislator-attorney two days before a temporary orders hearing in a SAPCR. Had the hearing been for a trial, the hearing could have gone forward at the court's discretion. But because a temporary orders hearing is not a "suit," Mother automatically received a legislative continuance. Temporary orders hearings are critical in SAPCRs because they help to stabilize the child's situation while the parents litigate. There should be no legislative continuances for temporary orders hearings. (J.V.)*

SAME-SEX EX-PARTNER HAD STANDING TO INITIATE SAPCR

¶11-3-10. ***In re Fountain,*** No. 01-11-00198-CV, 2011 WL 1755550 (Tex. App.—Houston [1st Dist.] 2011, orig. proceeding) (mem. op. on rehear'g) (05/02/11).

Facts: Two women, Fountain and Katcher, ended a seven-year relationship. During the relationship, the women never lived together, but owned a home located within the same neighborhood, jointly began caring for the Child, and each maintained a room for the Child. The women lived separately, but they frequently spent the night together with the Child at the home of one or the other. The Child's father had agreed to share possession of the Child with Fountain and Katcher, and he eventually "became comfortable with the idea" of the women adopting the Child. Fountain and Katcher sought adoption. Fountain suggested adopting the Child as the sole parent in order to speed up the process. Katcher believed that she would become a second adoptive parent at some point in the future. The adoption was finalized with only Fountain listed on the certificate of adoption.

At trial, evidence was presented showing that both women cared for the Child. Among other things, Katcher selected the Child's day care, attended medical appointment with the Child, and spent a substantial amount of time with the Child after the adoption. After the women ended their relationship, Katcher claimed that Fountain began denying Katcher access to the Child. Katcher filed suit, asking to be named sole managing conservator, or in the alternative, joint managing conservator. Fountain filed a motion to dismiss, arguing that Katcher lacked standing to initiate an original suit affecting the parent-child relationship. An associate judge denied the motion, granted Katcher visitation rights, and Fountain appealed. Trial court orally adopted the associate judge's ruling, and Fountain filed a petition for mandamus.

Holding: Mandamus denied

Opinion: Standing is a threshold issue. TFC 102.003 gives standing to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." Whether a party has standing is a question of fact, and it is not necessary that "the time be continuous and uninterrupted," rather, the court will "consider the child's principal residence during the relevant time." Further, "[n]othing in section 102.003(a)(9) requires that care, custody, control, and possession be exclusive." Here, whether Katcher had standing depended on whether she exercised "'actual' care, control, or possession of the child." COA determined sufficient evidence was presented to support a finding that the two women shared parenting responsibilities until their separation and that Katcher had standing to seek conservatorship.

Editor's Comment: *This opinion goes on to say Troxel (the parental presumption) doesn't apply to suits between parents and nonparents, which I think goes directly against the U.S. Supreme Court's intent in Troxel and the constitutional rights of a parent to parent their child free of intervention from interlopers. (M.M.O.)*

MOTHER WAS ENTITLED TO NOTICE OF FINAL HEARING, DESPITE THE FACT THAT SHE DID NOT FILE AN ANSWER, BECAUSE SHE ATTENDED AND PARTICIPATED IN THE INITIAL HEARING

¶11-3-11. ***In re N.L.D.,*** -- S.W.3d --, 2011 WL 2139122 (Tex. App.—Texarkana 2011, no pet. h.) (05/27/11).

Facts: Great-Grandmother, Great-Uncle, and Great-Aunt were concerned that Mother was abusing and neglecting the Child, so they filed a petition seeking to be named managing conservators of the Child. Mother was served with two documents; the first was a notice of a hearing, and the other was to inform her of the filing of the petition seeking conservatorship. Both documents stated that if she did not "file a written answer with the Clerk . . . default judgment may be taken against [her]." Mother did not file a written answer, but she did appear at the hearing. No formal evidence was introduced, but trial court did grant Mother's requested continuance so her appointed attorney could attend the hearing. Mother did not attend the reset hearing, and she did not appear for the ordered drug testing. A final hearing was scheduled, but Mother did not appear. After taking judicial notice of Mother's failure to submit to drug test and of testimony offered by Great-Grandmother, Great-Uncle, and Great-Aunt, trial court named Great-Grandmother, Great-Uncle, and Great-Aunt joint managing conservators and named Mother and the Child's father possessory conservators. Trial court ordered the Child's parents to pay child support and allowed Mother visitation "by agreement." Mother filed a motion to set aside the default judgment and a motion for new trial, which were overruled by operation of law. Mother appealed.

Holding: Reversed and Remanded

Opinion: TFC 102.004 gives standing to file an original suit requesting conservatorship if the person filing is a relative of the child related within the third degree of consanguinity. Relatives within the third degree of consanguinity include parents, children, brothers, sisters, grandparents, grandchildren, great-grandparents, great-grandchildren, aunts, uncles, nephews, or nieces. Great-aunts and great-uncles are not on this list. Thus, Great-Aunt and Great-Uncle did not have standing to seek conservatorship. However, Great-Grandmother is related to the Child within the third degree of consanguinity, so she may have the requisite standing if the other requirement is met.

In addition to the proximity of the relative, TFC 102.004(a)(1) requires a finding "that the child's present circumstances would significantly impair the child's physical health or emotional development." Here, Mother failed to submit to a drug test, she admitted to methamphetamine use, she had a history of drug use, and Mother's Facebook page made references to drug use. Mother would leave the Child at Great-Aunt's home without formula or diapers. Additionally, the child suffers from a heart condition, but Mother failed to take child to doctor's appointments. Great-Aunt usually took the Child to scheduled doctor's appointments, and she had to take the Child to the emergency room once when the Child became ill. Mother was angry with Great-Aunt for making this emergency room trip. Mother was physically abusive to the Child's father, and she once attempted to run the Child's father over with her car while the Child was in the car. Because there was sufficient evidence to support a finding that the present circumstances would significantly impair the Child's physical health or emotional development, Great-Grandmother had standing to seek conservatorship of the Child.

Once a party makes an appearance in a case, she is entitled to notice of the trial setting. A party can be physically present at a hearing without making an "appearance." Whether the party "appeared" depends on the nature and quality of the party's activities in the case. Here, Mother conferred with opposing counsel, who told the court that Mother did not "wish to relinquish custody or grant full access and that sort of thing at [that] point in time." Further, Mother explained that she qualified for legal assistance and had an appointment to meet with her legal aid attorney the following day. Mother requested a continuance, which trial court granted. Mother's conduct at the hearing amounted to an appearance despite her lack of written response. However, Mother did not receive actual or constructive notice of the trial, which means the second and third prongs of the *Craddock* test do not apply, and Mother is entitled to a new trial.

Editor's Comment: *Very important case for family lawyers. Mother clearly participated in the proceedings but filed no written answer. Court of appeals held she made an appearance and therefore was entitled to written notice of trial setting. Again….no notice, no valid judgment. (C.N.)*

Editor's Comment: *This is another instance in which a default judgment was taken and the respondent who had made an appearance did not receive notice. Obviously a party can make an appearance in a case without filing a written response or answer. In this case, mother physically appeared at the first hearing and requested a continuance so that her appointed attorney could attend the hearing. Although the result may have been the same, mother was entitled to notice of the trial. This case and the other default judgment cases in this issue are indicative of the perils we face when dealing with a pro se opposing party. (J.A.V.)*

Editor's Comment: *Notice... duh... part 4. (M.M.O.)*

SAPCR

CONSERVATORSHIP

FATHER LOSES EXCLUSIVE RIGHT TO CONSENT TO MEDICAL, DENTAL, PSYCHOLOGICAL, AND PSYCHIATRIC TREATMENT AFTER HE VOLUNTARILY MOVED OUT OF STATE

¶11-3-12. ***In re M.A.M.,*** -- .W.3d --, 2011 WL 1448633 (Tex. App.—Dallas 2011, no pet. h.) (04/15/11).

Facts: Parents divorced in 2005. Father given exclusive right to designate the primary residence of the child within Dallas and contiguous counties. Parents granted joint right to make decisions regarding Child's education and medical and mental health treatment. In 2006, Father filed a petition to modify to appoint him as SMC and to allow him to relocate with Child to Atlanta, Georgia. Father was a professor at SMU, but he wanted to accept a position at Emory University. Following trial, trial court gave Mother the exclusive right to establish Child's primary residence within Dallas and contiguous counties and to make decisions concerning the child's education and medical and mental health treatment. Father appealed trial court's granting mother the exclusive right to determine Child's medical and mental health treatment.

Holding: Affirmed as modified (modifications to child support obligations)

Majority Opinion: Since 2005 divorce, trial court held a number of hearings as a result of parents' inability to make joint decisions regarding Child. Subsequently, Father voluntarily and unilaterally chose to accept a job in Atlanta, Georgia. Although geographical distance does not make joint decision making impossible, the distance does make some aspects of co-parenting impractical. As a result, trial court gave Mother an exclusive right to consent to medical, dental, psychological, and psychiatric treatment.

Concurring and Dissenting Opinion: (C.J. Wright). When one parent is given the exclusive right regarding the physical care of the child, the evidence generally shows that one parent is a better choice. Such cases include those in which parents were inattentive, irrational, or overly emotional. Here, although Mother testified that Father's decision to move rendered joint decision making impractical, there was no other evidence showing Father might be incapable of participating in choosing doctors for Child. In fact, Father has an established relationship with Child's therapist and pediatrician. Further, Mother had previously made unfounded allegations Father sexually abused Child, and the court-appointed psychologist suggested Mother was "doctor shopping" in an effort to find one that would "take the bait and call Dad a potential molester." The court-appointed psychologist recommended an appointed psychologist monitor Child to reduce the likelihood of additional allegations. Despite the geographical separation of the parents, Father is fully capable of accessing

the same information as Mother, communicating with doctors and therapists by phone and email, and making informed decisions regarding Child's medical and psychological care.

Editor's Comment: *The court appropriately cites Doyle v. Doyle, 955 S.W.2d 478, 481 (Tex. App.—Austin 1997, no pet.), where the Austin court "questioned how a father in Florida could evaluate schools, after school activities, and health care providers located in Texas." (J.V.)*

Editor's Comment: *This case also includes an interesting and helpful analysis of when a court can award above guideline child support (in this case, private school tuition), and stresses that, even if you have an expert who testifies that the child should stay in the private school, you need to present evidence that the private school is a **need** of the child. Whenever in doubt, go back to the statute itself and read the text to remind yourself exactly what you have to prove up, and prepare your client's testimony accordingly. (R.T.)*

Editor's Comment: *Father unilaterally chose to move outside the geographically restricted area without regard to whether the child would be allowed to move. Thankfully the Dallas Court distinguishes the Lenz case. (Disclosure: I was the lawyer for Mom in this case.) (M.M.O.)*

TRIAL COURT ERRED IN DECLINING TO HEAR EVIDENCE OF POSSIBLE SEXUAL ABUSE BY FATHER AGAINST MOTHER AT MOTION FOR NEW TRIAL HEARING

¶11-3-13. ***In re M.B.D.,*** -- S.W.3d --, 2011 WL 1709895 (Tex. App.—Texarkana 2011, no pet. h.) (05/06/11).

Facts: Mother and Father entered a relationship when she was fourteen-years-old, and he was twenty. During the relationship, they had one child. Mother and Father reached an agreement regarding conservatorship and child support. Both parents were named joint managing conservators, and Father was granted the right to designate the residence of the child. The agreement was confirmed by trial court. Mother filed a motion for new trial, in which she claimed that her agreement to the conservatorship arrangement was the result of undue influence and that she had agreed under duress. Mother's motion was denied, and she appealed.

Holding: Reversed and Remanded

Opinion: At the new trial hearing, Mother presented evidence which may have amounted to credible evidence of Father's history of sexual abuse against Mother, but trial court declined to hear the evidence. During the hearing, Mother's attorney filed a brief in support of the motion for new trial. The brief specifically cited TFC 153.004(b), which states that if credible evidence shows a history of sexual abuse by one parent against the other, the court cannot grant a joint managing conservatorship to the offending parent. Mother's undue influence and duress arguments stem from the fact that her relationship with Father began when she was a child as defined in the TFC and while Father was an adult. Further, the language of TFC 153.004(b) appears to be mandatory, in that a "court may not appoint . . . if credible evidence is presented . . . ." Mother's counsel properly identified the TFC's provision for preventing a child from being placed "with a child sexual abuser." Mother presented evidence that amounted to a question of fact, and trial court was obligated to hear the evidence and issue its findings on the question of fact. Because the trial court declined to hear evidence which "probably prevented the appellant from properly presenting the case to the [COA]," trial court made a reversible error.

Editor's Comments: *This is a very important case. As a general rule, the trial court is required to hold an evidentiary hearing when a motion for new trial is verified and alleges grounds such as newly discovered evidence, jury misconduct, erroneous grant of a default judgment, or any other ground that would necessitate the receipt of evidence in order for the movant to show reversible error. Here, the court of appeals concludes that mother was entitled to an evidentiary hearing because her motion was verified and because it alleged a ground that, if proven, would result in reversal of the judgment because of the mandatory language used in TFC 153.004(b). (C.N.)*

Editor's Comment: *Texarkana got it right – even if the parties had an agreement the trial court still has to approve it as being in the child's best interest. In determining best interest and under TFC §153.004(b) mom's evidence of abuse cannot be ignored. The child deserves a decision based upon relevant and credible evidence. (A.B.R.)*

SAPCR

CHILD SUPPORT

★★★ TEXAS SUPREME COURT ★★★

IF OBLIGOR IS UNEMPLOYED OR UNDEREMPLOYED, OBLIGEE DOES NOT HAVE TO PROVE THAT IT WAS FOR THE PURPOSE OF REDUCING CHILD SUPPORT

¶11-3-14. ***Iliff v. Iliff,*** -- S.W.3d --, 2011 WL 1446725 (Tex. 2011) (04/15/11).

Facts: Prior to wife filing for divorce, Father quit his job that paid $102,000 per year because he believed that the job was causing him harm. Father was an engineer with a graduate degree. Over the next two years he earned about $200 per month operating a tractor and performing some consulting work. Trial court found Father was underemployed and set child support based on Father's earning potential rather than his actual earnings. Father appealed arguing Wife failed to show Father was unemployed for the purpose of reducing child support.

Holding: Affirmed

Opinion: Petition granted in order to resolve a split among the courts of appeals on this issue. TFC 154.066 states that a court may determine child support based on earning potential if the obligor is intentionally unemployed or underemployed. It is unnecessary to prove that the obligor is unemployed or underemployed *for the purpose of reducing child support*. Looking at the structure of the statute, the court determined the word "intentional" modified "unemployed or underemployed" and did not modify "reduction of child support obligations." Requiring proof of the obligor's purpose would add an additional requirement that Legislature did not express.

TFC 154.066 is a discretionary rule, so a trial court will need to make a case-by-case determination on whether child support should be based on potential or actual earnings. The court will need to consider the best interests of the child, as well as "a parent's right to pursue his or her own happiness." The obligor must provide proof of his or her actual wages. Subsequently, the burden falls to the obligee to show the obligor is intentionally unemployed or underemployed. If intentional unemployment or underemployment is shown, the burden then shifts to the obligor to offer evidence in rebuttal. In making its decision, the court should weigh nonmonetary factors such as obligor's available time to spend with the children, obligor's ability to live closer to the children, and obligor's other objectives in respect to his or her own education and future career. Additionally, this statute only applies when the obligor makes "significantly" less than his or her potential income.

Editor's Comment: *The Lazy Bum Rule: in proving underemployment, you don't have to show the bum's intent is specifically to avoid child support, any reason for being a bum will do. (M.M.O.)*

TRIAL COURT ORDERED TO VACATE ORDER HOLDING FATHER IN CONTEMPT BECAUSE COA'S INTERVENING OPINION RESOLVED CHILD SUPPORT ISSUE.

¶11-3-15. ***In re Maasoumi,*** -- S.W.3d --, 2011 WL 1448721 (Tex. App.—Dallas 2011, orig. proceeding) (04/15/11).

Facts: In a matter directly related to this mandamus, issued by this court and styled *In re M.A.M.*, father appealed from trial court's order modifying his child support. While that appeal was still pending, mother filed motions for clarification, sanctions, and enforcement of child support. Trial court conducted a hearing and held Father in contempt for failure to pay seventy-five percent of the child's private school tuition and failure to make a $1,500 child support payment. Father filed a petition for writ of mandamus arguing trial court erred in holding him in contempt.

Holding: Petition for writ of mandamus granted

Opinion: In this court's *In re M.A.M* opinion, the COA reversed the portion of the order requiring Father to pay for the child's private school tuition. Additionally, the COA modified the amount of the child support payments from $1,500 to $1,200. In light of the *In re M.A.M* opinion, Father may not be held in contempt for failure to pay the private school tuition and failure to pay child support payments in the amount of $1,500.

Editor's Comment: *The each testified that they felt private school was necessary for the child and if either was awarded custody, he or she would want the child in private school. Where I come from, that is an agreement, which the trial court accepted and approved. Nonetheless, the court of appeals found the evidence insufficient to support an order for Father to pay private school tuition. Lesson: go overboard in proving "needs" to support an order for private school or any other support beyond the straight guideline amount. (Disclosure: I represented the Mom in this case.) (M.M.O.)*

SAPCR

CHILD SUPPORT ENFORCEMENT

TRIAL COURT ABUSED ITS DISCRETION BY AWARDING MOTHER $0 IN MEDICAL SUPPORT ARREARS BASED ON MOTHER'S FAILURE TO PROVIDE CHILDREN MEDICAL INSURANCE BECAUSE TRIAL COURT'S ORIGINAL ORDER DID NOT CONDITION MEDICAL SUPPORT ON MOTHER'S OBTAINING MEDICAL INSURANCE.

¶11-3-16. ***In re A.l.S.*** -- S.W.3d --, 2011 WL 692224 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (03/01/11).

Facts: Mother and father divorced in 1985. The divorce decree ordered father to pay monthly child support and also required father to maintain health insurance for the children. In 1990, trial court modified father's child support obligation. The modification order required mother to carry medical and health insurance and father to pay an extra $158.00 per month in addition to his monthly obligation "as additional child support for such insurance." Despite trial court's modification order, mother never purchased health or medical insurance for the children, and father never paid the additional $158.00 to mother for such insurance. In 2009, mother requested trial court to confirm father's medical support arrearage of approximately $27,630. Following a hearing, trial court determined father owed $0 in medical support arrears. Mother appealed.

Holding: Affirmed in part, reversed and remanded in part

Opinion: Mother argued trial court erred in forgiving father's obligation to pay monthly medical support awarded in the 1990 modification order. In response, father argued that his obligation to pay the medical support was contingent upon mother's obtaining a policy, and he was to reimburse mother's expenses for the insurance. The COA began its analysis by observing that trial court's 1990 order required mother to obtain medical insurance for the children, and obligated father to pay a monthly amount as additional child support for medical insurance. The order contained no language making father's obligation to pay medical support contingent upon mother's purchase of medical insurance. Nor was there any language permitting father to purchase insurance for the children himself rather than make the monthly payment to mother. Accordingly, trial court abused its discretion by concluding mother's failure to obtain medical insurance for the children extinguished father's obligation to pay the ordered medical support.

Editor's comment: Houston 14th—what were you thinking? *This can't be or at least shouldn't be the law. This opinion gives parents an excuse not to obtain insurance and still collect child support. The order specifically says "as additional child support for such insurance." Clearly the parties intended for the money to be used for health insurance for the children. (G.L.S.)*

Editor's Comment: *These parents shot craps with their children's health. Mother testified there was no group insurance available to her; Father testified that he had no obligation to pay mother additional child support for health insurance unless and until she purchased any. The children apparently went uninsured (the parties disagreed whether Father's insurance covered the children after 1994 and whether Father let them use it). The better ruling - if the court granted relief to either party - would have been to offset whatever Mother spent on the children's healthcare against whatever Father spent, then enter judgment accordingly. (J.V.)*

Editor's Comment: *Purchasing insurance should have been a condition precedent to payment of the insurance by Father. This is an unfortunate example of poor drafting (and armchair quarterbacking). I wonder if the result would have been different if Father had filed for enforcement of providing the health insurance at the same time as enforcement of the payment? (M.M.O.)*

TRIAL COURT ABUSED ITS DISCRETION BY HOLDING FATHER IN CONTEMPT FOR FAILURE TO PAY PAST-DUE CHILD SUPPORT WHEN MOTHER'S TESTIMONY REVEALED THAT HER MOTION TO ENFORCE CAUSED FATHER TO PAY HIS PAST-DUE CHILD SUPPORT UP TO THE TIME MOTHER FILED HER MOTION, BUT THEN FELL BEHIND AGAIN BEFORE THE ENFORCEMENT HEARING.

¶11-3-17. ***In re Ezukanma,*** -- S.W.3d --, 2010 WL 4644462 (Tex. App.—Fort Worth 2010, orig. proceeding) (op. on rhrng.) (03/09/11).

This opinion was originally issued on November 17, 2010--see Winter Section Report. The court withdrew its earlier opinion and has substituted a new opinion that is substantially similar to the original opinion. The majority holds that TFC 157.162(d) prohibits a trial court from holding a child support obligor in criminal contempt for failure to pay child support if the obligor appears at a hearing for a motion to enforce with proof that the obligor has become current on all payments up to the filing of the motion to enforce even if the obligor has fallen behind on payments accruing after the filing of the motion to enforce.

The **dissenting opinion** disagrees, arguing that the only reasonable interpretation of TFC 157.162(d) is that the obligor must be current in all child support payments at the time of the hearing on the motion for enforcement, or he foregoes the statutorily-created "free pass" to avoid criminal contempt for the past-due violations alleged in the motion to enforce.

Editor's Comment: *Keep an eye on this one because a mandamus has been filed in the Texas Supreme Court to resolve the meaning of the TFC 157.162(d). This section provides that a trial court may not hold a respondent in contempt if the respondent appears at the hearing with proof that "the respondent is current in*

the payment of child support as ordered by the court." We will wait to see what the Supremes have to say on the meaning of this phrase. However, it should be presumed that the legislature knew the procedures for finding someone in contempt and the fact that a motion for enforcement is often not up to date as to every payment not made by the time the hearing is held. That was the state of the law when the statute was enacted. Thus, if the legislature wanted the defense to apply only to unpaid support complained about in the motion it would have said "the respondent is current in the payment of child support which was complained about in the motion for enforcement." However, that is not the language used by the legislature. It seems the legislature believed the respondent could only use payment as a defense if he or she was "current in the payment of child support as ordered by the court", meaning all support ordered by the court whether it was complained about in the motion for enforcement or not. (C.N.)

Editor's Comment: *Keep your eye on this one - the Texas Supreme Court recently requested that Father file responses to the writs filed by Mother and the Office of the Solicitor General. (R.T.)*

TRIAL COURT PROPERLY ISSUED A WRIT OF WITHHOLDING ON FATHER'S EARNINGS BECAUSE THE BENEFITS OF THE STATUTE AS PROVIDED BY TCPRC 34.001(c) DO NOT APPLY TO CHILD SUPPORT JUDGMENTS UNDER THE FAMILY CODE.

¶11-3-18. ***Horton v. Horton*** ___ S.W.3d ___, 2011 WL 833807 (Tex. App.— Beaumont 2011, no pet. h.) (03/10/11).

Facts: After mother and father divorced in 1968, trial court ordered father to pay child support. In 2008, mother filed a notice of application seeking a judicial writ of withholding. In response, father filed a motion to stay alleging the amount of arrearage was incorrect. In 2009, trial court conducted a hearing and asked the parties to identify the issues involved in the case. Father identified two issues: 1) his Social Security benefits were exempt from withholding, and 2) the child support judgment was dormant and subject to the statute of repose as provided by TCPRC 34.001(c). At that point trial court concluded that those matters involved matters of law rather than fact. Father presented arguments on these two points of law at a second hearing. Following the second hearing, trial court confirmed $78,508 as the amount of father's arrearage. Father appealed.

Holding: Affirmed

Opinion: Father argued that he was entitled to the benefits of the statute of repose as provided by TCPRC 34.001(c) because mother failed to obtain within ten years a writ of execution of trial court's 1968 child support judgment and mother never revived the dormant judgment. The COA rejected father's argument observing that the Legislature amended TCPRC 34.001(c) in 2009, expressly providing that the ten-year limitation provided by the statute "does not apply to a judgment for child support under the Family Code." Moreover, although the divorce decree was rendered in 1968, this version of TCPRC 34.001(c) is retroactive, and therefore applies to child support judgments regardless of the date on which the judgment was rendered. Accordingly the dormancy and revival restrictions of TCPRC 34.001(c) do not apply to mother's writ of judicial withholding levied against father's Social Security benefits.

FATHER'S PETITION OF WRIT OF HABEAS CORPUS GRANTED BECAUSE TRIAL COURT'S AMENDED CONTEMPT ORDER CONTAINED INTERNAL INCONSISTENCIES AND DID NOT CONTAIN A COMMITMENT ORDER.

¶11-3-19. ***In re Johnson,*** -- S.W.3d --, 2011 WL 1173941 (Tex. App.—Dallas 2011, orig. proceeding) (03/31/11).

Facts: On July 23, 2010, trial court held father in contempt for failing to comply with the child support and spousal support provisions of a temporary order. Trial court suspended the commitment order and placed fa-

ther on community supervision. On March 7, 2011, trial court issued a second order holding father in contempt, revoking suspension and for commitment to county jail. Father was jailed pursuant to the March 7 order. On March 11, 2011, trial court signed an amended order purportedly to revoke suspension and for commitment to the county jail. The March 11 amended order was a copy of the March 7 order with multiple sections crossed out by hand and other language added in handwriting. Father then petitioned the Dallas COA for a writ of habeas corpus.

Holding: Habeas granted

Opinion: The COA began its analysis by observing that although trial court characterized its March 7, 2011 order as a revocation order, the order actually held father in contempt again. Father was ultimately confined pursuant to the March 7 order. Additionally, the COA noted that the March 11 amended order attempted to delete the March 7 contempt holding and revoke the suspension of commitment relating to the July 23, 2010 order. However, the March 11 order did not contain an order of commitment and nothing in the record showed trial court signed a separate commitment order with regard to the March 11 amended order. Furthermore, between the typed, scratched out, and handwritten provisions, the March 11, order, contained several internal inconsistencies. Thus, the COA concluded the March 11 order failed to comply with TFC requirements. Accordingly, the COA unconditionally granted father's petition for writ of habeas corpus and ordered father released.

Editor's Comment: *There is hardly anything we do in family law that comes under closer scrutiny than contempt and commitment orders. Spend some time before hand to get them drafted correctly, and if you're still fuzzy on it, do your client a favor and hire a co-counsel who does these kinds of cases every day!! (R.T.)*

TFC 157.007 DOES NOT TIME BAR ORDERS FOR JUDICIAL LIENS OR JUDICIAL WRITS OF WITHHOLDING AND CHILD SUPPORT JUDGMENTS ARE EXCLUDED FROM THE TCPRC 34.001 DORMANCY PROVISION.

¶11-3-20. ***Isaacs v. Isaacs,*** -- S.W.3d --, 2011 WL 1238381 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (04/05/11).

Facts: Mother and father divorced in 1976. In 2009, mother filed a notice of child-support lien and a notice of application for judicial writ of withholding. Following a hearing, trial court determined father owed $93,323.78 in child-support arrearages and that mother was entitled to child-support liens and a judicial writ of withholding. Father appealed.

Holding: Affirmed

Opinion: Father argued that TFC 157.005(b) deprived trial court of jurisdiction to render judgment for child-support arrearages. Under TFC 157.005(b), if a party files a motion for enforcement of child support and requests a *cumulative money judgment* for arrearages pursuant to TFC 157.263 within 10 years after the child becomes and adult or the obligation terminates, then the trial court retains jurisdiction to render judgment.

Here, Mother did not request a cumulative money judgment for arrearages under TFC 157.263 as required by the unambiguous language of TFC 157.005. Instead, she sought to enforce child-support liens against father's nonexempt property, and she sought a judicial writ of withholding from Father's earnings. The type of relief mother seeks is not time barred by TFC 157.005(b). Thus, 157.005(b) does not deprive trial court of subject-matter jurisdiction to render the judgment.

Father argued that TCPRC 34.001 precluded the relief trial court awarded. TCPRC 34.001 provides "if a writ of execution is not issued within 10 years after the rendition of a judgment … the judgment is dormant and execution may not be issued on the judgment unless it is revived." In 2009, the legislature added subsec-

tion (c) explicitly providing TCPRC 34.001 does not apply "to a judgment for child support under the Family Code." The legislative history of the amendment shows the legislature intended TCPRC 34.001(c) to apply to child-support judgments regardless of the date the trial court rendered judgment. Thus, TCPRC 34.001 did not prevent trial court from rendering judgment for the child-support arrearages.

TRIAL COURT'S AWARD OF ATTORNEY'S FEES AND COSTS WAS PROPER BECAUSE OAG'S INTERVENTION WAS "FRIVOLOUS, UNREASONABLE, OR WITHOUT FOUNDATION"

¶11-3-21. ***OAG v. Kalenkosky*,** No. 04-09-00762-CV, 2011 WL 1499419 (Tex. App.—San Antonio 2011, no pet. h.) (mem. op.) (04/20/11).

Facts: While Husband and Wife were married, OAG filed suit against Husband for child support due to a former spouse. During the proceedings, certain property was established to be Wife's separate property. A judgment was entered against Husband. Four years later, Wife filed for divorce. Husband was served by substituted service but did not appear. The divorce decree awarded Wife her separate property. Subsequently, Husband filed a petition for bill of review to set aside the divorce decree. OAG intervened claiming the property should have been found to be community property, which could be used to pay the child support judgment against Husband. Wife moved to strike OAG's intervention and moved for sanctions and attorney's fees, claiming OAG's invention was not based in any law or fact. Trial court granted Wife's motions, and OAG appealed.

Holding: Affirmed

Opinion: 105.002 of Tex. Civil P&R Code states that trial court may award fees and expenses to a party if the State's cause of action is "frivolous, unreasonable, or without foundation." OAG correctly states there is a presumption of community property because the property was in both spouses' names. However, the presumption is rebuttable, and in the child support proceedings, sufficient evidence was presented to establish the property was Wife's separate property. Because OAG participated in those proceedings, it was aware that the property was separate property belonging to Wife. Thus, OAG had no reasonable basis supporting a belief that Husband had any interest in the property. Trial court had sufficient grounds to dismiss OAG's case as "frivolous, unreasonable, or without foundation."

AFTER AN OBLIGEE FILES A NOTICE OF APPLICATION FOR JUDICIAL WRIT OF WITHHOLDING AND OBLIGOR TIMELY FILES A MOTION TO STAY THE WRIT, A TRIAL COURT IS OBLIGED TO SCHEDULE A HEARING ON THE MOTION

¶11-3-22. ***In re R.G.*,** -- S.W.3d --, 2011 WL 1796135 (Tex. App.—San Antonio 2011, no pet. h.) (05/11/11).

Facts: Mother and Father divorced in 1978. In 1985, Father was $630 in arrears. He repaid $710 over the next two years. In 2009, Mother served Father with a Notice of Application for Judicial Writ of Withholding claiming Father owed $33,759.98 in child support arrears including interest and requested $1,489.07 be withheld monthly from Father's paycheck. Father filed a motion to stay the issuance of the judicial write of withholding. Mother filed an answer with an "affirmative defense" section stating that the arrearages were established as a matter of law because Father failed to timely contest the arrears. After a hearing, trial court issued findings that Father was served with the notice of application and failed to request a hearing within thirty days. Thus, the court determined Father's arrearage was $33,759.98 "as a matter of law." Father appealed arguing the trial court erred in determining it lacked jurisdiction to hear his evidence and defenses.

Holding: Reversed and Remanded

Opinion: TFC 158.301 allows an obligee to file a notice of application for judicial writ of withholding if the obligor is behind in at least one month's child support payments. TFC 158.307 permits the obligor to file to stay the issuance of a writ if he files within ten days of receiving notice of obligee's application. TFC 158.309(c) states that after a hearing, the trial court shall either grant the stay or render an order for income withholding.

Trial courts have a duty to schedule a hearing on a stay regardless of whether an obligor requests one. TFC 158.302 states that if an obligor contests a withholding, he will have an opportunity for a hearing not later than thirty days after notice of the contest. TFC 157.061(a) states that "[o]n filing a motion for enforcement requesting contempt, the court shall set the date, time, and place of the hearing and order the respondent to personally appear and respond to the motion." COA held this language requires a trial court to set a hearing whether or not it has been requested by a party. The court further held that because Chapters 157 and 158 both deal with child support enforcement, the Texas Legislature likely intended this obligation to apply to both chapters. Because trial court had the burden to set a hearing, it erred in determining it lacked jurisdiction to consider Father's defenses.

Mother also argued that Father failed to preserve his right to appeal because he failed to offer evidence. However, the record indicates Father attempted to offer evidence numerous times, but the evidence was not heard due to trial court's incorrect determination that it did not have jurisdiction to consider the evidence. Rule 103(a)(2) states that error can be predicated on a ruling excluding evidence if the substance "was apparent from the context in which questions were asked." Specifically, Father focused on a letter from the AG stating the child support was paid in full, and the record indicated trial court was aware Father wanted to call an assistant AG to discuss this issue. Father preserved his complaint for appellate review.

Editor's Comment: *Finally the right decision! These cases are the biggest miscarriage of justice and a prime example of trampling the constitutional rights of a litigant. (M.M.O.)*

Editor's Comment: *Pay attention if you have case involving a notice of application for judicial writ of withholding and a notice of child support lien. This opinion acknowledges that where mother sought relief under Chapters 157 and 158 and where relief was granted under Chapters 157 and 158, father had the right to present defenses to the arrearage alleged by mother in her notice of child support lien under Chapter 157 even if he was otherwise precluded from presenting defenses to her Chapter 158 claims. (A.B.R.)*

PROCEEDS FROM SALE OF A HOMESTEAD ARE EXEMPT FROM CREDITORS EVEN IF THE HOMESTEAD CLAIMANT DOES NOT INTEND TO USE THE PROCEEDS FOR THE PURCHASE OF A NEW HOME

¶11-3-23. ***London v. London,*** -- S.W.3d --, 2011 WL 1856079 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (05/27/11).

Facts: Husband and Wife divorced, and Husband was ordered to pay child support. Subsequently, trial court increased Husband's child support obligation. Husband appealed, and COA reversed. Wife filed a motion for modification, and Husband filed a counterclaim to recoup the increased child support he paid while the earlier appeal was pending. After more litigation, COA entered a judgment against Wife for the increased child support.

Husband had still not been paid when he discovered Wife was trying to sell her homestead. She had identified certain creditors who would be paid from the proceeds of the sale. Husband was not among the indentified creditors. Husband asked trial court to appoint a receiver and order that the proceeds be delivered to the receiver. Trial court signed an "Order Granting Turnover and Appointing Receiver." Wife moved for the disbursement of proceeds to pay some of her creditors. Trial court partially granted her request. Trial court allowed only some of the identified creditors to be paid. Wife appealed trial court's order appointing the re-

ceiver and requiring her to turnover proceeds. Husband argued wife waived her right to a homestead exemption when she identified certain creditors to be paid from the proceeds.

Wife additionally petitioned for a writ of mandamus asking COA to compel trial court to order the disbursement. COA consolidated the two matters.

Holding: Reversed and Remanded

Opinion: The "turnover" statute permits a court to appoint a receiver in order to reach assets that are difficult to reach by attachment or levy. However, the "turnover" statute is inapplicable to assets that are exempt from attachment, execution, or seizure. Generally homesteads are exempt, and any proceeds from a sale of a homestead are exempt for six months after the sale. Tex. Prop. Code 41.001(c). This statute "limits options available to creditors, not the options available to homestead claimants." There is no requirement in the statute that the homestead claimant must intend to use the proceeds towards the purchase of a new home. Wife did not waive the exemption when she provided that proceeds of the sale of the homestead would be used to pay certain creditors.

In order to effectuate the beneficent purpose of the homestead exemptions, courts may equitably toll the six month exemption period to protect the claimant. To do otherwise, would defeat the purpose of the exemption. Thus, COA granted Wife's request to toll her exemption period. Because the COA was able to grant Wife an adequate remedy by appeal, trial court's order was erroneous, not void. Therefore, COA denied her petition for writ of mandamus.

Editor's Comment: *Homestead proceeds are inviolate -- how many ways do you have to say it? (M.M.O.)*

SAPCR

MODIFICATION

AFTER MOTHER MOVED CHILD TO ILLINOIS WITHOUT CONSENT OR A COURT ORDER IN VIOLATION OF GEOGRAPHIC RESTRICTION, EVIDENCE SUPPORTS MODIFICATION OF CONSERVATORSHIP TO FATHER.

¶11-3-24. ***In re W.C.B.,*** -- S.W.3d --, 2011 WL 1467912 (Tex. App.—Dallas 2011, no pet. h.) (04/19/11).

Facts: Mother and Father divorced, and Mother granted the exclusive right to designate the primary residence of Child, with a residency restriction to Grayson and its adjacent counties. Mother and Child subsequently moved to Illinois without consent or a court order. Father filed a petition to modify the parent-child relationship requesting the exclusive right to designate Child's primary residence. Following a hearing, trial court granted Father's petition and appointed him joint managing conservator with the exclusive right to designate Child's primary residence. Mother appealed.

Holding: Affirmed

Opinion: Here, Mother intentionally moved from Texas to Illinois without Father's consent or a court-order. Mother claimed that a motion had been filed requesting permission to move, but the motion was not included in the appellate record. Mother also claimed she sent Father a letter notifying him of the move, but evidence showed the letter was never delivered. Prior to the move, Child saw Father every weekend. Immediately after the move, Mother made no effort to take Child to see Father. A licensed professional presented evidence indi-

cating child would likely experience abandonment from not seeing his father as frequently. Thus, the evidence supported trial court's conservatorship modification.

Editor's Comment: *Mother's move-to-Illinois-first-modify-residency-restriction-later approach backfired in the trial court and in the Dallas COA. (A.B.R.)*

MOTHER FAILED TO SHOW EVIDENCE OF A MATERIAL AND SUBSTANTIAL CHANGE

¶11-3-25. ***Anderson v. Carranza*****,** No. 14-10-00600-CV, 2011WL1631792 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (mem. op.) (04/28/11).

Facts: Mother and Father divorced, and at the time of the divorce, they had two children together. The divorce decree named Father as sole managing conservator and Mother as possessory conservator. The court ordered that Mother's periods of possessions be supervised through the SAFE program. Mother was granted access to the Children for four hours on alternate Saturdays, and she was required to pay fees and costs assessed by SAFE. Mother visited the Children inconsistently and fell behind on her payments to SAFE. Mother never provided health insurance for the Children, and she had previously been found in contempt for failure to pay child support. About four years after the divorce, Mother filed a motion to modify the parent-child relationship, which trial court granted. Father appealed arguing there was insufficient evidence to support trial court's finding of material and substantial change.

Holding: Reversed and motion denied

Opinion: In order to prevail on a petition to modify the parent-child relationship, the petitioning party must show a material and substantial change in circumstances. Mother did not include details of any specific changed circumstances in her petition. At trial, she testified that she was in a more stable relationship and was raising three children. Mother also testified that Father had moved in with a girlfriend. These changes are slight and are not material and substantial. Mother's testimony that "[she is] an excellent mother" was conclusory and not competent evidence of changed circumstances. Because Mother failed to show a material and substantial change in circumstances, trial court erred in granting Mother's motion to modify the parent-child relationship.

Editor's Comment: *How are the following not material and substantial change in circumstances???: Since the prior order, Mother had gone from totally disabled to fully functioning, had gotten married, and Father had moved in with his girlfriend. The trial court got it right, and the appellate court is out to lunch. Maybe if the findings of fact and conclusions of law had been more detailed, the appellate court would have found more evidence to support the trial court's judgment. (R.T.)*

Editor's Comment: *At trial on a modification, always do a comparison of the situation before and at the time of the trial to show change of circumstances. (M.M.O.)*

SAPCR

TERMINATION OF PARENTAL RIGHTS

ALTHOUGH MOTHER MAY HAVE BEEN IMPROPERLY SERVED WITH CITATION BY PUBLICATION, TRIAL COURT PROPERLY DENIED MOTHER'S MOTION FOR A NEW TRIAL BECAUSE MOTHER FILED HER MOTION MORE THAN TWO YEARS AFTER TRIAL COURT TERMINATED HER PARENTAL RIGHTS.

¶11-3-26. ***In re E.R.,*** -- S.W.3d --, 2011 WL 724999 (Tex. App.—Dallas 2011, no pet. h.) (03/03/2011).

Facts: TDFPS filed a petition to terminate mother's parental rights to her four children. After failing to personally serve mother, TDFPS served mother with citation by publication. Mother did not appear at the termination proceeding. On November 14, 2007, trial court signed a decree terminating mother's parental rights. On November 16, 2009, mother filed a motion for new trial under TRCP 329. The trial court denied the motion for new trial. Mother appealed, arguing trial court erred by denying her motion for new trial.

Holding: Affirmed

Opinion: In 1997, the legislature added TFC 161.211, entitled "Direct or Collateral Attack on Termination Order." TFC 161.211 includes a six-month deadline for challenging the validity of a parental rights termination order of a person served with citation by publication notwithstanding TRCP 329's two-year period to request a new trial. The bill analysis accompanying the 1997 legislation specifies that the purpose of the statute is to establish a six-month window after which the validity of an order terminating the parental rights of a person would not be subject to attack.

Texas's fundamental interest in parental-rights termination cases is to protect the best interest of the child. This interest is aligned with another of the child's interests-an interest in a final decision on termination so that adoption to a stable home or return to the parents is not unduly prolonged. Thus, the mandatory language of TFC 161.211 leaves no room for a construction other than a requirement that any collateral or direct attack on the termination of parental rights, including a motion for new trial, be filed no more than six months after the termination order is signed.

Here, a temporary order appointed the DFPS as the temporary managing conservator of appellant's children on November 16, 2006. Mother failed to appear at various hearings for which she was served with citation by publication. Trial court signed the termination decree on November 14, 2007. Mother filed her motion for a new trial on November 16, 2009, three years after the DFPS was made the temporary managing conservator of the children and two years after the termination order was signed. These facts demonstrate why the legislature enacted TFC 161.211—to protect the best interests of children by ensuring that children's lives are not kept in limbo. Accordingly, trial court did not abuse its discretion in denying mother's untimely motion for new trial.

Dissent: The majority should have concluded pursuant to the plain language of the statute that the bar to direct and collateral attacks on parental termination orders presumes ***valid*** service. By the clear language of TFC 161.211(b), the bar applies only when a parent has been "served by citation by publication. When a party is not properly served, process is invalid and the trial court acquires no personal jurisdiction over a defendant. The legislature did not elect in TFC 161.211(b) to bar attacks on termination orders where, for example, "service is attempted by publication," or where a "good faith effort has been made to serve citation by publication."

Considering the strict requirements the legislature has imposed before a party is served by publication and the plain language of subsection 161.211(b), construing "served by publication" to mean "purportedly served" would allow for absurd and patently unconstitutional results. Thus, a proper construction of TFC 161.211(b) should lead to the conclusion that it was the intent of the legislature to bar attacks on parental termination orders only in situations where the parent was actually "served." Importantly, under TRCP 109, service by publication is proper when a party to a civil case makes an oath that it has been unable to effect personal service, the residence of a defendant is unknown, and after due diligence, the party has been unable to locate the whereabouts of the defendant.

Here, although the TDFPS caseworker submitted an affidavit that the residence and whereabouts of mother were unknown, the live petition alleged a specific address where mother could be personally served, and caseworker testified (1) she had a working phone number for mother, (2) she could communicate with mother by phone, (3) she spoke with mother more than once, and (4) mother had attempted to come to hearings. Accordingly, mother was never properly "served by citation by publication." Thus, trial court never acquired personal jurisdiction before terminating her parental rights.

EVIDENCE OF MOTHER'S AND FATHER'S INCARCERATION WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT TERMINATION OF THEIR PARENTAL RIGHTS IN CHILD.

¶11-3-27. ***In re N.R.T,*** -- S.W.3d --, 2011 WL 1004866 (Tex. App.— Amarillo 2011, no pet. h.) (03/22/11).

Facts: Child was born January 27, 2006. In May 2006, father was sentenced to seven years confinement in prison for robbery and for failing to register as a sex offender. In September 2007, mother was sentenced to four years in prison for robbery. The scheduled release date for mother is May 2011 and June 2012 for father.

Prior to her confinement, mother left child in the care of paternal grandmother. In June 2007, TDFPS opened a case regarding child when it learned that paternal grandmother and child tested positive for cocaine and that paternal grandmother cared for child while intoxicated. At that point, TDFPS sought termination of parents' parental rights. TDFPS and parents agreed that if TDFPS determined maternal grandmother as a suitable placement for child, TDFPS would become managing conservator until parents were released from prison. However, TDFPS determined placement with maternal grandmother was unsuitable because her twenty-year-old daughter, who then lived in the home, refused a drug screen. In 2009, child's foster mother requested adoption and TDFPS proceeded with a termination petition. Following trial, trial court terminated the parental rights of mother and father finding that termination was in child's best interest and that both mother and father committed predicate acts specified by TFC 161.001. Mother and father appealed, challenging the legal and factual sufficiency of trial court's findings.

Holding: Affirmed

Opinion: The COA determined that after TDFPS removed child from paternal grandmother's care due to grandmother's and child's testing positive for cocaine, child remained in the care of TDFPS for more than six months as of 2009 when it petitioned trial court for termination. This, along with the fact that TDFPS could not find a suitable placement for child constituted constructive abandonment of child by mother. Further, the undisputed evidence of mother's and father's incarceration during and extending beyond the proceedings satisfied various predicate grounds under TFC 161.001. Accordingly, the COA concluded the evidence was legally and factually sufficient to support trial court's findings that termination of the parent-child relationships between both parents and child was in the child's best interest.

JUDGE MAY SIGN ORDER OF TERMINATION AFTER NEW TRIAL HEARING DESPITE THE FACT THAT A DIFFERENT JUDGE PRESIDED OVER TERMINATION HEARING

¶11-3-28. ***In re J.A.R.,*** -- S.W.3d --, 2011 WL 1402780 (Tex. App.—San Antonio 2011, no pet. h.) (04/13/11).

Facts: Father did not comply with his family plan, and he did not see Child in a year. Trial court held Father constructively abandoned Child and ordered a termination of parental rights. Father motioned for a new trial. A different judge presided, who denied the motion and signed the Order of Termination. Father appealed arguing the subsequent judge abused his discretion because he did not preside over the original trial.

Holding: Affirmed

Opinion: Judge Nellermoe presided over the termination hearing and pronounced her judgment orally. Subsequently, Judge Sakai signed an Order of Termination after a new trial hearing in which Father testified that he did not complete his service plan, and he had not seen Child in the past year. Judge Sakai's order formalized Judge Nellermoe's oral judgment, and the order was supported by testimony heard in the hearing of the motion for a new trial. Although it would be better for the same judge who presided over the termination hearing to preside over the new trial hearing, the subsequent judge did not abuse his discretion by signing the Order of Termination.

MOTHER DID NOT ESTABLISH THAT SHE WAS PREJUDICED BY THE TRIAL COURT'S FAILURE TO TIMELY APPOINT APPELLATE COUNSEL

¶11-3-29. ***In re M.E.-M.N.,*** -- S.W.3d --, 2011 WL 2119686 (Tex. App.—Fort Worth 2011, no pet. h.) (05/26/11).

Facts: TDFPS received information that Mother had passed out in a car at a methadone clinic while two-year-old Child was present. TDFPS investigator visited Mother's residence, but no one came to the door. However, the investigator heard a small child inside the residence and called the police. Inside, police found Mother, the Child, and a friend of Mother's. Mother and the Child both tested positive for cocaine. TDFPS initiated a termination proceeding against Mother.

Trial court found Mother indigent and appointed trial counsel. Trial court subsequently found that Mother had endangered Child and that termination of Mother's parental rights was in the Child's best interest. Mother's trial counsel filed a notice of appeal and an "Agreed Motion to Withdraw as Counsel." Trial court granted the motion to withdraw but did not appoint appellate counsel. Mother did not file a motion for new trial or a statement of points for appeal. After Mother failed to timely file her appellate brief, COA abated the appeal and remanded it to trial court to determine whether Mother was indigent and wished to continue, to appoint appellate counsel for Mother, and to allow Mother to develop an evidentiary record to determine whether she was denied effective assistance of counsel during the thirty-day period following the final order of termination. Trial court found Mother indigent and appointed appellate counsel. The new counsel filed an "emergency motion to comply with abatement order." After a hearing, trial court found Mother was not represented during the thirty-day period following the final order and that Mother's appeal would be frivolous. Mother filed her appellate brief and a "motion to extend time to file the brief and/or allow for supplementation of the brief." COA granted the motion and ordered that COA would treat Mother's complaints in her brief as a sufficient statement of points on appeal.

Holding: Affirmed

Opinion: TFC 263.405(d) gives a trial court thirty days to hold a hearing to determine whether an appeal is frivolous. Here, COA had abated and remanded this appeal, extending trial court's jurisdiction. However, trial

court signed the order finding the appeal frivolous the day after its jurisdiction expired. Thus, the frivolous order is void.

Indigent parties in parental-rights termination cases are entitled to counsel, including the right to effective assistance of counsel. To show counsel was ineffective, appellant must show "(1) that counsel failed to perform in a reasonably effective manner and (2) that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable" TFC 263.405(b) states that an appellant in a termination proceeding has fifteen days after the final termination order to file a motion for new trial or a statement of points for appeal if an appeal is sought. Further, COA may not address issues not included in a timely filed statement of points. Here, Mother did not have counsel during the fifteen day period, but COA granted her motion on appeal for supplemental briefing and ordered that it would treat her appellate brief as a sufficient statement of points for appeal. Therefore, although trial court should have promptly appointed appellate counsel when Mother's trial counsel withdrew, it has not been shown that Mother was prejudiced by trial court's failure.

Termination decisions must be supported by clear and convincing evidence. TFC 161.001(1)(E) applies if "evidence exists that the endangerment of the child's physical well-being was the direct result of Appellant's conduct, including acts, omissions, or failures to act." Here, the Department filed this case after being informed that Mother was passed out in her car at a methadone clinic while the Child was present. Mother testified that she was withdrawing from hydrocodone and had suffered an overdose of a mixture of antibiotics and methadone. Mother had stopped getting drug treatment for a previous opiate addiction, and she had four positive drug tests during the pendency of the case. Mother and the Child tested positive for cocaine at the beginning of the case, and the man they were living with had a problem with cocaine. Mother had previously pled no contest to a felony prescription fraud charge, and she frequented a hospital emergency room for minor conditions to receive pain medication during that case. During this case, Mother did not appear for her psych exam, did not attend parenting classes or counseling sessions, and did not complete her drug and alcohol assessment. Mother was employed as a part-time caretaker, but her license was expired. Mother did not have stable housing. Finally, Mother had lost parental rights to her two oldest children because of an addiction to painkillers. Because the evidence was legally sufficient to support trial court's TFC 161.001(1)(E) finding, it was not necessary to address the 161.001(1)(D) finding.

miscellaneous

CHANGING CHILD'S SURNAME FROM MOTHER'S SURNAME TO FATHER'S SURNAME BASED SOLELY ON FATHER'S CLAIM THAT TRADITION MANDATED THE CHILD CARRY HIS NAME WAS ERROR.

¶11-3-30. ***In re H.S.B.,*** -- S.W.3d --, 2011 WL 1005559 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (03/01/11).

Facts: Mother and father engaged in a brief romantic relationship that resulted in the conception and birth of child. The parties did not marry and mother gave the child mother's surname when child was born. A few weeks after child's birth, father filed a petition to establish his paternal rights to child and his support obligations. The parties settled all disputes by mediation with the exception of child's surname. At trial, the only evidence father presented was his testimony that by tradition, the child should carry the father's surname. Following trial, trial court ordered the child's surname to be changed to father's surname. Mother appealed, arguing trial court impermissibly considered evidence of tradition and that the evidence was insufficient for trial court's findings that changing child's name was in child's best interest.

Holding: Reversed and rendered

Opinion: The COA began its analysis by observing that tradition and custom are key factors parents consider when choosing surnames for a child in the United States. Traditionally parents select the paternal surname in situations where the child is born within a marriage or the maternal surname where the child is born out of wedlock. The COA noted the rationales for gender-based naming traditions (in the courts) have been eradicated under modern law: society values gender equality, especially in family law disputes when the welfare of a child is concerned.

With the best interest of the child standard in mind, the COA observed that other Texas courts have held that a child's name should not be changed unless the party seeking the change shows that the original name is detrimental to the child. To this end, these courts have identified varying factors to determine whether a name change would be detrimental to the child. The COA expressly rejected any factor related to the parent's embarrassment, inconvenience, or confusion, reasoning that such considerations have no bearing on whether a name change is in the child's best interest. Further, the COA held that because a best interest determination is a fact-specific inquiry that requires courts to consider all relevant circumstances, a court may consider evidence of tradition when determining if it is in a child's best interest to order a name change, but tradition alone is an insufficient ground for changing a child's name.

Here, father testified that he wanted child to bear his surname because it was tradition, but his testimony was unsupported by any explanation of how using his surname would be in the child's best interest. Father made no attempt to link tradition with any factors relevant to child's best interest and offered no evidence that the father's surname would be better than the mother's surname. As a result, father presented legally insufficient evidence to support a finding that a name change would be in the child's best interest, and trial court abused its discretion in ordering the name change.

Editor's Comment: *The new "go to" case if you're fighting a name-change battle. This case will put you to sleep with its talk of anglo-saxon patriarchal traditions, but its synthesis of factors that other appellate courts have considered in similar cases is very helpful. (R.T.)*

WIFE'S DIVORCE ATTORNEY COULD PROPERLY INTERVENE IN ENFORCEMENT ACTION TO COLLECT HIS ATTORNEY'S FEES BECAUSE INTERVENTION WAS ESSENTIAL TO PROTECT FORMER TRIAL ATTORNEY'S INTERESTS.

¶11-3-31. ***Collins v. Moroch,*** -- S.W.3d --, 2011 WL 783619 (Tex. App.—Dallas 2011, no pet. h.) (03/08/11).

Facts: Trial court granted husband and wife a divorce in 2003. The divorce decree granted wife's claim for economic contribution and awarded her the residence. Husband appealed and the Dallas COA affirmed. The Texas Supreme Court denied husband's petition for review in February 2006. Trial attorney represented wife during the course of the divorce proceedings and assisted wife's appellate counsel during appellate proceedings. When the appellate proceedings ended, wife owed trial attorney over $20,000. When he received a $2000 check from wife with the notation "final payment," trial attorney crossed out the word "final," cashed the check, and filed a motion to withdraw from representing wife.

In November 2006, wife filed a post-judgment enforcement action against husband. Husband answered with a general denial. Wife's trial attorney then filed an intervention, seeking his attorney's fees earned during the divorce and appeal. Following trial, trial court denied wife's claims against husband and ordered her to pay her trial attorney's claim for attorney's fees. Wife appealed.

Holding: Affirmed

Opinion: Wife argued trial court erred by allowing trial attorney to intervene because he was not a proper party. The COA began its analysis by noting that wife signed a contract for attorney's legal services and agreed to pay for those services and that in fact, attorney represented wife during the divorce. Further, trial court granted the divorce in January 2003 and trial attorney stayed on the case until he withdrew in January 2005. Even though the attorney-client contract stated it did not include appellate representation, trial attorney continued to work on the case assisting wife's appellate counsel with wife's knowledge and approval. Because trial court previously ordered husband to pay wife's attorney's fees and because trial court could have reasonably concluded trial attorney's intervention would not complicate the case and was essential to protect trial attorney's interests, the COA concluded that trial court acted within its discretion by denying mother's motion to strike trial attorney's intervention.

Mother also argued under the "accord and satisfaction" affirmative defense, that trial court erred in awarding trial attorney attorney's fees because he accepted the $2000 check as complete payment of her account even though he crossed out the word "final" and cashed the check. With her check, wife sent a letter indicating she did not intend to pay the balance of her account. She concluded the letter, "If you have an objection to this payment, I will be more than happy to meet you in a fee dispute. Otherwise, I will assume that our professional relationship is terminated." In response, trial attorney sent wife a letter stating that he had coordinated and cooperated with her appellate counsel during the appeal, the bill for his services included services rendered during the divorce as well as new services rendered during the appeal. Reading the two letters together, the COA concluded the parties had no agreement that the $2000 check paid by wife would fully satisfy the entire claim. Thus, the COA rejected wife's accord and satisfaction affirmative defense.

TRIAL COURT ERRED BY FAILING TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO FATHER'S TIMELY REQUEST UNDER TRCP 296 AND 297, HOWEVER, TRIAL COURT'S FAILURE TO FILE THE REQUESTED FINDINGS AND CONCLUSIONS DID NOT CAUSE FATHER HARM.

¶11-3-32. ***Rumscheidt v. Rumscheidt,*** -- S.W.3d --, 2011 WL 977495 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (03/22/11).

Facts: Mother and father divorced in Nebraska. Afterward, mother and children moved to Texas while father stayed in Nebraska where he worked, earning a $72,000 annual salary. Later, father moved to Texas and began a new job earning $25,400. Father filed a petition requesting trial court to modify his child support obligation based on his reduced salary. After hearing testimony from both mother and father, trial court denied father's petition to modify child support. Afterward, father timely requested findings of fact and conclusions of law pursuant to TRCP 296. After trial court failed to respond to father's request, father filed a notice of past due findings and conclusions under TRCP 297. Trial court denied father's request for findings of fact and conclusions of law. Father appealed.

Holding: Affirmed

Opinion: Father argued trial court erred in denying his request for findings of fact and conclusions of law under TRCP 296 and 297. The COA began its analysis by noting that on the face of the past-due notice, trial court wrote that it would not make findings of fact and conclusions of law because it had not granted a modification of child support. On appeal, mother cited authority holding that trial court was not required to make findings under TFC 154.130 when it did not issue or render a new child-support order but merely denied obligor's motion to modify child support. The COA noted, however, that mother's reliance on this authority was misplaced, because the cited cases addressed a trial court's failure to file child-support findings requested under the TFC, not a trial court's failure to file findings of fact and conclusions of law under the TRCPs.

Here, trial court did not grant father's motion to modify child support; therefore, trial court was not required to make the specific statutory findings required under TFC 154.130. Rather, father's request for find-

ings of fact and conclusions of law was directed to trial court's findings and conclusions supporting its decision to *deny* father's request to modify his child-support obligation. Thus, because father timely and properly requested findings of fact and conclusions of law under TRCP 296 and 297, trial court erred by failing to file them. The COA observed, however, that the record affirmatively showed that father was not harmed by trial court's failure to file the requested findings of fact and conclusions of law. Father's petition reflects that trial court expressly found "there is no material or substantial change of circumstances of the children…" Further, the trial evidence was neither lengthy nor complicated. Father was able to brief all of the relevant issues and did not identify any issue that he was unable to brief as a result of the trial court's failure to make findings of fact and conclusions of law.

BE MINDFUL OF APPLICABLE STANDARDS OF REVIEW WHEN DRAFTING ARGUMENTS FOR A REVIEWING COURT.

¶11-3-33. ***In re C. M. G.,*** -- S.W.3d --, 2011 WL 1136215 (Tex. App.—Amarillo 2011, no pet. h.) (03/29/11).

Facts: Mother and father divorced in 2003 and had only one child during marriage. The divorce decree awarded mother primary custody and required child to live within Travis County or any contiguous county. Both mother and father remarried and had children with their new spouses. In 2009, stepfather lost his job in Austin and eventually found employment in Massachusetts. Afterward, mother requested trial court to modify the divorce degree so that she could move child to Massachusetts to accommodate stepfather's employment. Trial court denied mother's request.

Holding: Affirmed

Opinion: Mother argued that trial court abused its discretion by denying her request for a modification because the evidence warranted modification. The COA began its analysis by acknowledging that some evidence indicated that it would not be detrimental to child if trial court permitted mother and child to move to Massachusetts to be with stepfather. However, the evidence also suggested that because of stepfather's education and training, stepfather could have found employment in Texas. Moreover, the evidence showed that father exercised regular visitation with child and that child was close to her aunt who also lived in Texas. Accordingly, the COA held that trial court acted well within its discretion in denying mother's modification request.

In closing, the COA commented upon the "tenor" of mother's argument "not as criticism but rather as guidance for others who may journey down the same road." The COA noted that in her argument, mother focused most of her attention on the presence of evidence that would purportedly warrant modification of the previous order. Mother failed to address the lack of evidence supporting trial court's ruling or why the evidence that supported it was either deficient or unworthy of credence. Thus, the COA concluded, "litigants and their counsel must be mindful of the standard of review when drafting their briefs and argument if they wish to effectively help or influence the reviewing court."

Editor's Comment: *In other words, when you're seeking a modification at the trial level, the burden is on you, so you focus your attention on all the evidence that would warrant a modification. On the other hand, when you lose at trial, and appeal it, you need to "reverse" your analysis somewhat and instead point out the lack of evidence that supported the trial court's judgment, or the inadequate nature of the evidence that the trial court relied upon. Framing your argument is crucial! (R.T.)*

MOTHER'S RIGHT TO DUE PROCESS WAS DENIED WHEN SHE DID NOT RECEIVE ADEQUATE NOTICE OF THE DISPOSITIVE HEARING

¶11-3-34. ***Rojas v. Scharnberg,*** No.01-09-01039-CV, 2011 WL 941616 (Tex. App.—Houston 2011, no pet. h.) (mem. op.) (03/17/11).

Facts: Father filed a Petition to Modify Parent-Child Relationship. Trial court set a temporary injunction hearing, to which Mother appeared. In that hearing, trial court reset the hearing for a later date. Mother appeared at the second hearing, but Father passed on this hearing. Afterwards, Father's attorney sent Mother a letter notifying her that a hearing was scheduled, but the letter did not provide any further details on what was to be addressed in the hearing. Mother faxed Father's attorney stating she would not be able to attend and requesting that the hearing be rescheduled. Father did not respond. Mother did not appear at the hearing. In the hearing, Father stated that the letter to Mother "indicat[ed] that [they] would be setting today for the modification on final." Trial court issued a default judgment. Mother motioned for a new trial, and trial court denied the motion.

Holding: Reversed and Remanded

Opinion: In general, to set aside a default judgment, a defendant must satisfy the *Craddock* requirements, which include proof that (1) the failure to file an answer or appear at a hearing was not intentional or the result of conscious indifference, (2) the defendant has a meritorious defense, and (3) a new trial will not result in delay or prejudice to the plaintiff. However, if a defendant did not receive notice of a trial, she only needs to satisfy the first requirement. Furthermore, because Mother had appeared at previous hearings, due process entitled her to notice of the trial and dispositive hearings. Mother had clearly indicated her intention to defend herself in the lawsuit by filing an answer and attending two prior hearings. Although Mother knew of the scheduled hearing, she was not informed that it was a dispositive hearing that could result in a default judgment. Mother did not receive adequate notice of the hearing, and her motion for new trial should have been granted.

Editor's Comment: *This case reminds us how important it is to make sure the other side gets proper notice that, not only is a hearing scheduled, but that the hearing is a DISPOSITIVE one. Due process is not something to mess around with. See, e.g., In re Hughes, 2009 WL 1491866 (Tex. App. – Amarillo 2009, no pet.) (mem. op.) where the appellate court reversed the trial court under due process grounds because, after a temporary orders hearing on a common law marriage claim, the trial court found no common law marriage and dismissed the entire suit. Even though all parties were present and indeed engaged in a full-blown evidentiary hearing, because the wife did not have notice it might be a dispositive hearing, the court reversed. (R.T.)*

★★★ TEXAS SUPREME COURT ★★★

THE TEXAS GENERAL ARBITRATION ACT (TAA) DOES NOT PREVENT PARTIES FROM SEEKING JUDICIAL REVIEW OF AN ARBITRATION AWARD DESPITE AN AGREEMENT LIMITING ARBITRATOR'S AUTHORITY

¶11-3-35. ***Nafta Traders, Inc. v. Quinn,*** -- S.W.3d --, 2011 WL 1820875 (Tex. 2011) (05/13/11).

Facts: Petitioner-Employer terminated its employment of Respondent-Employee in response to worsening business conditions. Employee sued for sex discrimination. The employee handbook included an arbitration provision applicable to disputes arising out of employment terminations, but did not indicate whether state or federal law applied. Employer moved to compel arbitration under the FAA and Employee did not object. The

arbitrator awarded Employee back pay, damages, fees, and costs. Employee moved for a court confirmation of the award, and Employer moved for vacatur under FAA, TAA, common law, and a provision of the employee handbook that provided "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." Trial court confirmed the award. Employer appealed.

Before COA reached its decision, SCOTUS decided *Hall Street Associates, LLC v.* In *Hall Street*, SCOTUS held "FAA's grounds for vacatur and modification 'are exclusive' and cannot be 'supplemented by contract.'" Based on this opinion, COA held "parties seeking judicial review of an arbitration award covered under the TAA cannot contractually agree to expand the scope of that review and are instead limited to judicial review based on the statutory grounds enumerated in the statute."

Employer argued that the arbitrator exceeded his power because the arbitration agreement did not permit the arbitrator to commit reversible error, and Employee argues arbitrator issued an erroneous award. COA concluded that similarities between the TAA and the FAA weighed heavily in favor of construing the TAA as *Hall Street* had construed the FAA. Accordingly, the COA held Employer could not contractually expand judicial review of the arbitration and affirmed trial court's confirmation of the award. Employer sought review from Tex. Sup. Ct. COA applied the TAA, rather than the FAA, noting that neither party had dispute on appeal that the TAA governed their arbitration.

Holding: Reversed and Remanded — "The TAA presents no impediment to an agreement that limits the authority of an arbitrator in deciding a matter and thus allows for judicial review of an arbitration award for reversible error."

Majority Opinion: (J. Hecht, C.J. Jefferson, J. Wainwright, J. Medina, J. Green, J. Johnson, J. Willett, J. Guzman, J. Lehrman).

The questions presented here are "whether the Texas General Arbitration Act (TAA) precludes an agreement for judicial review of an arbitration award for reversible error, and if not whether the Federal Arbitration Act (FAA) preempts enforcement of such an agreement." The answer to both questions is no.

The TAA instructs a court to confirm an arbitration award unless certain grounds are met, including when an "arbitrator…exceed[s his] powers." Further, "[a]n arbitrator derives his powers from the parties' agreement to submit to arbitration." In *Hall Street*, the parties had agreed that a court could confirm the arbitrator's judgment unless "the arbitrator's findings of facts are not supported by substantial evidence, or…the arbitrator's conclusions of law are erroneous." SCOTUS held this agreement impermissibly enlarged the grounds for vacating an arbitration award under FAA.

Tex. Sup. Ct. acknowledged that *Hall Street* governs interpretation of FAA; however, the Tex. Sup. Ct. must apply its own reasoning to the interpretation of TAA. TAA allows parties to agree to the scope of an arbitrator's power. The FAA does not preempt state law that allows parties to agree to a greater review of arbitration awards.

An arbitration award is not susceptible to full judicial review merely because the parties have agreed. The parties must provide a record of the proceedings and complaints preserved as if the award were a court judgment on appeal. The only review to which the parties may agree is the kind that review courts conduct. The parties cannot agree to a different standard of judicial review than would ordinarily be applied to the conflict.

Concurring: (C.J. Jefferson, J. Wainwright, J. Lehrmann)

There are benefits to having cases tried in open court. The rules of court have been honed over many years. The outcome of the cases are publicized and critiqued and can lead to changes in our legislature and

common law. Although arbitration may be quicker, cheaper, and overseen by experts, arbitration is a private matter. Court rules do not apply. The proceedings are not recorded. If parties are being driven to arbitration because they do not believe the court can serve their needs, the court system needs to be improved. Burdens of discovery can make trial overwhelmingly expensive. Arbitration may be more attractive than a courtroom because the arbitrators are qualified professionals rather than "a person whose only qualification is the possession of a law license." Legislature should take steps to improve the efficiency of the judicial system and compel litigants to use the courts rather than private adjudication.