SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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Section Wear and Publications

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MESSAGE FROM THE CHAIR

Let me begin with a special thank you to Steven King of Fort Worth and JoAl Cannon Sheridan of Austin for an outstanding TAFLS Trial Seminar held on February 17-18, 2012. The trial attorneys made well-organized presentations, along with practical examples of "how to do it." Additionally, we appreciate the faculty for their hard work and for sharing their expertise with all of us.

The Section is now working with the State Bar Committee, Solutions 2012, appointed by President Bob Black. This committee will be prepared to present information and suggestions about how to help provide more legal services to the indigent, pro se population that need our help with their family law problems. As you know, many well-intentioned people across the State seem to view the solution as another set of forms. This issue is much more complex than just providing more forms, which most individuals cannot understand or complete correctly.

The Supreme Court Advisory Committee will receive "Solutions 2012" suggestions on April 13th. The Section will be present to give accurate information and suggestions of how the Bar and Judiciary can best assist the indigent, pro se population of our State. As many of you know, creating a system that will help the indigent, pro se population has been an effort the Section wishes to be a part of the solution & we do not believe it will be solved by providing additional forms.

Since this is probably my last message to you as Chair, I take this opportunity to thank you for the privilege of serving the Section this past year. I am proud of our Section for its generosity in the past and future of serving those in need of our services across the State. Of course, I am prejudiced in this regard from my personal experience with so many of you. In addition, your willingness to learn, so you can better serve your clients, is one of the reasons we have the best CLE in the country, and many around the USA continue to confirm that fact.

Best wishes as we welcome Diana Friedman as Chair in June, 2012. Join me in continuing to serve the people of Texas and assisting Ms. Friedman in any way we can.

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

EDITOR'S NOTE

Wanting something positive to come out of the Pro Se Forms Debate – District 11 State Bar Director Steve Fischer has created a Texas Family Lawyers on Facebook open to any attorneys who handle family law cases. The stated purposes of this Facebook page are to:

- Discuss issues of concern in the field of Family Law;
- Ask and answer questions about Law and Practice;
- Find attorneys who might be able to sit in for others;
- Inquire into customs and judges among the 254 Texas Counties;
- Serve as an organized voice for Family Lawyers throughout the State of Texas; and
- Allow announcements—want ads specific to our practice.

In just a short while, hundreds of family law lawyers have joined. I welcome all of you to join: https://www.facebook.com/groups/316750041700600/320162474692690/?notif_t=group_activity or search Texas Family Lawyers on Facebook.

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

2012 RECOMMENDED NOMINATIONS SLATE
STATE BAR OF TEXAS
FAMILY LAW SECTION

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

Officers

CHAIR:	**DIANA FRIEDMAN**
CHAIR-ELECT:	**SHERRI EVANS**
VICE-CHAIR:	**JIMMY VAUGHT**
TREASURER:	**HEATHER KING**
SECRETARY:	**KATHRYN MURPHY**
IMMEDIATE PAST CHAIR:	**TOM AUSLEY**

Nominations to the Class of 2017

1. **JONATHAN BATES (Dallas)**
2. **KELLY AUSLEY FLORES (Austin)**
3. **CHARLES HARDY (San Antonio)**
4. **CRAIG HASTON (Houston)**
5. **LISA MOORE (Victoria)**

The election will take place on April 26, 2012 at the section meeting during Marriage Dissolution.

OFFICE OF THE ATTORNEY GENERAL
2012 REVISED TAX CHARTS

Pursuant to § 154.061(b) of the Texas Family Code, the Office of the Attorney General of Texas, as the Title IV-D agency, has promulgated the following tax charts to assist courts in establishing the amount of a child support order. These tax charts are applicable to employed and self-employed persons in computing net monthly income.

INSTRUCTIONS FOR USE

To use these tables, first compute the obligor's annual gross income. Then recompute to determine the obligor's average monthly gross income. These tables provide a method for calculating "monthly net income" for child support purposes, subtracting from monthly gross income the social security taxes and the federal income tax withholding for a single person claiming one personal exemption and the standard deduction.

Thereafter, in many cases the guidelines call for a number of additional steps to complete the necessary calculations. For example, §§ 154.061 - 154.070 provide for appropriate additions to "income" as that term is defined for federal income tax purposes, and for certain subtractions from monthly net income, in order to arrive at the net resources of the obligor available for child support purposes. If necessary, one may compute an obligee's net resources using similar steps.

Reason for Revision:

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312 (HR 4853) was amended on February 22, 2012 by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (HR 3630), Section 1001, 126 Stat. 156, 158 (2012). The rate for Old-Age, Survivors and Disability Insurance Taxes is revised to 4.2% for employed persons and 10.4% self-employed persons. These charts should be used for the remainder of 2012.

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EMPLOYED PERSONS
2012 REVISED TAX CHART

Monthly Gross Wages	Social Security Taxes: Old-Age, Survivors and Disability Insurance Taxes (4.2%)*	Social Security Taxes: Hospital (Medicare) Insurance Taxes (1.45%)*	Federal Income Taxes**	Net Monthly Income
$100.00	$4.20	$1.45	$0.00	$94.35
$200.00	$8.40	$2.90	$0.00	$188.70
$300.00	$12.60	$4.35	$0.00	$283.05
$400.00	$16.80	$5.80	$0.00	$377.40
$500.00	$21.00	$7.25	$0.00	$471.75
$600.00	$25.20	$8.70	$0.00	$566.10
$700.00	$29.40	$10.15	$0.00	$660.45
$800.00	$33.60	$11.60	$0.00	$754.80
$900.00	$37.80	$13.05	$8.75	$840.40
$1,000.00	$42.00	$14.50	$18.75	$924.75
$1,100.00	$46.20	$15.95	$28.75	$1,009.10
$1,200.00	$50.40	$17.40	$38.75	$1,093.45
$1,256.67***	$52.78	$18.22	$44.42	$1,141.25
$1,300.00	$54.60	$18.85	$48.75	$1,177.80
$1,400.00	$58.80	$20.30	$58.75	$1,262.15
$1,500.00	$63.00	$21.75	$68.75	$1,346.50
$1,600.00	$67.20	$23.20	$81.88	$1,427.72
$1,700.00	$71.40	$24.65	$96.88	$1,507.07
$1,800.00	$75.60	$26.10	$111.88	$1,586.42
$1,900.00	$79.80	$27.55	$126.88	$1,665.77
$2,000.00	$84.00	$29.00	$141.88	$1,745.12
$2,100.00	$88.20	$30.45	$156.88	$1,824.47
$2,200.00	$92.40	$31.90	$171.88	$1,903.82
$2,300.00	$96.60	$33.35	$186.88	$1,983.17
$2,400.00	$100.80	$34.80	$201.88	$2,062.52
$2,500.00	$105.00	$36.25	$216.88	$2,141.87
$2,600.00	$109.20	$37.70	$231.88	$2,221.22
$2,700.00	$113.40	$39.15	$246.88	$2,300.57
$2,800.00	$117.60	$40.60	$261.88	$2,379.92
$2,900.00	$121.80	$42.05	$276.88	$2,459.27
$3,000.00	$126.00	$43.50	$291.88	$2,538.62
$3,100.00	$130.20	$44.95	$306.88	$2,617.97
$3,200.00	$134.40	$46.40	$321.88	$2,697.32
$3,300.00	$138.60	$47.85	$336.88	$2,776.67
$3,400.00	$142.80	$49.30	$351.88	$2,856.02
$3,500.00	$147.00	$50.75	$366.88	$2,935.37
$3,600.00	$151.20	$52.20	$381.88	$3,014.72
$3,700.00	$155.40	$53.65	$396.88	$3,094.07
$3,800.00	$159.60	$55.10	$416.04	$3,169.26
$3,900.00	$163.80	$56.55	$441.04	$3,238.61
$4,000.00	$168.00	$58.00	$466.04	$3,307.96
$4,250.00	$178.50	$61.63	$528.54	$3,481.33
$4,500.00	$189.00	$65.25	$591.04	$3,654.71
$4,750.00	$199.50	$68.88	$653.54	$3,828.08
$5,000.00	$210.00	$72.50	$716.04	$4,001.46
$5,250.00	$220.50	$76.13	$778.54	$4,174.83
$5,500.00	$231.00	$79.75	$841.04	$4,348.21
$5,750.00	$241.50	$83.38	$903.54	$4,521.58
$6,000.00	$252.00	$87.00	$966.04	$4,694.96
$6,250.00	$262.50	$90.63	$1,028.54	$4,868.33
$6,500.00	$273.00	$94.25	$1,091.04	$5,041.71
$6,750.00	$283.50	$97.88	$1,153.54	$5,215.08
$7,000.00	$294.00	$101.50	$1,216.04	$5,388.46
$7,500.00	$315.00	$108.75	$1,341.04	$5,735.21
$8,000.00	$336.00	$116.00	$1,467.54	$6,080.46
$8,500.00	$357.00	$123.25	$1,607.54	$6,412.21
$9,000.00	$378.00	$130.50	$1,747.54	$6,743.96
$9,500.00	$385.35****	$137.75	$1,887.54	$7,089.36
$10,000.00	$385.35	$145.00	$2,027.54	$7,442.11
$10,082.06*****	$385.35	$146.19	$2,050.52	$7,500.00
$10,500.00	$385.35	$152.25	$2,167.54	$7,794.86
$11,000.00	$385.35	$159.50	$2,307.54	$8,147.61
$11,500.00	$385.35	$166.75	$2,447.54	$8,500.36
$12,000.00	$385.35	$174.00	$2,587.54	$8,853.11
$12,500.00	$385.35	$181.25	$2,727.54	$9,205.86
$13,000.00	$385.35	$188.50	$2,867.54	$9,558.61
$13,500.00	$385.35	$195.75	$3,007.54	$9,911.36
$14,000.00	$385.35	$203.00	$3,147.54	$10,264.11
$14,500.00	$385.35	$210.25	$3,287.54	$10,616.86
$15,000.00	$385.35	$217.50	$3,427.54	$10,969.61

Footnotes to Employed Persons Revised 2012 Tax Chart:

* An employed person not subject to the Old-Age, Survivors and Disability Insurance/Hospital (Medicare) Insurance taxes will be allowed the reductions reflected in these columns, unless it is shown that such person has no similar contributory plan such as teacher retirement, federal railroad retirement, federal civil service retirement, etc.

** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption ($3,800.00) and taking the standard deduction ($5,950.00).

*** The amount represents one-twelfth (1/12) of the gross income of an individual earning the federal minimum wage ($7.25 per hour) for a 40-hour week for a full year. $7.25 per hour x 40 hours per week x 52 weeks per year equals $15,080.00 per year. One-twelfth (1/12) of $15,080.00 equals $1,256.67.

**** For annual gross wages above $110,100.00, this amount represents a monthly average of the Old-Age, Survivors and Disability Insurance tax based on the 2012 maximum Old-Age, Survivors and Disability Insurance tax of $4,624.20 per person (4.2% of the first $110,100.00 of annual gross wages equals $4,624.20). One-twelfth (1/12) of $4,624.20 equals $385.35.

***** This amount represents the point where the monthly gross wages of an employed individual would result in $7,500.00 of net resources.

* *

References Relating to Employed Persons 2012 Revised Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax

(a) Contribution Base
(1) Social Security Administration's notice appearing in 76 Fed. Reg. 66111 (October 25, 2011)
(2) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))
(3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

(b) Tax Rate
(1) Section 3101(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3101(a))
(2) Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312 (HR 4853), Section 601(a)(2), 124 Stat. 3296, 3309 (2010) as amended on February 22, 2012 by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (HR 3630), Section 1001, 126 Stat. 156, 158 (2012)

2. Hospital (Medicare) Insurance Tax

(a) Contribution Base
(1) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))
(2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

(b) Tax Rate
(1) Section 3101(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3101(b))

3. Federal Income Tax

(a) Tax Rate Schedule for 2012 for Single Taxpayers
(1) Revenue Procedure 2011-52, Section 3.01, Table 3 which appears in Internal Revenue Bulletin 2011-45, dated November 7, 2011
(2) Section 1(c), (f) and (i) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1(c), 1(f), 1(i))

(b) Standard Deduction
(1) Revenue Procedure 2011-52, Section 3.11(1), which appears in Internal Revenue Bulletin 2011-45, dated November 7, 2011
(2) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

(c) Personal Exemption
(1) Revenue Procedure 2011-52, Section 3.19, which appears in Internal Revenue Bulletin 2011-45, dated November 7, 2011
(2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

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SELF-EMPLOYED PERSONS
2012 REVISED TAX CHART

Monthly Net Earnings From Self-Employment*	Social Security Taxes: Old-Age, Survivors and Disability Insurance Taxes (10.4%)**	Social Security Taxes: Hospital (Medicare) Insurance Taxes (2.9%)**	Federal Income Taxes***	Net Monthly Income
$100.00	$9.60	$2.68	$0.00	$87.72
$200.00	$19.21	$5.36	$0.00	$175.43
$300.00	$28.81	$8.03	$0.00	$263.16
$400.00	$38.42	$10.71	$0.00	$350.87
$500.00	$48.02	$13.39	$0.00	$438.59
$600.00	$57.63	$16.07	$0.00	$526.30
$700.00	$67.23	$18.75	$0.00	$614.02
$800.00	$76.84	$21.43	$0.00	$701.73
$900.00	$86.44	$24.10	$2.39	$787.07
$1,000.00	$96.04	$26.78	$11.69	$865.49
$1,100.00	$105.65	$29.46	$20.98	$943.91
$1,200.00	$115.25	$32.14	$30.27	$1,022.34
$1,300.00	$124.86	$34.82	$39.57	$1,100.75
$1,400.00	$134.46	$37.49	$48.86	$1,179.19
$1,500.00	$144.07	$40.17	$58.15	$1,257.61
$1,600.00	$153.67	$42.85	$67.45	$1,336.03
$1,700.00	$163.27	$45.53	$78.86	$1,412.34
$1,800.00	$172.88	$48.21	$92.80	$1,486.11
$1,900.00	$182.48	$50.88	$106.75	$1,559.89
$2,000.00	$192.09	$53.56	$120.69	$1,633.66
$2,100.00	$201.69	$56.24	$134.63	$1,707.44
$2,200.00	$211.30	$58.92	$148.57	$1,781.21
$2,300.00	$220.90	$61.60	$162.51	$1,854.99
$2,400.00	$230.51	$64.28	$176.45	$1,928.76
$2,500.00	$240.11	$66.95	$190.39	$2,002.55
$2,600.00	$249.71	$69.63	$204.33	$2,076.33
$2,700.00	$259.32	$72.31	$218.27	$2,150.10
$2,800.00	$268.92	$74.99	$232.21	$2,223.88
$2,900.00	$278.53	$77.67	$246.15	$2,297.65
$3,000.00	$288.13	$80.34	$260.09	$2,371.44
$3,100.00	$297.74	$83.02	$274.03	$2,445.21
$3,200.00	$307.34	$85.70	$287.97	$2,518.99
$3,300.00	$316.95	$88.38	$301.91	$2,592.76
$3,400.00	$326.55	$91.06	$315.85	$2,666.54
$3,500.00	$336.15	$93.74	$329.79	$2,740.32
$3,600.00	$345.76	$96.41	$343.73	$2,814.10
$3,700.00	$355.36	$99.09	$357.67	$2,887.88
$3,800.00	$364.97	$101.77	$371.61	$2,961.65
$3,900.00	$374.57	$104.45	$385.55	$3,035.43
$4,000.00	$384.18	$107.13	$399.49	$3,109.20
$4,250.00	$408.19	$113.82	$453.49	$3,274.50
$4,500.00	$432.20	$120.52	$511.58	$3,435.70
$4,750.00	$456.21	$127.21	$569.67	$3,596.91
$5,000.00	$480.22	$133.91	$627.75	$3,758.12
$5,250.00	$504.23	$140.60	$685.84	$3,919.33
$5,500.00	$528.24	$147.30	$743.92	$4,080.54
$5,750.00	$552.25	$153.99	$802.01	$4,241.75
$6,000.00	$576.26	$160.69	$860.09	$4,402.96
$6,250.00	$600.28	$167.38	$918.18	$4,564.16
$6,500.00	$624.29	$174.08	$976.26	$4,725.37
$6,750.00	$648.30	$180.78	$1,034.35	$4,886.57
$7,000.00	$672.31	$187.47	$1,092.43	$5,047.79
$7,500.00	$720.33	$200.86	$1,208.60	$5,370.21
$8,000.00	$768.35	$214.25	$1,324.78	$5,692.62
$8,500.00	$816.37	$227.64	$1,440.95	$6,015.04
$9,000.00	$864.40	$241.03	$1,569.55	$6,325.02
$9,500.00	$912.42	$254.42	$1,699.66	$6,633.50
$10,000.00	$954.20****	$267.82	$1,830.81	$6,947.17
$10,500.00	$954.20	$281.21	$1,968.94	$7,295.65
$10,793.19*****	$954.20	$289.06	$2,049.93	$7,500.00
$11,000.00	$954.20	$294.60	$2,107.06	$7,644.14
$11,500.00	$954.20	$307.99	$2,245.19	$7,992.62
$12,000.00	$954.20	$321.38	$2,383.31	$8,341.11
$12,500.00	$954.20	$334.77	$2,521.44	$8,689.59
$13,000.00	$954.20	$348.16	$2,659.56	$9,038.08
$13,500.00	$954.20	$361.55	$2,797.69	$9,386.56
$14,000.00	$954.20	$374.94	$2,935.81	$9,735.05
$14,500.00	$954.20	$388.33	$3,073.94	$10,083.53
$15,000.00	$954.20	$401.72	$3,212.06	$10,432.02

Footnotes to Self-Employed Persons 2012 Revised Tax Chart:

* Determined without regard to Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12)) (the "Code").

** In calculating each of the Old-Age, Survivors and Disability Insurance tax and the Hospital (Medicare) Insurance tax, net earnings from self-employment are reduced by the deduction under Section 1402(a)(12) of the Code. The deduction under Section 1402(a)(12) of the Code is equal to net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) multiplied by one-half (1/2) of the sum of the Old-Age, Survivors and Disability Insurance tax rate (determined without regard to the temporary employee payroll tax cut as described by section 601(b)(1) of the ''Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010") (12.4%) and the Hospital (Medicare) Insurance tax rate (2.9%). The sum of these rates is 15.3% (12.4% + 2.9% = 15.3%). One-half (1/2) of the combined rate is 7.65% (15.3% x 1/2 = 7.65%). The deduction can be computed by multiplying the net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) by 92.35%. This gives the same deduction as multiplying the net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) by 7.65% and then subtracting the result.

For example, the Social Security taxes imposed on monthly net earnings from self-employment (determined without regard to Section 1402(a)(12) of the Code) of $2,500.00 are calculated as follows:

(i) Old-Age, Survivors and Disability Insurance Taxes:
$2,500.00 x 92.35% x 10.4% = $240.11
(ii) Hospital (Medicare) Insurance Taxes:
$2,500.00 x 92.35% x 2.9% = $66.95

*** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption ($3,800.00) and taking the standard deduction ($5,950.00).

In calculating the annual federal income tax, gross income is reduced by the deduction under Section 164(f) of the Code. The deduction under Section 164(f) of the Code for 2011 is computed at the rate of 59.6 percent of the OASDI tax paid plus one half of the Hospital (Medicare) Insurance tax paid as described by section 601(b)(2) of the ''Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010." For example, monthly net earnings from self-employment of $8,500.00 times 12 months equals $102,000.00. The Old-Age, Survivors and Disability Insurance taxes imposed by Section 1401 of the Code for the taxable year equal $9,796.49 ($102,000.00 x .9235 x 10.4% = $9,796.49). The Hospital (Medicare) Insurance taxes imposed by Section 1401 of the Code for the taxable year equal $2,731.71 ($102,000.00 x .9235 x 2.9% = $2,731.71). The deduction under Section 164(f) of the Code for 2011 is equal to $7,204.57 (($9,796.49 x 0.596) + ($2,731.72 x 0.5) = $7,204.57).

**** For annual net earnings from self-employment (determined with regard to Section 1402(a)(12) of the Code) above $110,100.00, this amount represents a monthly average of the Old-Age, Survivors and Disability Insurance tax based on the 2012 maximum Old-Age, Survivors and Disability Insurance tax of $11,450.40 per person (10.4% of the first $110,100.00 of net earnings from self-employment (determined with regard to Section 1402(a)(12) of the Code) equals $11,450.40). One-twelfth (1/12) of $11,450.40 equals $954.20.

***** This amount represents the point where the monthly net earnings from self-employment of a self-employed individual would result in $7,500.00 of net resources.

* *

References Relating to Self-Employed Persons 2012 Revised Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax

(a) Contribution Base
(1) Social Security Administration's notice dated 76 Fed. Reg. 66111 (October 25, 2011)
(2) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))
(3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

(b) Tax Rate
(1) Section 1401(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1401(a))
(2) Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312 (HR 4853), Section 601(a)(2), 124 Stat. 3296, 3309 (2010) as amended on February 22, 2012 by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (HR 3630), Section 1001, 126 Stat. 156, 158 (2012)

(c) Deduction Under Section 1402(a)(12)
(1) Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12))
(2) Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312 (HR 4853), Section 601(a)(2), 124 Stat. 3296, 3309 (2010) as amended on February 22, 2012 by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (HR 3630), Section 1001, 126 Stat. 156, 158 (2012)

2. Hospital (Medicare) Insurance Tax

(a) Contribution Base

(1) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))

(2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

(b) Tax Rate

(1) Section 1401(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1401(b))

(c) Deduction Under Section 1402(a)(12)

(1) Section 1402(a)(12) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(a)(12))

3. Federal Income Tax

(a) Tax Rate Schedule for 2012 for Single Taxpayers

(1) Revenue Procedure 2011-52, Section 3.01, Table 3 which appears in Internal Revenue Bulletin 2011-45, dated November 7, 2011

(2) Section 1(c), (f) and (i) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1(c), 1(f), 1(i))

(b) Standard Deduction

(1) Revenue Procedure 2011-52, Section 3.11(1), which appears in Internal Revenue Bulletin 2011-45, dated November 7, 2011

(2) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

(c) Personal Exemption

(1) Revenue Procedure 2011-52, Section 3.19, which appears in Internal Revenue Bulletin 2011-45, dated November 7, 2011

(2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

(d) Deduction Under Section 164(f)

(1) Section 164(f) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 164(f))

(2) Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312 (HR 4853), Section 601(a)(2), 124 Stat. 3296, 3309 (2010) as amended on February 22, 2012 by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (HR 3630), Section 1001, 126 Stat. 156, 158 (2012)

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Mis-Matched: Taking a State Approach to Enforcing the Growing International Matchmaking Industry, Trinh **Tran**, 50 FAM. CT. REV. 159 (2012).

ASK THE EDITOR

Question: I represent Husband in a divorce suit. The parties entered into an "Irrevocable Settlement Agreement and Rule 11" (the "Agreement"). The Agreement was signed by Husband Wife, myself, and Wife's attorney. The agreement states in part that "[t]he mortgage debt will be re-financed solely into Husband's name before finalization of the divorce." The Agreement was based on Husband's good faith belief that he would have the ability to refinance the Marital Residence under the conditions of the Agreement. Husband relied on representations made by the finance company, All America Bank, that he would be able to refinance the loan solely in his name. The day after the Agreement was signed, Husband went to execute the refinance documents pursuant to the terms of the Agreement; however, All America Bank changed its position, and Husband was told that he would not, in fact, be eligible to refinance the loan. Is there any basis for Husband revoking the Agreement.

Answer: Yes, Husband can seek rescission of the Agreement based upon the affirmative defenses of mutual mistake or, possibly, unilateral mistake. In regards to mutual mistake, where parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be, except

(a) where the welfare of innocent third persons will be unfairly affected, or
(b) where the party seeking to avoid the transaction can obtain reformation or performance of the bargain according to the actual intent of the parties when the transaction was entered into, or
(c) where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he supposed it to be, and such compensation is given.

RESTATEMENT (FIRST) OF CONTRACTS § 502. As a general rule, a mistake that justifies rescission must be a mutual, not a unilateral, mistake. *Cigna Ins. Co. of Tex. v. Rubalcada*, 960 S.W.2d 408, 412 (Tex. App.—Houston [1st Dist.] 1998, no pet.). However, equity may permit rescission based on a unilateral mistake when:

(1) the mistake is of so great a consequence that to enforce the contract would be unconscionable;
(2) the mistake relates to a material feature of the contract;
(3) the mistake occurred despite ordinary care; and
(4) the parties can be placed in status quo, *i.e.*, the rescission must not prejudice the other party except for the loss of the bargain.

Id.; *James T. Taylor & Son, Inc. v. Arlington Indep. Sch. Dist.*, 160 Tex. 617, 620, 335 S.W.2d 371, 373 (Tex. 1960).

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'm a collaborative law attorney and love what I do. I really and truly believe that it's best for couples to split as amicably as possible – especially when there are kids involved. What makes me want to jump off a bridge is that so many of my clients say they want to do this and then they revert to ridiculous childish behavior which impedes the entire process! I have had people stomp out of mediation, burn their soon-to-be ex's clothes in the front yard, kidnap pets – you name it. It's crazy! Why are these people so self-destructive?? Do they go temporarily insane? They seem so normal when they hire me! And what do you think an attorney or mediator can do to ensure a productive process, given the fact that so many of our clients are, well, nuts?

Thanks,
Collaborative Chris

Dear CC,

First of all, don't jump. It's painful and often deadly and it just creates all sorts of problems for those you leave behind. Just thought I'd mention that…

It's always good to hear that there are professionals in the world who actually care about the people they're supposed to be helping. In both our fields, the inherent conflict of interest is, of course, money. Any case of yours or mine is an opportunity to exploit a situation for cash – we can easily create more conflict so that we can bill more hours. I'm sure you don't know any people who do this and of course, neither do I – but we both know it happens – and it taints everyone's reputation, even those of us who find this to be appalling behavior. This is why there are so many lawyer jokes, right? I don't know any therapist jokes, but someone surely is writing them all down somewhere. I no doubt will get some emails from my readers sharing some of their favorites. Bring them on…

I believe, as you seem to, that doing what's in the clients' best interest always always always makes for a more successful practice for therapists and attorneys alike – and ensures better outcomes for our clients. Duh. Why is this such a hard concept for professionals to grasp? That's a rhetorical question.

You asked why your clients, who seem to want a collaborative process, become self-destructive and, well, just plain destructive, when they're going through a divorce. The answer is simple math. A divorce attorney once told me that whatever the person is like before the papers are filed, multiply that by 1000 and that's the behavior you'll get during the process. Think of it as one of those 8th grade science experiments. Put a substance in a beaker and turn the heat up too high enough and all sorts of things start to fly around the room. Smoke, flames, broken glass … fire extinguishers, failing grades. Not that I have any personal experience with this, you understand. That was my lab partner's fault. But still, the analogy is apt.

When the heat is on, people revert to primitive behavior. They act out their feelings instead of taking responsibility for them and processing them instead. Think of a two year old who doesn't get his or her way. What does the kid do? Throw a fit. Even after they learn not to throw fits, kids will have complete meltdowns if their feelings get out of control. A tiny thing like wanting gum at the check-out line at the grocery store becomes a colossal battle of the wills.

Acting out feelings is childish but normal. Somehow people feel better and more satisfied – at least in the moment – when they stomp out and slam doors. Everyone else pays for this nonsense, of course, but when a person is swimming in emotion, they rarely care how they're affecting the people around them. They just want to feel better. Now. The satisfaction of burning someone's clothes in the yard outweighs any concept of future consequences or remorse.

I know that collaborative law involves a behavioral contract. Unfortunately, since most people don't know how to turn the heat down on the beaker and regulate their emotions, the behavioral contract is a guide-

line that people sometimes don't have the emotional maturity to follow. Even though it's in their best interest to do so.

I recommend you familiarize yourself with the basic math of human behavior. In my work with last-ditch couples, I often ask them to pick a few emotions that express their typical feelings in the relationship. They are given these options: fear, pain, anger, shame, guilt, loneliness, joy. They usually stare blankly at the list, then choose anger. Imagine the buzzing sound from Family Feud at this point. BUZZER!! Survey says… Anger is always a secondary emotion. It's often the most accessible one but rarely the most important one.

Anger is typically made up of fear and something else, like loneliness. When I *86* anger as an option and make them choose something else, they look at me blankly and say, "I'm not lonely. I want to get rid of the #$*%U#Y#." I calmly and patiently explain that loneliness doesn't mean lonesome – as in "I sure wish he'd come over and eat Cheetos on my $10,000 couch tomorrow morning early." It refers to that pit in the stomach feeling you get when you're alone in a relationship, alone because a relationship failed you – or alone in the world without an advocate. Ding! Ditto for fear. A blank look followed by, "I don't feel afraid." BUZZER!! Survey says… Really? How about fear of being misunderstood? Fear of losing? Fear of rejection? Ding! When I suggest guilt or shame, I often get a blank stare and a retort: "What do I have to be ashamed of? He's the one who had the affair with that pop-tart!" I might gently suggest at this point that people often feel reflexive shame when they're rejected for someone else. It doesn't have to make sense to be a real feeling. Ding!

Often people can't pick any of the feelings on the list. They'll look at me blankly and say, "none of mine are on there." I ask them for their list. Common answers are defensiveness, worry, frustration, exhaustion, numbness, irritation, rage.

The math on these emotions often looks like this: defensiveness = fear + guilt or shame + anger; frustration = fear + pain + anger. Exhaustion = fear + pain + loneliness. Rage = fear + pain + loneliness + guilt + shame → anger. And so on.

The goal here isn't to learn the formulas and get the right answer, like a 7th grade algebra test. The goal is to get your clients to get underneath the anger and find out what's really going on so they'll have a better shot at managing themselves. Typically a few questions (and a heightened tolerance for blank stares) will elicit some useful responses.

This will sound like a digression but keep reading. I love the movie Saving Private Ryan. The first 30 minutes of that move genuinely scared me. I FELT scared, sitting there in the theater. Like I was there. I was enraged at the Germans for shooting at us. I was terrified of getting shot. Even though I was perfectly safe and none of it was actually happening to me in real time. The filming of the beach landing is so powerful and so well-done that you don't think, "Wow, those guys must be really scared!" You actually FEEL the fear. And it's paralyzing.

A collaborator on that film was Steven Ambrose, who wrote a book called ***Citizen Soldiers***. Ambrose was a historian who wrote for the rest of us. I love his books. In ***Citizen Soldiers***, he looked at the lives, experiences, and motivations of the regular guy on the front lines. The average guys who never became heroes but who nevertheless were called on to do extraordinary things under unthinkable circumstances. One of the things these guys discovered was that *fear is inevitable, but it can be managed.*

This is a basic truth in the universe that somehow eludes most of us. Here's how it works.

1) Triggering events are inevitable in life. They do not go away. Example: finding out your spouse has had an affair
2) These events trigger a typical set of feelings that are *normal* for the person feeling them. Feelings are inevitable. They are a normal part of life. They do not go away.
3) Typically when a person feels those things, they tell themselves a predictable set of messages: "I have no power," "no one will ever love me," "I got cheated on because I have cellulite."
4) After whipping through these messages, a person does a predictable set of behaviors. Run, argue, throw things, rage, cry, shrink away, shut down, call a plastic surgeon – you name it. Most people can easily reel off their list.
5) They begin to experience hopelessness, despair – whatever – which becomes a Triggering event. Boom. We're right back where we started.

The point of intervention is at step 3. The thought process. A person who identifies loneliness and fear may need to be reminded that they do indeed have an advocate (you) and that they are not in the fight alone. This simple but obvious fact can be tremendously reassuring and can diffuse what might turn in to a rage-festival triggered by fear and loneliness.

My suggestion is that you prep your clients for the inevitable barrage of feelings they're about to experience, help them parse the most important ones, find out the messages they tell themselves, and then help them write a better list. A better set of behaviors will follow.

This can be tricky to do – especially since lawyers are often more comfortable dealing with spreadsheets and contracts than icky squishy feelings. But it will ensure a better outcome for your clients.

Alternatively, of course, you can send your clients to therapy (shameless plug alert!!). A good therapist can walk your client through the whole thing and help ensure that you and the client have the positive outcome you both want. If clients balk at the expense, remind them that it's cheaper than going to trial or to jail. That's usually motivation enough.

Another suggestion is to consider including the transformative mediation process in your practice. This is a little-known form of mediation and intervention that sounds squishy but is actually wildly effective. I recently heard of a divorce case involving hundreds of millions of dollars that screeched to a halt over a pair of salt and pepper shakers. I'm not kidding. Total melt down of the entire process. Transformative mediation unlocked the problem. The couple settled and moved on. Ding!

My next column will address transformative mediation in detail and suggest resources for you and your colleagues. Stay tuned… And thanks for caring. Really. I would never tell a lawyer joke about you.

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

IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Characterization: A Florida trial court correctly ruled that a domain name and website were the husband's nonmarital property when the husband bought the domain name and started working on the website ten days prior to marriage, but the enhanced value of the domain name and website from the husband's efforts during marriage was marital property. *Robertson v. Robertson*, ___ So.3d ___, 2012 WL 162008 (Fla. App. 2012). The Georgia Supreme Court agreed with the wife that a husband transformed his separate property into marital property when he placed separate property accounts and real estate into the names of both himself and his wife as joint tenants with right of survivorship. *Shaw v. Shaw*, 720 S.E.2d 614 (Ga. 2012). The Alaska Supreme Court held that a trial court has discretion to include property acquired prior to marriage in the marital estate if "the parties were an economic unit during their pre-marital cohabitation." *McLaren v. McLaren*, 268 P.3d 323 (Alaska 2012).

Child Support: A Montana trial court did not abuse its discretion when it imputed earning capacity of $90,000 per month to a husband who worked odd jobs and whose business sold apparel and accessories under the names "Cowboy Junk" and "Sticker Dude" even though the husband's tax returns showed income of no more than $26,000 per annum because the husband grossed as much as $432,199 per annum and disposable income is not necessarily the same as taxable income. *In re Everett*, 268 P.3d 507 (Mont. 2012). An Ohio appellate court held that it is not an abuse of discretion to order the noncustodial parent to pay child support even though the Social Security benefits the disabled obligee received for the children exceeded the amount of court-ordered child support. *Parker v. Parker*, 2011 WL 5515511 (Ohio App. 2011). A Virginia appellate court held that neither ERISA nor Virginia law prohibited a trial court from signing a QDRO to permit the

obligee to attach the obligor's retirement account for the purpose of obtaining the obligor's "very considerable child support arrearage." *Nkopchieu v. Minlend*, 718 S.E.2d 470 (Va. App. 2011).

Facebook spoliation: We all know how important evidence from Facebook and other social media can be, but some do not realize that social media is protected from spoliation. In a wrongful death case, *Lester v. Allied Concrete Co.*, 80 Va. Cir. 454 (Va. Cir. 2010), the Circuit Court of Charlottesville, Virginia, sanctioned plaintiff's counsel $542,000 for instructing the decedent's widower, who was Administrator of her estate, to delete certain photos he had posted on Facebook and in addition sanctioned the widower/Administrator $180,000 for following those instructions. One such photo showed the bereaved "clutching a beer can, wearing a T-shirt emblazoned with 'I ♥ hot moms' and in the company of other young adults." *Note: Thanks to Judge Doug Woodburn who found this order and emailed it to Allison Unger who emailed it to Georganna Simpson who emailed it to me.*

Relocation: A New York appellate court granted a Marine custody of his daughter and permitted him to move to Philadelphia, reasoning, in part, that "the father was required to move due to military orders. Although he chose to renew his contract and remain in the Marines, that choice provided him with stability in employment during turbulent economic times, as well as benefits including health insurance for his family." *Adams v. Bracci*, 91 A.D.3d 1046 (N.Y. App. 2012). A Washington court correctly applied the preponderance of the evidence standard, rather than a "clear, cogent, and convincing" evidence standard, to a relocation case, and it did not abuse its discretion in denying the mother's request to move to Vancouver, noting: "This is a father who has never missed a support payment, has never missed an hour of visitation available to him, and has built a home in Sequim designed around the needs of his children." *In re Wehr*, 267 P.3d 1045 (Wash. App. 2011).

Maintenance: A Pennsylvania trial court erred when it failed to enforce a maintenance award to the wife in the amount of 125% of the Federal Poverty Guidelines pursuant to the Form I-864 affidavit of support that the husband filed with the Department of Homeland Security in support of the wife's petition for permanent residency. *Love v. Love*, 33 A.3d 1268 (Pa. Super. 2011). An Arizona appellate court held that a service member's Combat-Related Special Compensation must be included as income for purposes of calculating maintenance because it is not a disability benefit. *In re Marriage of Priessman*, 266 P.3d 362 (Ariz. App. 2011).

Modification: A North Carolina engineer who quit his $172,000 per year job "to follow Jesus Christ" and subsequently took a job as a pastor at $52,800 per year did not show a substantial change in circumstances warranting a reduction of child support. *Andrews v. Andrews*, 719 S.E.2d 128 (N.C. App. 2011). A New York home inspector who was laid off but worked three part-time jobs did not show a change of circumstances warranting a reduction of child support when his federal income tax return showed $19,732 in wages and about $65,000 in unexplained foreign income. *Miller v. Miller*, 91 A.D.3d 437 (N.Y. App. 2012). A Utah restaurant manager who was fired for cause from his job did show a substantial change of circumstances, the trial court having erred by "conflating" the substantial change in circumstances analysis with the issue whether the ex-husband had become voluntarily underemployed. *Busche v. Busche*, ___ P.3d ___, 2012 WL 163822 (Utah Court App. 2012).

Waste & fraud: A New York appellate court affirmed a trial court's finding that a husband wastefully dissipated the marital estate when the husband failed to make mortgage payments on the marital home, resulting in foreclosure; withdrew retirement funds to prevent the foreclosure but used them for personal expenses instead; cancelled the wife's medical insurance when she was recovering from back surgery; permitted the parties' cars to be repossessed; and allowed a judgment to be entered for unpaid marital debt. *Maggiore v. Maggiore*, 91 A.D.3d 1096 (N.Y. App. 2012). A Connecticut court did not err when it included four properties in the marital estate that the husband had fraudulently conveyed to his children in anticipation of the divorce. *Cottrell v. Cotrell*, 33 A.3d 839 (Ct. App. 2012). But a Florida appellate court reversed a trial court for counting $90,000 in gambling losses against the husband upon divorce when the gambling losses occurred while the marriage was intact, the husband often gambled in the course of entertaining business clients, and the wife gambled, too. *Zambuto v. Zambuto*, 76 So.3d 1044 (Fla. App. 2011).

COLUMNS

CHALLENGE EXPERTS' REASONING

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

Enhance your direct- and cross-exams of experts by asking them to explain the reasoning that supports their testimony—don't stop at the expert's methodology. Experts use "inductive reasoning," a bottom-up approach similar to how lawyers analyze problems, to develop their testimony: they gather data through their methods and then reason from that data to derive their conclusions and opinions. The reasoning must make sense and must be grounded in the "knowledge and experience of the [expert's] discipline." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993). If the "analytical gap" [bridged by reasoned inferences] between the data and the opinion is "too great," the testimony should be inadmissible. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1997). At times, the analytical gap is "too great" because the expert's reasoning is flawed.

Experts are vulnerable to the same reasoning flaws that affect us all: illusions; distortions wrapped around long-held values; snap judgments based on insufficient data; overconfidence—a pernicious mindset fed by unreasonable feelings of certainty. These flaws represent aspects of thinking, often outside our awareness, that can readily bias our judgments. As a result, explore the reasoning underlying an expert's testimony to open opportunities for credible direct-exams and incisive cross-exams. Competent testifying experts acknowledge and manage potential reasoning problems; incompetent experts don't.

Explore the expert's reasoning by focusing on two caselaw- and research-based lines of questions: Did the expert actively consider reasonable alternative explanations of her data? *see* Fed. R. Evid. 702 advisory committee's note; *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 565 (Tex. 1995). Is the expert aware of cognitive biases that may compromise her opinions?

The most effective strategy for experts to manage reasoning problems that could infect their opinions is to *actively* consider reasonable alternative explanations of their data until the best explanation survives—an effortful, critical thinking approach to which experts must commit themselves as they form their opinions. Merely acknowledging that alternative explanations exist without purposefully marching the data through those explanations is insufficient. Psychologist Daniel Kahneman characterizes the effort that distinguishes the active from the passive approach: "Sustaining doubt is harder work than sliding into certainty."

But to *actively* consider reasonable alternative explanations of their data, experts should also know the kinds of judgment biases that may infect their reasoning. This knowledge is critical because it alerts experts to the kinds of reasoning flaws to which they may be vulnerable, often without realization, as they develop their opinions. Lawyers can use the different judgment biases as hooks to test the reliability of experts' reasoning.

Let's look at three research-based biases:

Confirmatory bias is the tendency to seek or recall information that proves one's view while discounting or ignoring information inconsistent with that view. Confirmatory bias often takes hold with two kinds of experts. One expert, unfamiliar with the professional literature in the area of her testimony, doesn't know what reasonable alternative explanations of the data are available to consider. Thus, she bases her opinions primari-

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ly on personal experience and intuition. Another expert, testifying to promote an "agenda," chooses not to actively consider alternative explanations. Instead of the "bottom-up" reasoning-from-the-data approach, these expert types adopt a "top-down" approach, yielding to confirmatory bias by using premature conclusions to cherry-pick and explain the data.

Availability bias occurs when the expert is overly influenced by knowledge that comes to mind easily—information that is vivid, recently disclosed by a lawyer or in pleadings, and/or is similar to previous cases or events in which the expert has participated. For example, an expert, steeped in "diagnosing" abuse but unfamiliar with the professional literature on abuse, may uncritically view alarming allegations as similar to her previous cases—somehow, the cases, with apparent similar facts, seem alike. Or an expert having evaluated only a few abuse cases may judge the current case by comparing it to those previous cases. Not inclined towards the hard work of considering alternative explanations of the data, these experts fall prey to simple answers—overly influenced by easily recalled cognitively "available" information.

Anchoring and adjustment, a related bias, occurs when the expert latches onto a particular explanation of the data, and that explanation then becomes the "anchor" from which subsequent data will be interpreted—like a salesman beginning with a high offer to "anchor" the bargaining. Subsequent give-and-take may adjust the anchor, but not by much. For example, one study showed a bias among clinicians to minimize or dismiss data of a patient that indicated emotional problems when that patient was seen initially as less disturbed. In your case, did the expert use key information about the litigants received early from the lawyers or pleadings to anchor her judgments of the litigants? To counter this tendency, experts must actively consider reasonable alternative explanations of data that they consider while developing their opinions.

How can you improve your direct- or cross-exams by addressing experts' reasoning? First, ask experts to show how they actively considered alternative explanations of the data as they reached their opinions. Then, ask them to define biases that could infect their reasoning and explain how they kept those biases from compromising their opinions.

Challenge experts on both their methodology *and* reasoning to address the admissibility and quality of their testimony. Caselaw requires it. So should we.

ELDER CARE ISSUES—PLANNING FOR TODAY AND TOMMORROW

by Christy Adamcik Gammill, CDFA[2]

These days, it is not unusual for many people to live 20 or more years beyond normal retirement age. When seniors reach their eighties and nineties, plans that were satisfactory at age 65 may require a second look. Some areas of special concern to older seniors and individuals with aging parents or loved ones are asset management, health care, and living arrangements.

Managing Assets

Many older seniors may find themselves unable to continue managing their assets. A variety of arrangements are possible to transfer that responsibility to others, among them:

Revocable and Irrevocable Trusts

Seniors who wish to *retain control* over their property, while delegating the daily management to others, may want to consider a **revocable trust**. This arrangement would allow the senior to monitor the management

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of his or her assets, yet offers the flexibility to change the trust as needs and circumstances warrant. As added protection, a revocable trust may remain unfunded, as long as the senior is legally competent. Please note, a revocable trust is subject to estate taxes. Alternatively, an individual who is willing to *relinquish* ownership of assets altogether could establish an **irrevocable trust**.

Durable Power of Attorney

This mechanism allows seniors to designate a trusted relative or friend to make legal and financial decisions for them in the event of disability or cognitive impairment. The powers granted may be limited or broad in scope, and their definition and limitation vary from state to state. Some financial institutions are reluctant to recognize durable powers of attorney, so it is worthwhile to thoroughly explore this option beforehand.

Informal Arrangements

Some seniors transfer property *informally* to their heirs—in many cases free of gift taxes—in exchange for being taken care of for the rest of their lives. This arrangement, however, should be approached with caution. Even well-meaning adult children may unintentionally deplete assets through poor management, divorce, or creditor claims. Once the assets are gone, the senior could become dependent on the goodwill and financial assistance of relatives.

Health Care

With health care costs spiraling upward and people living longer than ever before, seniors of advanced age should anticipate facing high medical costs. The federal government provides *some* health care benefits through the **Medicare** and **Medicaid** programs, but seniors need to understand the *coverage* those programs may provide and what *costs* they can expect to face.

Medicare Part A covers inpatient services at hospitals and other health care facilities. It is provided automatically, at no cost, for seniors age 65 and older who are eligible for Social Security, and at a substantial cost for those who enroll independently. Medicare Part B provides additional health care coverage that is *optional* and must be paid for separately.

Eligibility for Medicaid, which covers long-term nursing home care, depends on financial need. Seniors may require professional assistance in managing their income and resources to meet Medicaid's strict eligibility requirements.

Living Arrangements

Seniors who are able to care for themselves and have the means to do so, may wish to remain in their own homes. Public services may be available to help prolong the period of self-care.

However, elders who are unable to live independently have several alternatives to consider. Assisted living/residential care facilities provide a protected environment with a semblance of independent living. Generally, some daily meals are provided in a communal dining room and minimal assistance, such as with washing, dressing, or medication is available. Continuing care communities offer a combination of independent living and health care support. If family members work, senior daycare centers—either publicly or privately funded—can provide opportunities for socialization and activities to relieve boredom. In some cases, bringing in outside help may be the solution.

Periodically Review Plans

It is wise for aging seniors and/or family caregivers to periodically review existing financial, health care, and living arrangements. In the transition to the later stages of life, fresh needs and concerns may call for revisiting plans made at an earlier age.

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THE ADMISSION OF THE ILLUSIVE BANK STATEMENT

By Jeff Coen[3]

A common evidentiary problem that arises in both temporary hearings and final trials is the introduction of business records from third parties that are needed to sustain or rebut a burden. In the most common situations it is either impossible or impractical to call a witness with "actual knowledge" of these records. With the electronic means of receiving and paying debts by individual households, it is becoming increasingly difficult to obtain the primary documents necessary to prove payment. Even if your client still pays their bills by paper check, virtually no bank operating in the 21st Century returns the cancelled check to the customer. More and more, banks aren't even allowing customers to view the scanned facsimile of their own cancelled checks on line. As this is being written major banks are adding new fees to provide account documentation to their customers. The lack of primary documentation reduces the amount of discovery that must be produced (a subject for another day) but, can make it difficult to introduce at trial the required proof of payment or even the expenditure or deposit of funds into an account.

Let's take the example of monthly bank statements, either provided electronically or the old fashioned paper copies sent out monthly. Say your client needs to prove the payments and deposits over a specific period of time. All you can obtain from the bank is a monthly statement which lists the transactions for a specific month. How do you avoid a hearsay objection when trying to introduce the third party bank record?

Your first line of defense is MAD (Mutual Assured Destruction). If your opponent objects to the introduction of your client's bank records, you will object to his/her client's bank records. This is not particularly reliable as there are many self-immolating opposing counsel who win battles but lose wars. Or in response to a "hearsay objection" to the monthly statement, you could go down the murky and dimly lit road of "Your honor, we're offering it only for the limited purpose of showing my client made a payment/deposit, not for the truth of the matter asserted." When making this response pay close attention to the judge's facial expression. Even if the court admits the record for the limited purpose, what have you got? If it is not for the truth of the matter asserted, than all you have is proof of a piece of paper issued by the bank to your client and possibly some action taken by your client regarding it.

A much better response and one that should work, possibly with copies of the primary cases, is to explain to the court that your client has adopted the bank's records as his/her own and they have therefore become your client's business records which meet the exception to hearsay.

Hopefully, we all know that Texas Rule of Evidence Rule 803(6) is the business records exception to the hearsay rule. But to review, it is a tangible document made at or near the time of an event's occurrence by a person with knowledge, is kept in the regular course of a business activity and it was the regular practice of that business activity to make such document, as testified to by the business records custodian, or other qualified witness and the method or circumstances of preparation do not show a lack of trustworthiness. So how do we get the bank's business records to become your client's records. It doesn't take magic or even a convoluted parsing of the rules to get there.

Your client's personal record keeping fits within the definition of 'business" in Rule 803(6) if it is any (and every) kind of regular organized activity whether conducted for profit or not. While my wife may not think my personal bill paying habits fit the definition of "organized activity", most client's record keeping will qualify. *Hauviller v. State*, 2001 Tex. App. LEXIS 7680 (Tex. App. Dallas Nov. 15, 2001) (meticulous records of personal coin collection deemed business records); and, *Amni Petroleum, Inc. v. Cotten*, 2000 Tex. App. LEXIS 1683 (Tex. App. Dallas Mar. 15, 2000)(individual's personal records of amortization schedules and notations constituted business records).

Your client's own records are exceptions to the hearsay rule. Now how does he/she adopt the records of the bank? In the past the usual scenario involved a business needing to adopt a sub-contractor's invoices as their own. A contractor was allowed to do so in *Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 814 (Tex.1982), but only if the contractor's employees regular responsibilities required them to verify the subcon-

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tractors' performance and accuracy of the invoices. If your client reviews the bank statements or balances a checking account on a regular basis and compares the statement to their own knowledge of the account, the verification of the bank's records is met and the monthly bank statements are now part of your client's business records.

Today a common evidentiary challenge is allowing a successor or assignee holder of a mortgage to use the original loan documents when the originating lender or servicer is long gone. Perhaps in anticipation of a deluge of similar cases, courts have lowered the bar for adoption of third party records even further. A document prepared by a third party may now be admissible under Rule 803(6) if: (1) it is incorporated and kept in the course of the testifying witnesses' business; (2) that business typically relies upon the accuracy of the contents of the document; and (3) the circumstances otherwise indicate the trustworthiness of the document. *Bell v. State*, 176 S.W.3d 90, 92 (Tex. App. Houston 1st Dist. 2004). The major question in the admissibility of the records seems to be the degree of trustworthiness they can be accorded. For instance Bank of America sends out millions of monthly bank statements. Few are in error. Once the reliability is established by the proponent business, the benefit of any doubt favors admitting the records.

What client doesn't typically incorporate bank statements into their own records (think Quick Books)? They then rely on those bank records for any number of transactions - such as preparing their individual tax returns. And if your client routinely makes notations on the records demonstrating the review and reliance, even better.

With a few extra questions added to the standard business records predicate, you can admit for all purposes any number of third party generated records that your opponent never thought possible.

ARTICLES

WANNA BE MY BABY MAMA?:
The Legal Status of Enforceability of Gestational Agreements in Texas
By K. Leigh Mathews[4]

Thesis: TEX. FAM. CODE § 160.754 should be amended to allow unmarried intended parents to enter into enforceable gestational agreements.

Ah, surrogacy. The goal: a child. The process: sometimes complicated. Take Abraham and Sarah for example. Complications of "biblical" proportion. As the story goes, God promises Abraham descendants, but Sarah has trouble conceiving.[5] So, Sarah proposes her maidservant Hagar serve as a surrogate, and Abraham conceives Ishmael with her.[6] Of course, the situation becomes a bit … complicated: Sarah begins to despise Hagar; Sarah and Abraham conceive a son of their own (Isaac); Hagar makes fun of Sarah; as a result, Hagar and Ishmael are banished.[7]

In order to address such complicated issues as may arise in surrogacy arrangements, modern society (including Texas) has developed a mechanism for the process. Within the United States, surrogacy contracts (or, as the Uniform Parentage Act refers to them, gestational agreements[8]) are legal in forty-four states.[9] In Texas,

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[5] *Genesis* 15:2-5, New International Version. Though, technically, Abraham was going by "Abram" at the time, and Sarah, "Sarai."

[6] *Genesis* 16: 1-16.

[7] *Genesis* 16:5, 21:1-14.

[8] Compare UNIFORM PARENTAGE ACT § 8.01 (2002) with TEX. FAM. CODE § 160.754(b) (Vernon 2011). The latter requires the intended parent "be married to each other." The former merely states "The man and the woman who are the intended parents must both be parties to the agreement."

[9] Diane Hinson and Maureen McBrien, Surrogacy Across America, FAMILY ADVOCATE, 32, 34-36 (Fall 2011).

gestational agreements are statutorily permitted, but restricted.[10] The Texas version of the Uniform Parentage Act is more restricted than the version promulgated by the Uniform Law Commission, in that the Texas Family Code limits judicial enforceability to such contracts executed by married couples.[11] This analysis will consider the practical applications for the execution and enforcement of gestational agreements in Texas and present arguments for the expansion of the statute to unmarried intended parents.

I. Overview: Gestational Agreements, Texas, and the Problem

The first part of this analysis will focus upon the concept of surrogacy, the potential conflicts and consequences in the arrangement, the current state of Texas law regarding court approval of gestational agreements, the current practice in surrogacy law, and the proposed amendments for statutory expansion of gestational agreement court approval availability.

A. *Terminology*

Use of a surrogate is one type of Assisted Reproductive Technology (ART). There are two types of surrogates historically. A "traditional surrogate" gestates the pregnancy, as well as supplying the genetic material, or egg.[12] In the Book of Genesis story, Hagar would be classified as a traditional surrogate.[13] For reasons that will be further discussed, this type of surrogacy arrangement is prohibited in Texas.[14]

A "gestational surrogate" or "carrier" gestates the pregnancy, but has no genetic tie to the carried and delivered child.[15] For purposes of this analysis and argument, only gestational surrogates will be considered. The focus will be limited to the following players: (1) the intended child, (2) the carrier, (3) the intended parents and/or donors of genetic material.

Curiously, defining a "donor" in the context of gestational agreements is more complicated. The Texas Family Code generally defines a donor as "an individual who provides eggs or sperm to a licensed physician to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration."[16] However, the Code goes on to expressly prohibit from this donor definition "a husband who provides sperm or a wife who provides eggs to be used for assisted reproduction by the wife" and "an unmarried man who, with the intent to be the father of the resulting child, provides sperm to be used for assisted reproduction by an unmarried woman."[17] Essentially, this definition and exclusion is limited to a child created through in-vitro or another non-surrogate form of conception.

The Family Code does not offer categorization for an intended mother or father who provides sperm or eggs to be used by a gestational carrier as "donors," but rather as "intended parents." Intended parents are defined by the Family Code as "individuals who will be the parents of a child born to a gestational mother by means of assisted reproduction, regardless of whether either individual has a genetic relationship with the child."[18] As will be further examined more closely, these definitions are problematic if Texas law changes, as this analysis argues it ought to be changed.

B. *Gestational Agreements Generally*

As previously mentioned, traditional surrogacy (where the gestational mother is also the egg donor) is prohibited in Texas insofar as court approved gestational agreements are concerned.[19] These statutory requirements to regulate surrogacy as a form of ART are intended, in part, to address the type of problems that arose in the "quintessential" surrogacy case, *Matter of Baby M*.[20] In the New Jersey case, Baby M. was the result of a traditional surrogate mother and intended biological father. The intended mother was married to

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[10] *Id*. at 34.
[11] TEX. FAM. CODE § 160.754(a) (Vernon 2011).
[12] Rosenberg, Meryl, "Critical Legal Considerations for All Parties to Surrogacy Arrangements", 34, No. 2 FAMILY ADVOCATE, 23 (Fall 2011).
[13] Obviously ART was not employed in this classic case; the child was conceived by "old-fashioned means", i.e. sexual intercourse.
[14] TEX. FAM. CODE § 160.754 (c) (Vernon 2011).
[15] Rosenberg, *supra* note 8.
[16] TEX. FAM. CODE § 160.102(6) (Vernon 2011).
[17] TEX. FAM. CODE §§ 160.102(6)(A, C) (Vernon 2011).
[18] TEX. FAM. CODE § 160.102(9) (Vernon 2011).
[19] TEX. FAM. CODE § 160.754(c) (Vernon 2011).
[20] *Matter of Baby M.*, 217 N.J.Super. 313 (1987).

Baby M.'s father, but did not donate genetic material in the surrogacy. Baby M.'s biological father and biological/surrogate mother entered into an agreement, by which the surrogate mother was to relinquish custody of and parental rights to Baby M. after birth. Baby M.'s intended mother was not a party to the agreement. Baby M.'s biological and surrogate mother was artificially inseminated, conceived, but refused to give up custody of Baby M. after she was born. This resulted in a sticky legal controversy, including a rush across state lines. In the end, the Supreme Court of New Jersey ruled for specific performance of the surrogate agreement in favor of the intended parents.

C. *Court Approved Gestational Agreements in Texas*

With gestational agreements in Texas, there is an advantage to gaining court approval. This process allows intended parents to become legal parents of the child upon birth of the child without an adoption. Such agreements are sanctioned in Texas even when a surrogate mother is compensated and require no biological connection between the unborn child and the intended parents (as would be the case, for example, if a surrogate mother and only donated genetic material of third parties were used). The 2000 Uniform Parentage Act was promulgated and codified in the Texas Family Code to provide a structure of statutory requirements which, if met, could allow intended parents and a surrogate to enter into such a court-approved agreement, thereby allowing the intended parents an efficient and dependable arrangement to avoid such problems as were present in *Matter of Baby M*.

D. *Court Approval Process and Requirements*

As it currently stands under Texas law, court approval of a gestational agreement is only available when the intended parents are married to each other and are both parties to the agreement.[21] To better understand the argument for statutory expansion, a brief overview of the court-approval process under current Texas law will be helpful.

In 2001, the Texas Legislature codified the Uniform Parentage Act (as found in the 2000 version) in the Texas Family Code.[22] The provisions for gestational agreements were not included at that time.[23] In 2003, the provisions for gestational agreements were enacted in a separate bill, which contained the restriction on availability of a judicially enforceable gestational agreement only to married couples.[24] This limitation continues under current Texas law. However, after much opposition to such a restriction,[25] the 2002 revisions to the Uniform Parentage Act removed the marriage requirement, mandating only that "the man and the woman who are the intended parents must both be parties to the gestational agreement."[26] Comments to the 2002 Uniform Parentage Act provide insight into policies motivating the amendments:

> Under subsection (b), a valid gestational agreement requires that the man and woman who are the intended parents, whether married or unmarried, to be parties to the gestational agreement. This reflects the Act's comprehensive concern for the best interest of nonmarital as well as marital children born as a result of a gestational agreement. Throughout UPA the goal is to treat marital and nonmarital children equally.[27]

The policy in favor of the Uniform Parentage Act's amendments is a compelling argument, based upon the best interest of the resulting child. This argument is relevant to proposed amendments to the Texas Family Code, as will subsequently discussed further.

In Texas, statutory mandates for court-approved gestational agreements require written agreement by prospective gestational mother, her husband if married, each donor, and each intended parent that: (1) the prospective gestational mother agrees to pregnancy by ART; (2) the prospective gestational mother, her husband if married, and each donor to relinquish all parental rights to the child; (3) the intended parents will be the parents to the child; and (4) the gestational mother and each intended parent agree to exchange relevant

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[21] TEX. FAM. CODE § 160.754(b) (Vernon 2011).
[22] TEX. FAM. CODE § 160.754(a) (Vernon 2011).
[23] Acts 2001, 77th Leg., ch. 821, § 1.01, eff. June 14, 2001.
[24] Acts 2003, 78th Leg., ch. 457, § 2, eff. Sept. 1, 2003.
[25] *See* John J. Sampson, Preface to the Amendments to the Uniform Parentage Act (2002), 36 FAM. L.Q. 1, 1 (2003).
[26] UNIFORM PARENTAGE ACT § 8.01(b) (2002).
[27] UNIFORM PARENTAGE ACT § 8.01 comment (2002).

health information.[28] Court approval for the gestational agreement will only be allowed if: the intended parents are married to each other and each intended parent is a party to the agreement; the eggs to be used in the ART procedure are from an intended parent or donor (but not from the gestational mother); the physician to perform ART procedure has informed parties regarding rate of success, risks, expenses, and reasonably foreseeable psychological effects; the parties must enter into agreement before the 14th day preceding date of transfer to gestational mother; and that the agreement does not apply to birth of child conceived by means of sexual intercourse.[29]

After such requirements are met, the agreement can be validated by the court in accordance with a hearing[30] and the court has discretion in finding the following: (1) that the parties submit to jurisdiction of the court; (2) that the intended mother is unable to carry a pregnancy to term and give birth to a child without unreasonable risk to herself or the unborn child; (3) a conducted home study determines intended parents meet standards of fitness applicable to adoptive parents (may be waived by the court); (4) that each party is voluntarily entering and understands the terms of the agreement; (5) that the prospective gestational mother has had a previous pregnancy/delivery and carrying another pregnancy to term/giving birth would not pose unreasonable risk to herself or the child; and that (6) all reasonable health care and pregnancy-related expenses have been adequately provided for by the parties.[31]

E. *2011 Proposed Amendments*

In the most recent regular legislative session, House Bill 910 and Senate Bill 1324 proposed identical amendments to the Texas Family Code, which would have effectively expanded court approval availability for gestational agreements executed by intended parent couples who are unmarried and intended single parents.[32] The intended purpose of the legislation would "allow single or unmarried parents to benefit from the legal safeguards surrounding these agreements."[33]

The bills proposed that the statutory language for gestational agreements be changed from "intended parents" to "parent" and remove mention of the genetic material donor as a party to the agreement.[34] Further, the amendments would change TEX. FAM. CODE § 160.754(b) to read as follows:

> Subject to the requirements of this subsection, an intended parent may be married or unmarried. If an intended parent is married, each spouse must be an intended parent and a party to the gestational agreement. If an intended parent is unmarried, another individual may not be a party to the gestational agreement as an additional intended parent of the child.[35]

Proponents of the proposed amendments argued that statutory expansion would provide parents who are financially, legally, and emotionally responsible at birth, better serving the well-established commitment of Texas law to the best interest of the child.[36] Opponents of the proposed amendments argued statutory expansion would encourage creation of single-parent family structure, and homosexual intended parenthood, and that such results are not in the best interest of children.[37] This analysis will now consider the benefits and deficiencies inherent in the various statutory approaches to judicially enforceable gestational agreements: (1) the current state of Texas law, (2) the law under proposed amendments of H.B. 910 and S.B. 1324, and (3) a liberal statutory approach to gestational agreements.

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[28] TEX. FAM. CODE § 160.754(a) (Vernon 2011).
[29] TEX. FAM. CODE § 160.754 (Vernon 2011).
[30] TEX. FAM. CODE § 160.756(c) (Vernon 2011).
[31] TEX. FAM. CODE § 160.756(b) (Vernon 2011).
[32] H. B. 910, 2011 Leg., 82nd Reg. Sess. (Tex. 2011); S.B. 1324, 2011 Leg., 82nd Reg. Sess. (Tex. 2011).
[33] Legislative Budget Board, Fiscal Note, 82nd Regular Legislative Session, In Re: HB910 by Thompson, *available at* www.legis.state.tx.us (last visited Dec. 14, 2011).
[34] H. B. 910, 2011 Leg., 82nd Reg. Sess. (Tex. 2011); S.B. 1324, 2011 Leg., 82nd Reg. Sess. (Tex. 2011).
[35] *Id*.
[36] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statement of Ellen Yarrell, Texas Family Law Foundation).
[37] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statements of Mary Lynn Gershtensclagger, Texas Eagle Forum and Cecilia Wood, a Texas Family Board Certified Attorney).

II. Argument: Why Universal Enforceability for Gestational Agreements Should Be Available in Texas

Court-approved gestational agreements should be available to intended parents, whether married or unmarried, individuals or couples, if the other statutory requirements are met. Expansion of this availability would reflect general freedom to contract, a commitment of the law not to result in biased outcomes, and (as will be detailed further in subsequent discussion) would be more congruent with a commitment to the best interest of an intended child. To illustrate the benefits and pitfalls created by various statutory approaches, consider the results of three statutory approaches to enforceability of gestational agreements: (1) current limitation to married couples only; (2) proposed amendments to expand availability to individual intended parents; and, (3) an expanded approach to allow individuals, unmarried couples, and married couples to enter into enforceable gestational agreements.

A. *The Current State of the Law: Limitation of Availability to Married Couples*

If the policy argument behind the current law's limitation to married couples only is that a married couple deserves statutory preference as a traditional family structure and thus are in the best position to care for an intended child from the surrogacy arrangement, then such a policy falls short. There may be no better illustration than a hypothetical divorced couple.

Consider the hypothetical situation of Harvey and Wanda Jones, a married couple who want a family, and have chosen to utilize a surrogacy arrangement with Suzanne Smith as a carrier. Mr. and Mrs. Jones have the option, under Texas law, to receive court approval of their gestational agreement before implanting a predetermined number of embryos in Ms. Smith. Mr. and Mrs. Jones may find court approval advantageous, since it eliminates the need for a subsequent adoption proceeding and provides an enforceable contract in the event that Ms. Smith fails to relinquish custody of or rights to the intended child. Assume Mr. and Mrs. Jones and Ms. Smith meet the statutory requirements and obtain court approval for a gestational agreement pursuant to Texas Family Code § 160.754. Further, assume the embryo used contains genetic material from Harvey Jones and an egg donor. In this situation, the intended baby would be the biological child of Harvey and the egg donor, carried by Suzanne Smith, and the legal child of Harvey and Wanda Jones.

To complicate the hypothetical (and illustrate the very point, that the statute falls short of ensuring its intention) suppose that during Ms. Smith's pregnancy, Harvey and Wanda decide to get divorced. The validity of the court-approved gestational agreement is not in question, but achievement of its goal is certainly tenuous at best. What if Harvey or Wanda decides that he or she no longer want legal rights to the intended child? What is the resulting relationship between the intended child and the couple, especially Wanda who has a contractual obligation but no biological connection? How will Harvey and Wanda determine custody? How would a Texas court settle such a dispute? However atypical the scenario of Harvey and Wanda Jones may be, the illustrated point is simple: Whatever the law is attempting to preserve or protect by limiting court approval of a gestational agreement to married couples is still at risk of family structure collapse.

The shortcomings of the current restriction of a judicially enforceable gestational agreement to married couples are clear: the preservation of traditional family structure is only as strong as the preservation of such a structure by the individuals inside it. Limiting the availability does not make a married, heterosexual couple family stronger, it only serves to weaken the family structure of alternative families.

Further, it is not the proper inquiry of the law to favor any type of parent-child relationship over another, whether that parent be heterosexual or homosexual, married or single (or anywhere in between). Importantly, expansion of the court-approval process for gestational agreements creates no conflict or contradiction with the state of Texas law in regards to same sex marriage because it does not ultimately concern a marital relationship, but rather a parent-child relationship.

It is worthwhile to note, that though Texas law does not recognize any family structure other than married couples that may enter into judicially enforceable gestational agreements, there is no prohibition against others entering into a general (non-enforceable) gestational agreement. In fact, according to a Fiscal Note regarding H.B. 910, the proposed amendments would impact attorneys practicing in this area, but not create any significant anticipated impact upon court operations.[38] Presumably, then, same-sex couples may already be

[38] Legislative Budget Board, Fiscal Note, 82nd Regular Legislative Session, In Re: HB910 by Thompson, *available at* www.legis.state.tx.us (last visited Dec. 14, 2011).

utilizing the use of surrogates, only under the additional risk of preclusion from court enforceability of a gestational agreement. The result being that, under the current state of Texas law pertaining to gestational agreements, a same-sex partner who is not a biological parent, is at risk of being "left out in the cold" as a parent of an intended child. For example, consider the case of *In the Interest of H.C.S., a Child*,[39] which considers the same-sex relationship of K.D. and Marie. With the intention of having a child to be raised together, K.D. used ART methods to conceive a child. Marie's brother, J.S. was the sperm donor.[40] Seemingly in order to facilitate a relationship with the paternal side of the family after K.D. and Marie broke up (including a relationship between Marie and the child), J.S. brought suit to establish paternity of the child.[41] The court found that, as merely a donor of genetic material, J.S. had no standing for the suit.[42] Should gestational agreements have been available to same-sex partners in Texas in such circumstances at the time, Marie could have standing as an intended parent. Not only would this be in Marie's interest, but could also be in the best interest of the intended child as another source of physical and financial support.[43]

Finally, there is an additional, arguably more common problem caused by the current state of the law. Consider the situation of a single woman who chooses to have a child as a single mother. If this woman wants to adopt a child who has no biological relationship to her, assuming all other statutory requirements are met, she can establish a parent-child relationship through adoption. Or, if this woman wants to utilize the ART procedure in-vitro fertilization, using a sperm donor, she can establish a parent-child relationship by carrying and birthing a biologically related child. However, if the single mother is medically unable to carry a child, under current Texas law, she does not have the option to utilize a gestational carrier through a judicially enforceable gestational agreement. Thus, for a single mother, the current state of Texas law regarding gestational agreements results in the problem of reproductive ability as legal roulette.

B. *Proposed Amendments of 2011 Legislative Session: Expansion to Individuals*

Under the proposed amendments of H.B. 910 and S.B. 1324, judicially enforceable gestational agreements would be available to married couples and individual intended parents.

In terms of a single intended mother or a single intended father, expansion of the statute to allow such a person to obtain court approval for a gestational agreement, and avoid the need for a subsequent adoption process, would be beneficial. Regarding conservatorship arrangements for children (visitation, possession, residence of a child, etc.), the Texas Family Code already prohibits consideration of marital status of a party. Regarding conservatorship, possession, and access to a child, the "court shall consider the qualifications of the parties without regard to their *marital status* or to the sex of the party or the child in determining: (1) which party to appoint as sole managing conservator; (2) whether to appoint a party as joint managing conservator; and (3) the terms and conditions of conservatorship and possession of and access to the child."[44] In the context of surrogacy, the same rationale applies. Expansion of the statute merely promotes consistency of the law.

Critics of the proposed amendments argued that expansion of the statute will result in what is tantamount to judicial approval of parenthood by same sex couples.[45] Proponents of the amendments deny that such an outcome is encouraged through statutory expansion.[46] However, what does remain unclear is the exact implication of the proposed amendments as they are practically implemented. If, under the proposed changes, judicially enforceable gestational agreements are available to only one intended parent, what process is required of any additional intended parent? There are three possibilities. First, perhaps the second intended parent would have another gestational agreement executed and offered to the court. Alternatively, perhaps a second-party adoption would be the possible proper procedure following the birth of the child. Finally, perhaps a

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[39] *In the Interest of H.C.S., a Child*, 219 S.W.3d 33 (Tex.App.-San Antonio 2006, no pet.).
[40] *Id.* at 34.
[41] *Id.*
[42] *Id.*
[43] For more information regarding the issue of surrogacy and same-sex parenthood, particularly the concept of shared maternity, see "*What If Heather Has Two Mommies In Texas?"* by Jayde Ashford.
[44] TEX. FAM. CODE § 153.003 (Vernon 2011) (emphasis added).
[45] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statements of Mary Lynn Gershtensclagger, Texas Eagle Forum and Cecilia Wood, a Texas Family Board Certified Attorney).
[46] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statement of Ellen Yarrell, Texas Family Law Foundation).

second intended parent would be a de-facto parent to the resulting child, with no legal parent-child relationship formed.

If the first option of single or unmarried couples as intended parents is the result of the law under proposed amendments, there appears to be no prohibition on same-sex couples, unmarried couples, or single intended parents to entering into a gestational agreement. However, it is unlikely that this would be the result of the amendments, given the wording of the proposed inclusion that: "If an intended parent is unmarried, another individual may not be a party to the gestational agreement as an additional intended parent of the child."[47] In fact, though the specific outcome is ambiguous, the resulting gestational agreement framework under the proposed amendments is *intended* to only allow single intended parents or married intended parents to have the availability of judicial enforceability.[48]

If the second option is the result, the outcome of the second-party adoption will be dispositive in determining if same-sex couple parenthood is the result of surrogacy. A second-party or second-parent adoption is a process by which a parent-child relationship may be established by a parent whose rights have not been terminated.[49] However, to further complicate the issue, "the jury is still out" on the ability to complete a second-party adoption for a same-sex couple in Texas. The Family Code makes this process seemingly only available to the spouse of a petitioning parent;[50] and there is no statutory support for second-parent adoption by a same-sex partner intended parent.[51] However, same-sex partner second-parent adoptions are not expressly prohibited by the Family Code.[52] There remains some indication that such adoptions are being granted in certain parts of Texas.[53] For an intended parent who is the same-sex partner of the intended parent party to the judicially enforceable gestational agreement under proposed amendments, perhaps a second-parent adoption is somewhat of a possibility. It seems more likely it is completely unavailable as a practical matter.

If the third option is the result, any additional intended parent serves only as de-facto parent, with no legal establishment of a parent-child relationship. With such an outcome, there are significant risks and drawbacks involved. Upon dissolution of relationship between intended de-facto parents, or on the death of the parent who has a legal relationship, the child could be left without legal safeguards of custodial and financial provision by the other intended parent. However, same-sex couples wishing to become parents through surrogacy in Texas may prefer the law as it would be under the proposed amendments over the current state of the law. At least, under the expansion, there is an established parent-child relationship for one intended parent, offering more security during the surrogate's pregnancy and avoiding the necessity of an adoption after the child is born.

C. *Expanded Approach: Availability to Individuals, Married Couples, and Unmarried Couples*

As the analysis of judicially enforceable gestational agreements thus far illustrates, it is a complicated and messy subject. Perhaps an expanded approach to availability is preferred. In this approach, a judicially enforceable gestational agreement would be available to an intended parent or intended parents, regardless of marital status or sexual orientation. It is important to note that such an approach is certainly wider in scope than the current state of the law, and seemingly even much more expansive than the law would be under proposed amendments to the statute. While passage of a statute reflecting such an approach may appear far-fetched, the benefits of such a law are not difficult to deduce.

First, the expanded approach prevents the "reproductive ability as legal roulette" problem presented under the current gestational agreement statute. Expansion allows a single intended mother, unable or unwilling to utilize other forms of ART, to utilize a surrogate and enjoy the safeguards of a judicially enforceable gesta-

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[47] H. B. 910, 2011 Leg., 82nd Reg. Sess. (Tex. 2011); S.B. 1324, 2011 Leg., 82nd Reg. Sess. (Tex. 2011).
[48] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statement of Ellen Yarrell, Texas Family Law Foundation).
[49] *See* TEX. FAM. CODE § 162.001 (Vernon 2011).
[50] TEX. FAM. CODE § 162.001(b)(2) (Vernon 2011).
[51] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statement of Ellen Yarrell, Texas Family Law Foundation).
[52] Ritter, Michael, "The Legal Status of Same-Sex Adoption in Texas", FAM. LAW SEC. REP. (State Bar of Texas), 12 (Sept. 15, 2010).
[53] *Hearing on H.B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statement of Ellen Yarrell, Texas Family Law Foundation).

tional agreement. Of course, this problem is also solved under the already proposed amendments to the statute as well.

Second, the expanded approach prevents the need for second-party adoptions after the child is born. Allowing a couple (married, unmarried, heterosexual, or homosexual) to enter into one judicially enforceable gestational agreement, with all intended parents as parties to the same agreement, there is an already-established parent-child relationship. This would allow a family to save on any additional expenses involved in a second-party adoption and, more importantly, definitively establish parenthood of the child prior to birth.

Finally, the expanded approach closes any risk caused by having one intended parent act as a de-facto parent, rather than one with an established, legal parent-child relationship. If family instability or separation of a couple occurs later in the child's life, this makes a custody agreement or child support available. Should one parent die, the other parent already has an established relationship to assert in right to care for the child. This would allow the child to remain with a parent without risk of state intervention or intervention by a relative of the deceased parent.

Indeed, perhaps this approach to gestational agreements is not as unlikely as it seems. Court approval of a gestational agreement with intended parents in a same-sex couple is more complicated than the preceding intended parent family structures presented, but only slightly. As previously mentioned, a gestational agreement is a contract concerned with an intended parent-child relationship. The marital relationship of contracting parties is relevant only as it pertains to the family structure of the intended parent-child relationship. Therefore, expansion to the expanded approach would not in any way impact the legal absence of homosexual marriage or actually have any overlap with that issue.

A Texas court has already affirmed the parent-child relationship of a same-sex partner to the biological father of the child pursuant to a gestational agreement executed in California in the *Berwick v. Wagner* case.[54] In *Berwick*, a parent-child relationship was formed under UCCJEA standards, determined in California where the child was born.[55] A parent-child relationship for the subject child was found present for both men, former same-sex relationship partners, based upon a biological relationship with one father, and an intended parent relationship with the other father by gestational agreement.[56]

As the *Berwick* decision illustrates, a parent-child relationship between an intended father who has no biological relationship with the intended child, and the child born of a surrogate carrier who is biologically the son of the intended father's same-sex partner is possible. Further, allowing a gestational agreement in such situations is beneficial for both the intended parents and the intended child. It allows a parent who intends to physically and financially care for an intended child to establish his or her rights to the child before the baby is born. Further, it provides a clear structure inside of which child support, conservatorship, and other complicated issues pertaining to a child might be determined should the same-sex couple decide to break up. The beautifully uncomplicated benefit is that all this can be determined without approaching the issue of a valid marriage between same-sex individuals and legally determine issues for the benefit of the child regardless. Of course, as with single parents and unmarried heterosexual couples, expansion of court approval for gestational agreements provides for this need without any subsequent adoption proceeding necessary.

A similar argument for statutory expansion using an expanded approach with gestational agreements for couples who have elected not to marry is applicable as with single intended parents. Texas law already requires consideration by the court regarding conservatorship of a child to be determined without regard to marital status.[57] Also, as with single intended parents, statutory expansion would prevent the need for any subsequent adoption proceeding, should one be possible.

Suppose a court is concerned about the stability of an unmarried couple for the intended child. Of course, as illustrated in the hypothetical of Harvey and Wanda Jones, stability is no guarantee with a married couple. Nonetheless, there is already a statutory provision, which could help assuage any of the court's insecurities in approving a gestational agreement for an unmarried heterosexual couple. It is within the court's discretion to have a home study determining that the intended parents meet standards of fitness applicable to adoptive par-

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[54] *Berwick v. Wagner*, 336 S.W.3d 805 (Tex.App.-Houston 2011, pet. filed).
[55] *Id.* at 807, 809.
[56] *Id.* at 807.
[57] *See* TEX. FAM. CODE § 153.003 (Vernon 2011).

ents.[58] Under such discretion then, the court could have a home study report on the home environment, financial condition, and relationship history of the intended parents.

The analysis will now turn to arguments for statutory expansion in consideration of the best interest of the child.

D. *Best Interest of the (Intended) Child*

In general surrogacy law, it is established that the terms of a gestational agreement are subservient to considerations of best interests of the child.[59] Under Texas law with regards to conservatorship, possession and access, "the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship of and access to the child."[60] However, application of these arguments with respect to court approval of gestational agreements in Texas is not so straightforward. As previously noted, Texas law states court approval of the gestational agreement applies only when the prospective gestational mother agrees to pregnancy by ART,[61] and the parties must enter into agreement before the 14th day preceding date of transfer to gestational mother.[62] Therefore, at the stage of court approval, there is no actual child about whom to consider the best interest. There is only the intention for a child. This distinction is important for both the court's holding in *Matter of Baby M* and Texas law with regard to conservatorship, because in both those instances a child is already in existence.

However, perhaps the best interest argument is not that difficult to apply to an intended child. After all, the drafters of the Uniform Parentage Act had no problem presenting their rationale for amending the act for availability to an unmarried couple based upon the best interest of a child.[63] Comments to the act expressly opted to provide a policy basis for the amendments, not on the rights or equality of intended parents regardless of their marital status, but upon rights and equality of marital and nonmarital children. Explicitly the amendment "reflects the Act's comprehensive concern for the best interest of nonmarital as well as marital children born as a result of a gestational agreement. Throughout UPA the goal is to treat marital and nonmarital children equally."[64]

Alternatively, with gestational agreements perhaps the issue is more properly considered as "entitlement" to a parent-child relationship rather than to a specific child. Gestational agreements are more than just a contingency should a child result, they are contracted with the clear intent of producing a child. Since parental rights are of a constitutional nature in the United States, establishment of a parent-child relationship is possible in Texas for the types of intended parents eligible under the proposed statutory expansion, arguably the statute should be expanded to comply with the constitutional rights of these groups. As argued by proponents of the proposed amendments to the Family Code, because of the arduous effort and significant cost involved in utilizing a surrogate, the resulting children are perhaps "the most wanted babies in the world."[65]

For argument's sake, consider that the best interest consideration of an intended child is applicable regarding gestational agreements. How would statutory expansion be a furtherance of a child's best interest? First, it would allow for the legal establishment of the family structure that is intended for the child without any court proceeding or adoption necessary after the child's birth. Second, should the family structure of the intended (after birth, legal) parents collapse, there is a potential for more financial and physical provision for the child's needs by facilitating a legal parentage for intended parents to the agreement. Third, should the child for any reason require Child Protective Services involvement, the legal parentage of a non-abusive or non-neglectful parent may be beneficial to the child and more efficient for the government.

In fact, expansion of the statute for gestational agreements may prevent some unnecessary government involvement contrary to the child's best interest. Consider *Raftopol v. Ramey*,[66] a Connecticut case in which there was a valid gestational agreement between an intended parent/biological father, intended parent same-

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[58] TEX. FAM. CODE § 160.756(b)(3) (Vernon 2011).
[59] *Matter of Baby M.*, 217 N.J.Super. 313, 391 (1987).
[60] TEX. FAM. CODE § 153.002.
[61] TEX. FAM. CODE § 160.754(a) (Vernon 2011).
[62] TEX. FAM. CODE § 160.754 (Vernon 2011).
[63] UNIFORM PARENTAGE ACT § 8.01 comment (2002).
[64] *Id*.
[65] *Hearing on H. B. 910 Before the Comm. on Judiciary and Civil Jurisprudence*, 82nd Reg. Sess. (2011) (statement of Ellen Yarrell, Texas Family Law Foundation).
[66] *Raftopol v. Ramey*, 12 A.3d 783 (Conn. Sup. Ct. 2011).

sex partner of the biological father, and surrogate (who had been a surrogate for the intended parents on a prior occasion and was carrying embryos from a 3rd party egg donor).[67] After the child's birth, the health department refused to issue a birth certificate naming the intended parents as legal parents.[68] The court found the health department's actions to be improper and ordered it to issue a replacement birth certificate.[69] The court also affirmed judgment that the non-biological intended father was conferred parental status on grounds as an intended parent and party to the valid gestational agreement.[70]

While comparison of this case to the best interest of Texas children is limited, especially considering this gestational agreement was validly executed and still resulted in adverse involvement after the birth of the child, there is a relevant illustration. Expansion of availability for judicially enforceable gestational agreements to unmarried individuals and couples is likely to result in an increase in gestational agreement execution by such persons. An increase in gestational agreement frequency could result in an increased culture comfort with the concept and more efficiency in their utilization by those encountering the arrangements, including hospitals, attorneys, schools, etc. The increased culture comfort with implementation of gestational agreements is likely to result in a more efficient navigation through life's institutions for the resulting children.

III. Conclusion

In conclusion, judicially enforceable gestational agreements should be available in Texas for unmarried intended parents. The current law's restriction to married couples only results in problematic outcomes and unnecessarily biased decisions under the law.

Regarding expansion of Texas Family Code § 160.754, the approach of proposed amendments under H.B. 910 is an option, allowing single intended parents to take advantage of a judicially enforceable gestational agreement. This would solve the current unavailability for a single mother who needs to utilize a surrogate. However, as previously discussed, the amendments do not expressly allow the same-sex partner of an intended parent party to the agreement any venue to establish a parent-child relationship with the intended child.

A more expanded approach to statutory expansion would allow married or unmarried, heterosexual or homosexual, individuals or couples to enter into judicially enforceable gestational agreements. This approach is likely to be more difficult to achieve, given the expressed concerns of those already opposing the middle-ground approach to proposed amendments, but would result in more equal outcomes for intended parents and better serve the best interest of both marital and nonmarital intended children. Additionally, the court would still have discretion to require a home study, ensuring intended parents meet the established requirements of adoptive parents. Finally, expansion of judicial enforceability for gestational agreements in no way creates a conflict or contradiction with the current state of Texas law regarding the legality of same sex marriage, since gestational agreements are concerned only with establishment of the parent-child relationships.

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

What if Heather has Two *Legitimate* Mommies in Texas?
by: Jayde Ashford[71]

Introduction

In the picture book *Heather has Two Mommies*[72] author Leslea Newman provides a glimpse into the life of 3-year old Heather, who was conceived by assisted reproduction through artificial insemination, also known as intrauterine insemination.[73] The black and white drawings show happy Heather in a little house with her parents, Mama Jane and Mama Kate. At play group however, Heather begins to cry when she notices that she is missing something the other children have—a father. The children are then encouraged to draw pictures of their own diverse families, including single moms, step-parents, and siblings with disabilities. Heather soon feels at ease and accepted despite her unique family makeup.[74] Newman's picture book presents a simplified understanding of the concept of lesbian parenting for a first-grade audience. In reality, however, the concept of lesbian parenting faces very complex and controversial problems.

The controversy surrounding the publication of *Heather Has Two Mommies* illustrates those problems.[75] Since publication, *Heather* has sold up to 35,000 copies.[76] However, its road to success was marked by friction as it was snatched from library bookshelves and attacked by numerous religious groups.[77] One notable challenge to the distribution of the book was by a very determined Protestant minister in Wichita Falls, Texas.[78] In July of 1999, Reverend Robert Jeffress checked out the only two copies of *Heather Has Two Mommies* from the local library and refused to return them, apparently happily paying the fines in order to keep them out of circulation. The events surrounding the Jeffress incident lead to a lawsuit filed on behalf of numerous citizens of Wichita Falls who protested the unconstitutionality of the removal of the book.[79] Five weeks after the Reverend refused to return the book, the library advisory board decided to keep the books on the shelves, but agreed to move them from the children's section to the juvenile social studies section.[80]

Although *Heather* was published in 1989, resistance to the legal recognition of nontraditional family units was nothing new. The traditional American family ideally consists of a mother, father, and children. Resistance to nontraditional family units is often based on the proposition that children are best raised in this traditional family unit.[81] However, studies have shown that children brought up in planned lesbian households fare just as well, if not better than children raised by heterosexual parents.

In the first study ever to track children raised by lesbian parents from birth to adolescence,[82] researchers Nanette Gartrell, a professor of psychiatry at the University of California at San Francisco (and a law professor at the University of California, Los Angeles), and Henry Bos, a behavioral scientist at the University of Amsterdam, focused on what they call planned lesbian families—households in which the female couple

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[72] , and Diana Souza. *Heather Has Two Mommies*. Los Angeles: Alyson Wonderland, 2000. Print; http://www.allvoices.com/people/Catherine_Dent/video/14136045-catherine-dent-reads-quot-heather-has-two-mommies-quot

[73] TEX. FAM. CODE ANN. § 160.102(2)

[74] *See id*.

[75] http://www.michaelbauman.com/heather.htm

[76] http://news.yahoo.com/banned-books-week-heather-two-mommies.html

[77] http://classguides.lib.uconn.edu/content.php?pid=68208&sid=504011

[78] http://www.ala.org/ala/alonline/currentnews/newsarchive/1998/may1998/daddysroommate.cfm

[79]http://www.ala.org/ala/mgrps/affiliates/relatedgroups/freedomtoreadfoundation/ftrfinaction/reportstocouncil/ftrfreporttocouncilac00.pdf

[80]http://www.ala.org/ala/alonline/currentnews/newsarchive/1998/july1998/reverendsire.cfm. Immediately after the return of the book, the library had at least 200 requests from patrons for the book, much to the dismay of religious leaders. Before the month long battle with religious leaders, the book had only been requested six times in two years.

[81] Assisted Reproductive Technology. Charles P. Kendregan, Jr. & Maureen McBrien. A Lawyer's Guide to Emerging Law and Science, Second Edition.

[82] http://www.time.com/time/health/article/0,8599,1994480,00.html. The data that Gartrell and Bos analyzed came from the U.S. National Longitudinal Lesbian Family Study (NLLFS), begun in 1986. The authors included 154 women in 84 families who underwent intrauterine insemination to start a family; the parents agreed to answer questions about their children's social skills, academic performance and behavior at five follow-up times over the 17-year study period. Children in the families were interviewed by researchers at age 10 and were then asked at age 17 to complete an online questionnaire, which included queries about the teens' activities, social lives, feelings of anxiety or depression, and behavior.

identified themselves as lesbian at the time of intrauterine insemination.[83] The authors found that children raised by lesbian mothers scored similarly to children raised by heterosexual parents on measures of development and social behavior. Additionally, the study showed that children in these particular lesbian homes actually scored *higher* than kids in traditional families on some psychological measures of self-esteem and confidence, did better academically, and were less likely to have behavioral problems. Further, even the children whose "two mothers" ended up separating did as well as children in lesbian families in which the two moms stayed together. In sum, the resistance to parenting by lesbian partners cannot be solely attributed to the negative assertion regarding the effect on the welfare of the child because it is clear that lesbian parents create a nurturing environment for their children that produces great outcomes.

The argument against nontraditional family units seems to be based in part on the lack of applicable law governing such units.[84] Whereas a heterosexual married or non-married couple may look to statutory provisions that give them clear guidelines of their rights regarding their relationship with their children, such as child support, inheritance, and custody, homosexual couples suffer from a lack of applicable law governing their rights as parents. Notwithstanding this, the law has addressed some aspects of the complicated child-custody disputes arising from the separation of lesbian couples with children.

Many courts have held that, in the absence of a legally defined parent-child relationship, the second plaintiff has no rights regarding the child of a former partner, despite the many years he or she may have helped raise the child and contributed to the child's mental, emotional and financial well-being. For example, in the case of *In re Thompson*, the Tennessee Court of Appeals consolidated two demands for visitation by lesbian ex-partners.[85] The court denied the petitions, holding that the Tennessee General Assembly had not conferred any parenting rights on persons in the plaintiffs' situation.[86] An appellate court in Florida held that a trial court has "no inherent authority to award visitation" to a non-biological lesbian parent.[87]

To the contrary, some states do find parental protections for a member of a same-sex couples who part ways without legal rights. For example, when confronted with homosexual parents in child custody disputes, some courts have declared de facto parent-child relationships notwithstanding that one parent is not a biological or legal parent.[88] One clear recognition of positive rights came from the Supreme Judicial Court of Massachusetts in the case of E.N.O. v. L.M.M.[89] In that case, the court recognized a nonparent's right to seek visitation when the same-sex relationship with the birth mother ended.[90] The court noted:

> The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and defendant, are deciding to have children. It is expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto.[91]

Although the courts have faced legal disputes such as the one mentioned above, they are in no way prepared to confront the legal implications surrounding a unique legal quandary: shared maternity. When considering family planning options, many lesbians have something in common with heterosexual couples: the desire to share in the procreation of their child. And now, due to advances in the science of Assisted Reproduc-

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[83] *Id.* Families interviewed consisted of women who underwent intrauterine insemination to start a planned lesbian family.

[84] Assisted Reproductive Technology. Charles P. Kendregan, Jr. Maureen McBrien. A Lawyer's Guide to Emerging Law and Science, Second Edition.

[85] White v. Thompson (In re Interest of Thompson), 11 S.W.3d 913 (Tenn. Ct. App. 1999).

[86] *Id*. at 920 n.8.

[87] *See Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. App. 1995).

[88] Holtzman v. Knott (In re Custody of H.S.H-K.), 533 N.W.2d 419 (Wis. 1995), cert. denied, Knott v. Holtzman, 516 U.S. 975 (1995)(Constitutues the first decision in the history of the United States in which a court recognized a lesbian as the "de facto parent" of a child whom her partner had conceived and delivered during the course of their relationship.) *See, e.g.,* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (finding de facto parent); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (finding psychological parent); J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996)(in loco parentis); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000)(substantial parentlike relationship). *See also* Kristine H. v. Lisa R., 117 P. 3d 690 (Cal. 2005)(estoppels of biological birth mother's right to deny maternity of co-parenting former domestic partner named as parent on birth certificate).

[89] E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999). Note that the *E.N.O. v. L.M.M.* case is subject to more than a little scrutiny, given the fact that Massachusetts was one of the first states to recognize same sex marriage.

[90] *Id.*

[91] *Id.*

tive Technology (ART),[92] lesbian couples have exactly that option. "Shared maternity"[93] is possible using in vitro fertilization (IVF) by retrieving eggs from one of the partners, fertilizing it with donor sperm, and implanting it into the other partner.[94] The result is the birth of a child with two irrefutable mothers, one biological and one gestational, each with a positive argument for legal recognition.

This relatively new reproductive option is not without its drawbacks: it is expensive and will cost a couple on average between $66,667 and $114,286 in the United States.[95] Further, there is no guarantee the treatment will work, causing multiple treatments and multiple checks to be given. Additionally, IVF requires the partners to decide which partner will supply the eggs and which will carry the resulting baby to term. Thus, while the partners are certainly considering factors such as their age, medical history, and high costs of the process, often times they neglect to consider the legal implications of shared maternity. A novel legal question arises from shared maternity; in the event that the couple separates, does the gestational or the biological partner have the better claim to legal motherhood? In other words, what if Heather has two *legitimate* mommies in Texas?[96]

Courts will face a unique problem in deciding which woman will be deemed the legal mother, or whether the women both have legitimate claims of maternal parenthood. Unlike the typical case of donors and surrogacy, the women participating in shared maternity both intend to be the legal co-parents from the outset, and to share in the emotional and financial responsibilities of childrearing. Due to this relatively recent innovation of the scientific process leading to shared maternity, there is sparse case law on the subject and no statutory construction to govern how courts should handle this legal quandary. However ideological or uncommon the problem may seem, the reality is that lesbian couples will continue to take advantage of ART to share in motherhood of their children. This paper will focus on the legal implications shared maternity will have on the traditional concept of parenthood.

Perhaps the legal complications of shared maternity may not be an immediate problem in Texas. However, as more and more lesbian couples begin to learn of the new possibility to procreate with shared maternity, it seems certain that many of such couples are going to engage in the process, and amongst those couples many will end up living in Texas. And typical to any modern-day relationships, a significant portion of those couples will separate and need resolution of child custody and support issues. The question then becomes: how will Texas deal with the complex and serious legal problems raised by this practice of ART?

This paper argues it is imperative for the law to recognize both women as legal mothers of the child in these situations. It will also highlight the reasons why Texas' existing procedures for establishing paternity should be available for determination of the legal parenthood of a genetic mother. It will explore the current statutory language applicable to shared maternity cases, and suggest ways courts can solve the quandary in a way consistent with the public policy goals of Texas.

Part I of the paper presents the arguments to resolve the potential debate between recognizing either the gestational mother or the genetic mother as the legal mother of a child.[97] Part II argues that Texas' existing procedures for establishing paternity should be available for use by the genetic mother in a shared maternity case. Part III discusses the case of *KM. v. E.G.*, a decision from the California Supreme Court, which is not only a case directly involving shared maternity, but also may serve as a useful tool to apply the Uniform Parentage Act to cases involving shared maternity. Part IV addresses why genetic mothers in cases of shared maternity should not be considered "donors" under the Texas Family Code. Part V acknowledges the likelihood that Congress will be slow to enact any changes to directly address the problem and, therefore, lesbian couples participating in shared maternity should look to other procedures to secure their parental rights. Part V also examines the case of *In re Adoption of Sebastian,*[98] a New York case that demonstrates the importance of adoption for lesbian couples who conceive through shared maternity. Part VI discusses the impediments to

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[92] The acronym ART has gained wide-spread acceptance as the short-hand term.

[93] http://www.medscape.com/viewarticle/718882_4 explaining concept of shared motherhood

[94] Assisted Reproductive Technology. Charles P. Kendregan, Jr. Maureen McBrien. A Lawyer's Guide to Emerging Law and Science, Second Edition.

[95] DANIEL L. CHEN AND GLENN COHEN, *TRADING-OFF REPRODUCTIVE TECHNOLOGY AND ADOPTION: DOES SUBSIDIZING IVF DECREASE ADOPTION RATES AND SHOULD IT MATTER?*, *MINNESOTA LAW REVIEW, VOL. 95, P. 485 (2010)*.

[96] See footnote 1, supra.

[97] Article uses the term "genetic" rather than "biological" because the Family Code definitions 101.024 parent means "mother" and legal status as "mother" is defined in 160.201 as derived through "giving birth, adjudication, or adoption"

[98] *In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009) 2009 WL 1141828 (N.Y. Sur. Ct. 2009).

progress in regulating child custody issues arising from shared maternity. In sum, although the new scientific capabilities leading to shared maternity are expensive and thus, cases of this nature will probably not arise frequently, it is of no less concern that Texas addresses the ideological argument behind a very real scenario.[99]

PART I. Gestational Mother vs. Genetic Mother Debate

"There is no dispute that many gay and lesbian couples are having children through ART, in order for one partner to have a genetic tie to their offspring."[100] What distinguishes shared maternity cases from gay couples is that lesbian couples use ART to achieve shared maternity so that *both* partners will have biological ties to their offspring. We now have a technology that takes Mama Kate's egg and puts it in Mama Jane's body. In cases such as these, *who* is the mother? In this unique scenario, Mama Jane is not merely a surrogate, growing Mama Kate's genetic contribution for Mama Jane. Nor is Mama Jane merely an egg donor with intentions to give up legal rights. The answer is, clearly, both women have a rightful claim to motherhood.

Many arguments support the priority of a genetic mother over a gestational mother, and unfortunately, vice versa.[101] Commentators have come to opposite conclusions regarding which woman should be designated the legal mother of a child. A number of scholars argue that the heredity and biological characteristics of a child are derived from the genetic mother, and thus she should take priority in obtaining legal rights.[102] On the other side of the argument, proponents argue that the greater emotional and physical involvement in carrying the baby to term gives the gestational mother the greater right to be the legal mother of the child.[103] This section presents the arguments supporting both the gestational and genetic mother's claims to motherhood in equal measure.

A. The Genetic Mother's Claim to Motherhood

The main argument supporting the genetic mother is based on her indisputable biological bond with the child. Her genetic identity will be present in the child as he or she grows, from the child's appearance, mannerism, intellect, and more. In this aspect, the genetic mother is accorded "a kind of limited, genetic immortality," which one commentator has called "the sense of living on *through* and *in* one's sons and daughters and their sons and daughters."[104] Such ongoing similarities are important as many variables are determined, to a greater or lesser degree, genetically. Such variables include "psychological dispositions and personal proclivities in such intimate matters as spousal preference and occupational choice."[105]

The significance of the genetic connection between the genetic mother and child is the major factor making her claim for motherhood so strong. However, providing the eggs from which the child will develop cannot, it itself, be the basis for a claim to parental rights. If that were so, the genetic mother in a shared maternity case would fare no better than a genetic donor in procuring rights in any ARTs situation. What distinguishes the genetic mother in shared maternity cases from an egg donor is the fact that she is not merely a donor; rather she possesses intent to play a continuous role as parent to the child.

When addressing conflicting legal claims to parenthood between donors and gestational hosts, commentators have also used a property-oriented argument. The argument is based upon the genetic mother's right to

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[99] *See* Afterword

[100] Judith F. Daar, *Accessing Reproductive Technologies. Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 33 (2008).

[101] John Lawrence Hill, *What Does It Mean to Become "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U.L. REV. 353 (1991) (arguing that the claims of those who first intend to have a child should prevail over those who assert parental rights on the basis of a biological or gestational relation). The result of this "solution" will most likely be a swearing match between "she said" and "she said."

[102] *Id. citing* Brahams, The Hasty British Ban on Surrogacy, 17 Hastings Center Rep. 16, 18-19 (1987); Samuels, Warnock Committee: Human Fertilization and Embryology, 51 Medico-Legal J. 174, 176 (1983).

[103] *Id. citing* Annas, Redefining Parenthood and Protecting the Embryos: Why We Need New Laws, 14 Hasting Center Rep. 50, 50-51 (1984) (presumption favoring surrogate mother provides certainty of identification at time of birth); Note, Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers, 99 Harv. L. Rev. 1936, 1950-51 (1986) (social and emotional bonds formed in childbirth process favor surrogate mother's rights).

[104] *Id. quoting* R. Lifton, The Life of the Self 32 (1983) (emphasis in original).

[105] *Id. citing* E. Wilson, On Human Nature 15-51 (1978) (discussing claim that personal and social practices are predicated upon genetic foundation).

the products of her body.[106] This argument would especially hold true in cases of shared maternity where the genetic mother never agrees to sign away her parental rights. Her willingness to procreate through a procedure involving a great deal of physical involvement and risk demonstrates her intent to claim equal parenting rights.

B. The Gestational Mother's Claims for Priority

Human nature leads us to conceptualize a woman who carries a baby to term as the natural mother of that child. To that end, perhaps the gestational mother in a shared maternity case has more arguments than the genetic mother supporting her claim for legal priority. The claims that favor the gestational mother for parental status are based on:

> prenatal and postnatal bonding between the birth mother and child; the best interests of the child; the harmful psychological effects to the birth mother resulting from compelled relinquishment of the child; the physical involvement of the birth mother in bringing the child into the world; and the extrinsic social and moral considerations which portend harmful consequences predicted to result from permitting the legal separation of birth mother and child.[107]

The most popular argument favoring the gestational mother lies in the claim that throughout the prenatal and postnatal periods, a deep bond develops between the mother and child.[108] Many women report feelings of loyalty toward the fetus early in the pregnancy, and even more so at the point of quickening at which time she begins to feel the movements of the fetus. Thus, proponents emphasize that the close attachment formed between a child and its birth mother does not dissolve simply because the woman lacks a biological link to the child.

Although there are convincing arguments on both sides of the debate between the genetic mother and the gestational mother, these arguments are typically applied to the independent issues of surrogacy or donor rights. However, in the case of shared maternity, both women's claims may be adjudicated to be equal because, unlike a surrogate mother or egg donor, each woman's attachment to the child cannot be precluded by knowledge that she will not be legally recognized as the mother of the child.[109]

PART II. Texas' Existing Procedures for Establishing Paternity should be Available for Determination of the Legal Parenthood of a Genetic Mother

Shared maternity triggers important questions about the way "parentage" is defined and legally constituted by the Family Code. It also brings up important concerns over how lesbian family units can protect their parent/child relationship despite the current lack of statutory construction. In Texas the determination of parentage is governed by Texas Family Code's enactment of the Uniform Parentage Act (UPA).[110] The UPA defines the parent-child relationship, which extends equally to every child and to every parent, regardless of whether the parents are married to each other or not.[111] No Texas statute deals directly with the unique issue resulting from shared maternity. Thus, the issue is clearly drawn whether the law should recognize both women in a committed lesbian relationship—one of whom is the biological mother, and the other of whom is the gestational mother—as the child's legal parents without the necessity of an adoption.[112]

Texas' statutory law directed at ART is largely limited to the Texas Legislature passage of the UPA governing gestational agreements. However, there also are provisions governing a husband's paternity of a

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[106] *Id.* at 392.
[107] *Id.* at 394.
[108] *Id.*
[109] *Id.* at 400.
[110] *See* Act of May 25, 2001, 77th Leg., R.S., ch. 821, § 1.01, 2001 Tex. Gen. Laws 1610 (enacting legislation substantially similar to 2000 version of UPA); HOUSE RESEARCH ORGANIZATION, BILL ANALYSIS, TEX. H.B. 920, 77th Leg., R.S. (May 8, 2001) (stating that the intent of this legislation was to enact the 2000 version of the UPA).
[111] TEX. FAM. CODE ANN. § 160.202
[112] Chapter 162 does not deal with the issue other than providing that an "adult may adopt child" without further definition except in the case that the parents are dead or terminated rights.

child of ART, as well as an unmarried man's paternity of such child.[113] These existing laws provide a framework for resolving the instant issue, despite a lack of explicit action taken by the uniform act. In fact, a leading family law commentator has argued that, "in the absence of specific legislation, courts should resolve 'new' issues arising from technological advances by reference to settled principles of family law."[114]

Specifically, the provisions of the Texas Family Code relevant to the determination of maternity in shared maternity cases are:

1. **Section 101.024**. Parent. section (a) "Parent" means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.[115]
2. **Section 160.201**. Establishment of Parent-Child Relationship. The mother-child relationship is established between a woman and child by: (1) the woman giving birth to the child; (2) an adjudication of the woman's maternity; or (3) the adoption of the child by the woman.[116]
3. **Section 160.7031 (a)** states that if an "unmarried man, with the intent to be the father of a resulting child, provides sperm to a licensed physician and consents to the use of that sperm for assisted reproduction by an unmarried woman, he is the father of a resulting child."[117]
4. **Section 160.106** states, "provisions of this chapter relating to the determination of paternity apply to a determination of maternity."[118]
5. **Section 160.204 (a)(5)** states that the law presumes a man is the father of a child if "during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own."[119]
6. **Section 160.751** states that "'gestational mother' means a woman who gives birth to a child conceived under a gestational agreement."[120]

Married heterosexual couples using ART do not have to jump through hoops to establish paternity. When such couples conceive using ART, failure by the husband to sign a consent form does not preclude a finding that he is the father for a child born to his wife if the wife and husband openly treated the child as their own.[121] Thus, a married man may simply substitute his conduct for the written consent require by the statute.[122] Insofar as unmarried men are concerned, as long as such man has the intent to be the father of a resulting child of assisted reproduction, provides sperm to a licensed physician, and consents to the use of that sperm for assisted reproduction by an unmarried woman, he is the father of a resulting child.[123] This formal agreement determines the rights of the unmarried man and unmarried woman toward the child with certainty.

Texas courts follow the decision reached in 2005 in *In re Sullivan*.[124] In that case a man who provided sperm was labeled a "donor;" nonetheless, he was allowed to pursue a genetic claim of paternity. The parties were unmarried and signed a co-parenting agreement prior to the procedure.[125] However, before the child was born, a disagreement arose between the parties and the donor filed a petition to adjudicate parentage.[126] The intended mother claimed that under the Texas Family Code, he lacked standing to bring a pro-

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[113] TEX. FAM. CODE ANN § 160.703 and §160.7031

[114] See *In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009) 2009 WL 1141828 (N.Y. Sur. Ct. 2009) *citing* Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv L Rev 835 [2000].

[115] TEX. FAM. CODE ANN. § 101.024(a)

[116] TEX. FAM. CODE ANN. § 160.201(a)

[117] TEX. FAM. CODE ANN. § 160.7031(a)

[118] TEX. FAM. CODE ANN. § 160.106

[119] TEX. FAM. CODE ANN. § 160.204(a)(5)

[120] TEX. FAM. CODE ANN. § 160.751

[121] TEX. FAM. CODE ANN. § 160.7049(b)

[122] See K.B. v. N.B., 811 S.W.2d 634 (Tex.App.—San Antonio 1991, writ denied)(husband's ratification of artificial insemination by conduct substitutes for written consent).

[123] *Id.*

[124] *In re Sullivan*, 157 S.AW.3d 911 (Tex. App.—Houston [14th Dist.] 2005, mand. Motion denied.

[125] *Id.* at 912-13.

[126] *Id.* at 913.

ceeding to adjudicate parentage because he was a sperm donor with no parental rights.[127] The court found for the donor, basing its decision on the "language of the statute, the object sought to be obtained, the circumstances under which the statue was enacted, the legislative history, former statutory provisions, including laws on the same or similar subjects, and the consequences of the different constructions."[128] Thus, even without settling the issue of whether or not the man was a donor, the court allowed him to standing to adjudicate his rights as the father of the child. On the other hand, there is no specific provision outlining the rights of a genetic mother similarly situated.

An even simpler procedure available to unmarried heterosexual parents is an Acknowledgment of Paternity.[129] Under this statutory provision, unmarried parents who agree as to the man's parentage may sign and execute an acknowledgement of paternity with the intent to establish the man's paternity. A man is able to legally recognize his paternity through this simple voluntary acknowledgement procedure even before the birth of the child.[130] After executing the acknowledgment, the signatories must understand that the acknowledgement is the equivalent of a judicial adjudication of the paternity of the child.[131]

Thus, the Texas Family Code confers various ways for a man alleging himself to be the biological father of the child in question to seek adjudication that he is the father of the child. On the other hand, there is no provision outlining the rights of a genetic mother similarly situated, since under the law there is only one mother: the person who gives birth to the child. The problem becomes clear. Unlike genetic fathers, genetic mothers are not clearly entitled to standing in shared maternity cases since they offer not a claim of fatherhood, but a claim of *additional* motherhood. There is no specific provision outlining the rights of a genetic mother similarly situated because, until recently, it has never been possible for a genetic mother to be in a situation so similar to that of a man claiming paternity. The statutory provisions providing genetic fathers an avenue to declare their parental rights should be available to genetic others in shared maternity cases. After all, what logical difference can be drawn between an unmarried man who is genetically related to a child and a lesbian genetic mother? Both have the intent to be legal parents and desire to establish legally recognized parental rights with regard to a child. Denial of the statutory acknowledgement procedure to the female genetic parent while making it available to men raises a serious question of treating similarly situated women in a discriminatory fashion.

PART III. Mother-Child Relation under Texas Law

Although Texas has not ruled on the issue directly, its adoption of the Uniform Parentage Act provides leeway for extending the availability of paternity acknowledgment proceedings to genetic mothers. Tex. Fam. Code § 160.201 designates a mother-child relation as established by a women giving birth to the child.[132] This seems to leave a genetic mother in a lesbian relationship with no legal rights to parenthood. However, the code contains a provision that allows for establishment of a mother-child relationship through an adjudication of the woman's maternity.[133] This provision also can be used to answer acknowledgment procedures as well as maternity suits in which DNA is a deciding factor. Further, § 160.106 states "the provisions of this chapter relating to the determination of paternity apply to a determination of maternity."[134] Significantly, the Commissioners' Comment to section 106 recognizes that cases involving disputed maternity are extraordinarily rare, explaining why the provision is written in terms applicable to the determination of paternity. The comment states:

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[127] *Id.* at 914.
[128] *Id.* at 919.
[129] TEX. FAM. CODE ANN. § 160.301-.315.
[130] TEX. FAM. CODE ANN. §160.304(b)
[131] TEX. FAM. CODE ANN. §160.302(5) requires that the acknowledgement must "state that the signatories understand that the acknowledgement is the equivalent of a judicial adjudication of the paternity of the child and that a challenge to the acknowledgement is permitted only under limited circumstances and barred after four years."
[132] TEX. FAM. CODE ANN. § 160.201(a)(1) Establishment of Parent-Child Relationship
[133] TEX. FAM. CODE ANN. § 160.201(a)(2) The mother-child relationship may be established between a woman and a child by an adjudication of the woman's maternity
[134] TEX. FAM. CODE ANN. § 160.106 Determination of Maternity

> any given case a judge facing a claim for the determination of the mother-child relationship should have little difficulty deciding which portions of the Act should be applied.[135]

Although no such claim has reached Texas, eighteen states have allowed for the establishment of a legally recognized parental relationship by a genetic mother.[136] Even some non-UPA states have recognized the principal. In the leading case of *K.M. v. E.G.*, the California Supreme Court drew upon this interpretation to recognize the parentage rights of both gestational and genetic mothers.[137] In that case, a lesbian couple derived shared maternity when K.M. provided the ova that were fertilized in vitro and implanted in her partner, E.G., resulting in the birth of twins. When the twins were born, the couple lived together and was registered domestic partners. After breaking up five years later, the egg provider, K.M., petitioned the court to establish a parental relationship with the twins.

The court found that both K.M. and E.G. were mothers of the children. The court declared that although K.M. was a donor, she was also a parent because genetic consanguinity is a legitimate basis for a finding of maternity, just as it is for paternity under the Uniform Parentage Act. The court noted that under Cal. Fam. Code § 7650, provisions applicable to determining a father-child relationship could be used to determine a mother-child relationship insofar as practicable.[138] Texas law seems to compel following California's handling of the issue by construing the Texas Family Code provisions regarding genetic paternity and paternity acknowledgment proceedings to genetic mothers.

PART IV. Parental Status of Donor

Another obstacle to genetic mothers in shared maternity cases is their potential status as a "donor." The problem lies in the fact that according to one possible statutory construction the woman providing the egg in shared maternity case could be accorded the same status as a sperm or egg donor who willingly gave up her rights to claim parentage. Section 160.702 of the Texas Family Code states: "A donor is not a parent of a child conceived by means of assisted reproduction. The Commissioners' Comment to this section further clarifies that if a woman supplies an egg for assisted reproduction that results in another woman bearing the child, the egg donor is not the child's mother.[139] It cites to the general rule in section 201(a) (1) that the woman who gives birth to a child is that child's mother.[140] The trouble, however, lies in the fact that men are treated differently in the provision.[141] It is clear that a man who provides sperm for use by his wife in assisted reproduction is not a "donor." Equating the "egg provider" in a shared maternity case as not being a "donor" will bring equal treatment to similarly situated individuals without regard to their sex.

Thus, the question once again arises, why should a lesbian couple be treated differently from similarly situated heterosexual parties? In shared maternity cases, one of the partners gestates and gives birth to a child formed from the egg provided by another woman with the intent to raise the child together. Thus, the statute limiting parental status of a donor should not apply to shared maternity cases because the lesbian couple does not intend to have the relationship of a "donor" and "surrogate," but rather intends to share in the procreation of a child by the only means available to them.

The court in *K.M v. E.G.* agreed with this proposition and found that, California Family Code § 7613(b), which stated that a man was not a father if he provided semen to a physician to inseminate a woman who was not his wife, did not apply. Further, the court found that the provision did not apply because the case at hand was not a true egg donation situation because the ova were supplied to produce children who would be raised in a joint home. The court looked to the factual record and took into consideration that the couple lived together and both intended to be parents to the child. If confronted with a case involving shared maternity, Texas courts should follow the California decision and reject construction that under the circumstances a genetic mother in a shared maternity case is a "donor." Further, courts should look to the Commissioners' Comment in section 160.702 to support the conclusion that genetic mothers in cases of shared maternity should not be

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[135] *Id.*
[136] Ryiah Lilith, The G.I.F.T. of Two Biological and Legal Mothers, 9 Am U J Gender Soc Pol'y & L 207, 234 n 189 [2001].
[137] K.M. v E. G., 37 Cal 4th 130, 33 Cal Rptr 3d 61, 117 P3d 673 [2005].
[138] *Id.* At 138.
[139] TEX. FAM. CODE ANN. § 160.702 (Commissioners' Comment to UPA Section 702)
[140] *Id.*
[71] *See Id.*

considered "donors." The comment states: "This act does not deal with many of the complex and serious legal problems raised by the practice of assisted reproduction."[142] Thus, shared maternity seems to be precisely the type of "complex and serious" legal problem anticipated by the legislature. It is clear that in shared maternity cases: (1) two women have acceptable proof of maternity; and (2) their intention in using ART is to both be a mother of the resulting child. In these cases, the lesbian partners' claims to parentage arise simultaneously.

The genetic mother's claim to be a mother should be equal to the gestational mother's claim; and Texas should not limit the legal recognition of maternity to the woman that gives birth to the child. Rather, Texas courts should apply the paternity provisions and declare the gestational woman a mother because she gave birth to the child, and declare the genetic woman a mother because she provided the ova from which the child was produced. There is no compelling reason to discriminate between male and female genetic parents who wish to use Texas' statutory paternity laws to establish parental rights.

PART V. Desirability of Adoption as a Protective Measure

Application of existing statutory paternity laws to genetic lesbian mothers would certainly make it easier for courts to deal with the legal complexities of shared maternity. However, in a shared maternity case there is another, perhaps more predictable and more stable procedure to guarantee legal parentage rights to the genetic mother. The only remedy currently available that will accord lesbian parents a full and unassailable protection of their parenting rights is a second-parent adoption.

The protections for the child in these cases in the absence of a legally protected parental relationship are presently uncertain.[143] In such scenario, a child is unable to claim inheritance rights or financial support for the second parent; is not entitled to any benefits in the instance the second parent dies or becomes incapacitated or incarcerated; and is ineligible for any type of insurance benefits from the second parent's employer.[144] Further, even seemingly secured protections can fail and put the child's best interest at harm in same-sex couples' cases. For example, even if the legal parent has named the second parent as the child's guardian in his or her will, courts are not required to approve the nomination and relatives of the deceased parent can challenge such nomination.[145]

A vivid illustration of the critical difference the protections of a second-parent adoption provides is seen in the case of *Matter of Petition of L.S.*[146] There, each of the women in lesbian relationship was granted a second-parent adoption of the other's biological child. Two years later, one of the women was killed in an automobile accident. However, due to the second-parent adoption, the surviving partner's rights were protected with her deceased partner's child. Further, both children were eligible for the Social Security survivor benefits, and both had standing to file an action for wrongful-death. Thus, the second-parent adoption protects more than just parenting rights affecting the woman involved.[147]

Another major problem arises from parties not securing parental rights through adoption. Assuming that a court would declare Texas' statutory paternity proceedings available to genetic mothers in maternity cases, such an order would not necessarily afford the mother the full protections of a legally recognized parental relationship outside of Texas' borders. It is imperative that the genetic mother in a shared maternity case obtain a determination of parentage that will be recognized in every jurisdiction. Adoption provides this protection in states that may not recognize the genetic mother's rights as derived through application of a statutory paternity provision in one particular state.

The importance of a second-parent adoption due to the inevitability of conflicting state laws on the issue was demonstrated in a case arising in New York. *In re Adoption of Sebastian* featured two women legally married under Netherlands law had a child gestated by one of the partners using the egg provided by the other

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[142] Commissioners'' Comment to UPA Section 702 in section 5, subdivision (b)
[143] http://www.nclrights.org/site/DocServer/adptn0204.pdf?docID=1221
[144] *Id.*
[145] *See, e.g., In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 (Fla. Cir. Ct. May 30, 1989) (following the death of the biological mother, the non-biological mother petitioned to invalidate the child's adoption by the biological mother's parents, who had adopted the child without her knowledge or consent); *In re Hatzopoulous*, Fam. Law Rep. (BNA) 2075 (Colo. Juv.Ct. 1977) (following the biological mother's death, the non-biological mother was thrust into a long court battle to regain custody of her child after custody was initially placed with the biological mother's aunt and uncle).
[146] *Matter of Petition of L.S.*, 119 Daily Wash. L. Rep. 2249 (D.C. Super Ct., Aug. 30, 1991).
[147] *See* Deb Price, *Girl Would Be Orphan If They'd Lost the Battle*, Minneapolis Star-Tribune, Jan. 5, 1994 at 4E.

woman with donor sperm.[148] The New York court recognized the status of the women as dual parents, but was concerned about recognition of such status in other states. Due to the legitimate concern of conflicting jurisdictional laws, the court allowed a decree of adoption. The court also recognized that "although there is no Supreme Court decision on point, federal courts that have considered the issue have held that a judicial order of adoption in one state must be afforded full faith and credit in every other state, and that there can be no 'public policy' exception to that mandatory recognition."[149]

Although adoption is an excellent option for the genetic mother of child conceived by ART to secure parental rights, it also comes with drawbacks. First, like most couples, many lesbian women in a committed relationship fail to consider the consequences of a separation between the two. Typically, the relationship between the two women is strong and adoption is not something they even consider because, frankly, they don't consider the possibility of their relationship ever ending.[150] Another possibility is that the couple is simply unaware of the legal implications of their decision to procreate using ART. After all, a heterosexual couple planning a family is not normally expected to pause their happy moments to consider adopting their own children, "just in case" the event of a separation. Likewise, mothers in shared maternity cases see their children in the same way heterosexual couples see their children: simply as "theirs," emotionally and legally.

Second, adoption is a complicated procedure filled with technicalities that would not be necessary if statutory provisions were available to regulate shared maternity. Texas law is currently unclear as to whether it recognizes or prohibits same-sex couple adoptions because it contains neither express permission nor prohibition.[151] Chapter 162 of the Texas Family Code seems create an option for same-sex couples to proceed with a second-parent adoption if the child is at least two years old and the non-parent has a managing conservatorship or actual care, control, and possession of the child for at least six months.[152]

However, Texas court decisions have been hesitant to clarify the status of the law with regard to the ability of same-sex couples to adopt. Further, the courts have been inconsistent in their rulings. While some courts generously grant such adoption petitions, others have imposed obstacles to same sex-coulees seeking the benefits of a full adoption.[153] For example, a Dallas judge purportedly threw a same-sex couple out of her courtroom for attempting to change an adopted child's name to reflect their second-parent adoption.[154]

A genetic mother's legal rights should not be determined by the luck in being assigned to one judge over another. The legislature has the duty to enact statutory provisions that outline citizens'' rights so that they may avoid the time, money, and effort spent fighting for their rights in a biased courtroom. Clearly, second-parent adoption cannot be completely relied on in Texas as a fully protective measure without a clarity being supplied by additional legislation.

Lastly, another big hurdle to achieving full parental rights through second-parent adoption comes into play; to wit, the general inconsistent nature of state laws regarding same-sex couples. Due to various stances on the subject by state legislatures, adoption may not be an ironclad solution in shared maternity cases.[155] Just as there are problems with other states recognizing the suggested statutory solution above, adoption by same-sex couples may run into the same problems of full recognition outside of Texas. Although some states, in-

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[148] *In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009) 2009 WL 1141828 (N.Y. Sur. Ct. 2009).

[149] *Id*. at 691, *citing* Adar v Smith, 591 F Supp 2d 857, 861-862 [ED La 2008]); Rhonda Wasserman, Are You Still My Mother?: Interstate Recognition of Adoptions by Gays and Lesbians, 58 Am U L Rev 1 [2008]; Barbara J. Cox, Adoptions by Lesbian and Gay Parents Must be Recognized by Sister States under the Full Faith and Credit Clause Despite Anti-Marriage Statutes That Discriminate against Same-Sex Couples, 31 Cap U L Rev 751 [2003]; Hollinger et al., 1 Adoption Law and [**585] Practice § 3.06 [6] [2008]; Scoles et al., Conflict of Laws § 16.6, at 703 [4th ed 2004]).

[150] Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 489, 493, 510 (1990)(discussing the complications lesbian couples face when the non-biological partner plans to adopt the biological partner's child).

[151] Michael J. Ritter, Note, Adoption by Same-Sex Couples: Public Policy Issues in Texas Law & Practice, 15 Tex. J. C.L. & C.R. 235, 235 (2010) (explaining that Texas adoption statutes are ambiguous as to whether same-sex couples may adopt children).

[152] TEX. FAM. CODE ANN. § 162.001(b)(1)-(4) (listing the conditions under which children may be adopted).

[153] Michael J. Ritter, Note, Adoption by Same-Sex Couples: Public Policy Issues in Texas Law & Practice, 15 Tex. J. C.L. & C.R. 235, 235 (2010) (explaining that Texas adoption statutes are ambiguous as to whether same-sex couples may adopt children) *citing* Goodson v. Castellanos, 214 S.W.3d 741 (Tex.App.—Austin 2007, pet. Denied; Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex.App.—Houston. 2006).

[154] *Id. citing* Taylor Gandossy, *Gay Adoption A New Take on the American Family*, CNN.com, June 27, 2007.

[155] See Courtney Joslin & Shannon Minter, Lesbian, Gay, Bisexual and Transgender Family Law ch. 5, 1 (2008)(overview of same-sex couple adoptions).

cluding Texas, allow second parent adoption by same-sex couples, not all states are on board with this concept.[156] For example, both Utah and Mississippi have shunned same-sex parent adoptions.[157] Other states have prohibited the recognition of adoption decrees issued to same-sex couples in other states.[158] And some states have yet to take a stance one way or the other.[159] These inconsistencies make normal procedural events such as changing a birth certificate of a child difficult for same-sex couples. It follows that genetic mothers cannot fully rely on solely second parent adoption *inside* or *outside* of Texas. Given the complications involving second-parent adoption, the necessity of legislative action regarding shared maternity is clear. Genetic mothers in shared maternity cases should not be burdened with the expensive and time consuming procedure of adopting a child already so clearly theirs. If the quick and easy paternity provisions were available to these women, they would avoid the expense of a drawn out procedure to gain rights that should already be available.

PART VI. Impediments to Progress

Not only is shared maternity a relatively new concept, it comes with undeniable medical, social, moral, religious, and legal disagreements.[160] The issues involved are politically controversial, which makes it difficult for the legislature to develop a consensus as how to regulate complex scenarios under ART. Particularly, declaring a child to have two legitimate mothers in cases of shared maternity obstructs many traditional notions of the concept of family. However, as more and more gays and lesbians seek options to reproduce, their access and use of ART is likely to become more and more scrutinized. Given that reality, the focus of the law must be on the best interest of the resulting children.

Some question whether gays should have children and assert that children raised by gay parents may suffer detriment.[161] The resistance to gay parenting is demonstrated by the fact that although many fertility clinics offer ART services to gays and lesbians, many do not. Despite this resistance, "the demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household…"[162]

As of now, courts confronted with shared maternity custody suits have decided the question of legal maternity on a case-by-case basis. The fact that these cases continue to arise demonstrates the new reality that Texas law must eventually confront the problem and should reject the unpredictable case-by-case basis and adopt legislatively determined statutory provision. Texas should look to amending its statutory provisions to reflect the fact that ART now aids in the formation of nontraditional family units. After all, other courts have accepted their role in keeping up with legal implications derived from advances in science. In *V.C. v. M.J.B.*, the Supreme Court of New Jersey commented:

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[156] *Compare* Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (affirming joint adoption of child by the birth mother and her female partner who were in a nonmarital same-sex union), *and In re* K.M. 653 N.E.2d 888, 899 (Ill. App. Ct. 1995)(finding that the statute does not bar second parent adoption because nothing in the statute specifically excludes it), *and* Sharon S. v. Super. Ct. 73 P.3d 554, 574 (Cal. 2003) (concluding that same sex couples not registered as domestic partners are not barred from second parent adoption), *with In re* Angel Lace M., 516 N.W.2d 678, 686 (Wis. 1994) (ruling that second parent adoption is not allowed even if the trial court found it to be in the child's best interests), *and In re* Adoption of Luke, 640 N.W.2d 374, 382-83 (Neb. 2002) (interpreting the Nebraska adoption statute as not authorizing adoption by unmarried persons involved in a same-sex relationship because the natural mother would not surrender her maternal rights); *See* VT. STAT. ANN. tit. 15A, § I- 102(b) (2009) (allowing adoption of a child with the mother's permission without the need for the natural parent to terminate her parental rights).

[157] UTAH CODE ANN., § 78B-6-115 (2008) (prohibiting non-martial cohabitation implicitly prohibits second-parent adoption); MISS. CODE ANN., § 93-17-3(5)(2007) (prohibiting adoption by a same-sex couple).

[158] *See* OKLA. STAT. tit. 10 § 7502-1.4(A) (2008) (prohibiting recognition of same-sex couples' adoption decrees issued in other states, notwithstanding the Full Faith and Credit Clause of the United States Constitution).

[159] *See* Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 Am. U. L. REV. 1, 13 (2008) note 126, at 10-12 (presenting the stances taken by various states regarding recognition of decrees permitting adoption by same-sex couples).

[160] Assisted Reproductive Technology. Charles P. Kendregan, Jr. Maureen McBrien. A Lawyer's Guide to Emerging Law and Science, Second Edition.

[161] *See* Goodridge v. Dep't fo Pub. Health, 798 N.E.2d 941 (Mass. 2003) (Cordy, J. dissenting).

[162] Troxel v. Granville, 530 U.S. 57, 64. 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

> [We should not be misled into thinking that any particular model of family life is the only one that embodies "family values."… Those attributes may be found in biological families, step-families created by modern reproductive technology, and in families made up of unmarried persons…Moreover, our judicial system has long acknowledged that "courts are capable of dealing with the realities, not simply the legalities, of relationships, and have adjusted the rights and duties of parties in relation to that realist…[T]he nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created.[163]

The issues surrounding shared maternity presently find solution in Texas statutory law. But to avoid the drawn-out process resulting from case law, there is a need for the Texas legislature to develop a statutory framework of rights and liabilities involved in ART, especially regarding shared maternity. After all "the legislature is the most appropriate forum to address issues raised by assistive reproductive technology in a comprehensive fashion."[164] In this regard, the fact that in 2001 the Texas Legislature enacted the Uniform Parentage Code and in 2003 strongly supports such action for consistency's sake.[165]

Conclusion

Mainstream resistance to the legal recognition of nontraditional family units is nothing new; however, children must be protected despite their being born into unconventional family settings. The resistance to parenting by lesbian partners obviously is not properly attributed to considerations of the welfare of the child, for social science studies have shown that lesbian parents create a nurturing environment in which children thrive. However, these children cannot thrive without adequate laws to provide protection for their interests.

It is imperative that the law recognize both the genetic and gestational mother in shared maternity cases as having equal claims to legal parenthood. Although both women in shared maternity cases have arguments that favor their priority of parenthood over the other, the debate between the genetic mother and gestational mother should not have much weight in the case of shared maternity because the women both intended to raise the child. In shared maternity procreation, a genetic mother is more than a "donor" and a gestational mother is more than a "surrogate."

Maternity proceedings and acknowledgment of maternity under the Texas Family Code should be available to lesbian genetic co-mothers in shared maternity cases. There is no compelling reason to discriminate between male and female genetic parents who wish to use Texas' statutory paternity laws to establish parental rights. The state has a legitimate interest in promoting predictability in the area of assisted reproductive technology and parentage determinations. Thus, the Texas Legislature should take a firm stand on its second-parent adoption policy as well as the applicability of the paternity proceedings to genetic mothers in shared maternity cases. Doing so would be consistent with Texas' purpose of serving the child's best interest by providing two responsible parents, instead of one.[166]

However, until action is taken on the subject, genetic co-mothers stuck in a bind may be best advised to resort to adoption to secure their rights as co-parents. Although neither of these solutions provides ironclad protection for a shared maternity couple, they are a start. Shared maternity litigation may arise immediately in Texas, or it may arise in the near future as the use of IVF technology to create shared maternity spreads to Texas.

AFTERWORD

This paper concentrates on the best possible fact situation in which it can be demonstrated in court or in the mind of a fair-minded person that in shared maternity situations Heather has two mommies. Each woman has an irrefutable fact circumstance to claim motherhood, either gestational or genetic. Thus, from the perspective of two mothers, this fact situation presents the very best case to demonstrate the issue at hand. Note,

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[163] V.C. v. M.J.B., 748 A.2d 539, 556-57 (N.J. 2000)(Long, J., concurring).

[164] Hodas v. Morin, 814 N.E.2d 320, 327 n.16 (Mass. 2004)(the court faced an absence of statute dealing with parentage of child carried by gestational surrogate).

[165] Acts 2001, 77th Leg., ch. 84, eff. June 14, 2001; Acts 2003, 28th Leg., ch. 457. Eff. Sept. 1, 2003.

[166] TEX. FAM. CODE ANN. § 153.002, 153.134 mandates that custody determinations are to be based on the best interests of the child.

however, the vast majority of case law in the country, of which there are abundant examples, involve more complex relationships between the alleged two mothers, where one may be either the genetic or gestational mother, but the other does not have a similar claim. Notwithstanding this, the existing case law attempts to resolve the claims of two women driven to receive recognition for the parental rights of both women.

On the other hand, examining the issue from the perspective of the child, Heather, yields itself to the conclusion that she has two mothers regardless of the contributions of the women to her conception. She has a parent-child relationship with both women, irrespective of a genetic or gestational relationship with either or both. The author contends that in a case of shared maternity, Heather has two mommies. Equally importantly, from the child's perspective under all factual scenarios she does have two mommies in fact as well.

A recent and welcome decision confirmed this sentiment. On December 23 2011, Florida's 5th District Court of Appeals issued a positive opinion for shared biological mothers in shared maternity cases.[167] The majority overturned the trial court and issued a ruling providing an egg provider the right to petition the trial court for custody, visitation and child support of the child carried by her ex-girlfriend.[168] In a case of first impression, Appellant, the biological mother, and Appellee, the birth mother, were involved in a committed relationship from 1995 until 2006.[169] The two women underwent shared maternity and raised a child that treated both women as parents and did not distinguish between one being the biological or the birth parent.[170] When the relationship deteriorated, the birth mother moved with the child to an undisclosed location, causing the biological mother to serve the birth mother with a custody lawsuit.[171] The trial judge issued summary judgment in favor of the birth mother, stating that he felt constrained by the state of the law:

> First, let me say, I find that [Appellee's] actions to be – this is my phraseology – morally reprehensible. I do not agree with her actions relevant to the best interest of the child. However that is not the standard. There is no distinction in law or recognition of rights of the biological mother verses a birth mother. If a contract is not binding in this situation, then intent is not relevant under these circumstances.
>
> Same-sex partners do not meet the definition of commissioning couple. There really is no protection for [Appellant] under Florida law because she could not have adopted this child to prevent this current set of circumstances. I do not agree with the current state of the law, but I must uphold it. I believe the law is not caught up with science nor the state of same-sex marriages. I do think that is on the horizon.[172]

The appellate court proved him right, finding that a choice between two mothers is not necessary. Based on the best interests of the child, the court concluded that both the birth mother and the biological mother have parental rights to the child.[173] The court echoed the sentiment perfectly in the assertion that "parental rights, which include the love and affection an individual has for his or her child, transcend the relationship between two consenting adults."[174] Thus, just as a separation does not dissolve the love and affection either woman has for the child, it does not place parental rights in one to the exclusion of the other.

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[167] T.M.H. v. D.M.T., 2011 Fla. App. LEXIS 20502, 37 Fla. L. Weekly D 4 (Fla. Dist. Ct. App. 5th Dist. Dec. 23, 2011).
[168] *Id.* at 47.
[169] *Id.* at 2.
[170] *Id.* at 3.
[171] *Id.*
[172] *Id.* at 4.
[173] *Id.* at 26-7.
[174] *Id.* at 27.

Focus on Your Fertility: Now and for the Future

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To many couples, one of the most important events in their lives is the birth of their child. While the ability to conceive a pregnancy is often safely taken for granted, one in seven couples will struggle with infertility. For those couples, this basic desire to have a family may become a challenge that can ultimately strain their relationships and become an overwhelming issue that consumes their lives.

Although most couples spend their early years focusing on how not to get pregnant, there are some basic tips for each stage of life that, if followed, will significantly lessen the likelihood that they will ultimately face infertility.

Singles can safeguard future fertility

Many behavioral choices made early in life can significantly affect one's subsequent fertility. For example, certain lifestyle choices – such as smoking, risky sexual behavior, and diet and exercise – can ultimately impair or enhance the ability to conceive.

Although everyone knows that cigarette smoking increases the risk of developing cancer, heart disease, and lung disease, few people know that smoking can also lead to early menopause and infertility. In fact, smokers have a 66 percent higher chance of infertility and, if they do conceive, they have a 70 percent increased risk of having a miscarriage. While most smokers say that they will quit smoking as soon as they conceive, for many the damage has already been done. Even second-hand smoke can negatively affect fertility, so it's very important that young adults – and even parents and grandparents – either avoid becoming smokers or quit immediately.

Other habits, such as illicit drug use and alcohol abuse, can also negatively impact one's fertility. Marijuana can interfere with ovulation and sperm production, and – contrary to popular belief - it can also adversely affect sexual performance. Cocaine can alter blood flow to the uterus, potentially affecting implantation. Common street drugs such as crystal methamphetamine, ecstasy, and oxycontin can cause lower sperm counts, decreased libido, and problems with ovulation. Even certain prescription drugs, when abused, can lead to infertility. Alcohol abuse can also adversely affect hormone production and metabolism, leading to potential problems with ovulation and sperm production.

Drug and alcohol abuse may also impair one's otherwise good judgment and lower inhibitions leading to risky sexual behavior. Unprotected sexual intercourse – whether promiscuous OR ISOLATED - significantly increases the risk of infection with a sexually transmitted disease (STD). Although many young adults believe that oral contraceptives or spermicides protect against STD transmission, in fact, only latex condoms provide such protection – and then only when used correctly. Some contraceptives, such as the IUD or using spermicides alone, may actually increase the risk of STD transmission. These infections, specifically gonorrhea and chlamydia, can do irreversible damage to the fallopian tubes, markedly increasing the risk of infertility.

While there is no diet that will ensure normal fertility, experts agree that all women should follow a well balanced diet as well as a regular exercise regimen to optimize their overall health. In addition, all women should consider taking a daily multivitamin. Over-the-counter prenatal vitamins are an excellent choice, as they provide a cost-effective, enhanced combination of supplements in one daily pill that exceeds that found in many more expensive, multi-pill regimens. In addition, when one is ready to pursue pregnancy, the higher levels of folic acid found in prenatal vitamins can protect against the development of fetal malformations such as spina bifida.

Couples should concede they might one day conceive

One of the last things on newlyweds' minds, appropriately so, is fertility. However, it is important to at least broach the subject of conception early in marriage. With many couples choosing to get married at later ages, an early conversation about fertility is even more important. While it is fact that a woman's fertility declines as she ages, it is important to separate the hype from the reality.

MYTHS:

- Women can easily conceive into their early to mid-40s
- Infertility is a female problem
- If we just keep trying we'll get pregnant

FACTS:

- Women are born with all of the eggs that they will ever have, approximately 6-7 million
- This number decreases rapidly:
  - At puberty, a woman has 300,000-500,000 eggs
  - By age 40, only 10,000 eggs remain
- Infertility is due to male problems in 40-50 percent of cases, so men should also be evaluated by a fertility doctor
- Couples who fail to conceive after one year of unprotected intercourse (six months if the woman is over 35) should see a specialist

Fertility rates remain high throughout one's twenties and early thirties, so for most couples, there is no need to rush into pregnancy.

You've decided to get pregnant!

When a couple decides that they are ready to pursue pregnancy, there are several things that they should consider. Typically it is fine to attempt conception as soon as one stops using contraception. The "old wives' tale" about needing to be off of birth control pills for three months before conception was never true. Similarly, one needs to wait only one cycle after having an IUD removed before trying to conceive.

There are certain tests that couples may choose to undergo before attempting pregnancy. These "preconceptual tests" can evaluate one's chromosomes for the presence of over 100 genetic diseases that are potentially preventable with today's technology. Examples include Tay Sach's disease, Canavan's disease, and sickle cell anemia. A simple saliva or blood test can identify whether either partner is a "carrier" of these genetic conditions. As both partners need to be carriers for a child to be affected with most genetic diseases, if one partner tests negative, there is no need to worry that an affected child will be conceived. In cases in which both partners test positive for the same condition, advanced fertility treatments can diagnose the presence of disease in an embryo prior to the time of implantation. Then, if the couple so chooses, a fertility specialist can transfer only those embryos that do not carry the disease.

Once you are ready to attempt conception, a few basic tips can help shorten the process and make it more successful. Couples should have sex every other day mid-cycle; women should consider buying an over-the-counter ovulation prediction kit to let them know both if and when during their cycle they are ovulating; and couples who have not conceived after 12 months of trying should seek care from a fertility specialist. This last recommendation has been modified to six months if the woman is 35 or older. In addition, couples should seek care sooner if they already know that they may have a problem. For example, if either partner has previously had an STD, if the woman has irregular cycles or she has had abdominal or pelvic surgery, or if either partner has a chronic medical condition such as diabetes, hypertension, or cancer, they should consult a fertility specialist right away.

Prepare to welcome the next generation

Infertility affects one in seven couples in the United States, or approximately 7.3 million couples. Although the overwhelming majority of affected couples can be successfully treated, taking simple steps before one is even ready for pregnancy can preserve your fertility and enable most couples to easily conceive whenever the time is right for them.

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.*), Sallee S. Smyth (*S.S.S.*)

DIVORCE

STANDING AND PROCEDURE

MICHIGAN JUDGMENT GRANTING DIVORCE WAS NOT ENTITLED TO FULL FAITH AND CREDIT IN TEXAS BECAUSE HUSBAND DID NOT RECEIVE PROPER NOTICE OF THE DIVORCE PROCEEDINGS

¶12-2-01. ***In re M.L.W.,*** -- S.W.3d --, 2012 WL 182152 (Tex. App.—Texarkana 2011, no pet. h.) (01/24/12).

Facts: Husband and Wife married in Michigan. When they separated, Husband moved to Illinois. Wife filed for divorce in Michigan, also seeking custody and child support orders for their unborn Child. The Michigan trial court found that service could not "reasonably be made as provided in [Michigan Court Rule] 2.105" and permitted alternative service of summons. Notice was mailed to an address in Illinois. Husband failed to file a response, and he did not appear at the hearing. The Michigan trial court entered a default judgment. Wife then filed the Michigan judgment in Texas to register it as a foreign judgment. Husband learned of the default judgment and filed a contest to the registration, claiming he had not been properly served with notice of the divorce proceedings. The Texas trial court granted Husband's contest and denied and vacated the Michigan judgment. OAG filed a motion for new trial, which was overruled by operation of law. Wife appealed, arguing that Texas was obligated to give the Michigan judgment full faith and credit.

Holding: Affirmed

Opinion: The full faith and credit clause of the U.S. Constitution requires each state to give judgments from sister states the same force and effect they would be entitled to in the state in which they were rendered. When a properly authenticated judgment from another state is admitted into evidence, a party opposing it must establish that the judgment is not entitled to full faith and credit. Michigan Court Rule 2.105 details the requirements of proper service. Before substituted service is appropriate, it must be shown that service cannot reasonably be made by personal delivery or by certified mail. If the defendant's address is unknown, the moving party must provide facts in an affidavit showing a diligent effort to ascertain the correct address. Here, there was evidence that personal service was not reasonably possible, but there was no evidence that service could not be accomplished by certified mail. Thus, Michigan trial court erred in permitting Wife to serve Husband by substituted service. Because Husband lacked adequate notice, Texas trial court properly denied and vacated the registration of the Michigan divorce order.

HUSBAND DID NOT RECEIVE PROPER NOTICE OF HEARING BECAUSE WIFE'S ATTORNEY INFORMED OF THE HEARING ON THE DAY IT WAS SCHEDULED

¶12-2-02. ***White v. White,*** No. 05-11-00498-CV, 2012 WL 425981 (Tex. App.—Dallas 2012, no pet. h.) (mem. op.) (02/08/12).

Facts: Husband and Wife separated. About eight years after the separation, OAG filed a SAPCR affecting Husband and Wife's Children. Husband signed a waiver of service and appeared pro se in that matter. Husband then filed a petition for divorce. Husband was represented by an attorney in the divorce action. Over a period of about six months, Wife filed three motions to compel discovery and impose sanctions. Shortly before the hearing on Wife's third motion, Husband's attorney filed a motion to withdraw. Husband was aware of a hearing scheduled on the motion to withdraw. Believing there was nothing he could do about the motion

to withdraw, Husband did not appear at the hearing. Trial court granted the motion to withdraw. A few days prior to that hearing, Husband's attorney had sent Husband a letter advising him of the date scheduled for the final divorce hearing.

On the day of the hearing on which Wife's third motion was originally scheduled, Wife's attorney asked for the hearing to be continued because Husband had not been presented with Wife's third motion. Wife's attorney asked for the hearing to reset for a specific date on which she knew Husband would be in court on a different matter related to the SAPCR. Trial court continued the hearing and requested Wife's attorney to "alert" Husband of the reset hearing. On the day of the reset hearing on Wife's third motion, at the SAPCR hearing, Wife's attorney told Husband about the hearing on Wife's third motion scheduled to occur later that day. Wife's attorney told Husband that she would ask trial court to strike Husband's pleadings. She "explained to [Husband] that this meant that [Wife] would take a default judgment against him on that day." Husband did not appear at the hearing on Wife's third motion. After granting the motion, Wife proceeded with a prove-up of a default divorce. Trial court granted the default divorce.

A few weeks later, Husband appeared at the trial court for the final divorce hearing. Husband then learned of the final divorce decree. Husband filed a motion for new trial, which was subsequently denied. Husband appealed, arguing that he did not receive proper notice of either of the scheduled hearing on Wife's third motion or of the hearing on the default divorce.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Husband had notice of a hearing on his attorney's motion to withdraw. Trial court's grant of the motion to withdraw was neither arbitrary nor unreasonable. Trial court did not abuse its discretion in granting the motion to withdraw.

Husband had no notice of the hearing on Wife's motion to compel discovery and impose sanctions. Tex. R. Civ. P. 21 requires that a party receive at least 3 days' notice if served in person. Here, Husband received notice of the hearing on the day of the hearing. The communication to Husband did not constitute proper notice. Trial court abused its discretion in granting Wife's motion that day. COA reversed trial court's order granting Wife's motion to compel and strike Husband's pleadings. Further, trial court denied Husband his due process rights by conducting a default divorce hearing that same day without giving Husband proper notice. Because Husband only sought a reversal of the property division in the final divorce decree, COA only reversed that portion. COA affirmed and severed the remaining portion of the final divorce decree.

Editor's comment: *In the order granting withdrawal of Husband's attorney, the trial court "ordered that all notices in the case be delivered to [Husband] in person or sent to him by both certified and regular first-class mail," but Wife's attorney did not follow the order. J.V.*

TEXAS TRIAL COURT DISMISSED DIVORCE PROCEEDING BECAUSE VIRGINIA HAD EXCLUSIVE CONTINUING JURISDICTION OVER CHILD CUSTODY MATTERS AND VIRGINIA WAS A MORE CONVENIENT FORUM FOR THE DIVORCE PROCEEDINGS

¶12-2-03. ***Okonkwo v. Okonkwo***, -- S.W.3d --, 2012 WL 556310 (Tex. App.—San Antonio 2012, no pet. h.) (02/15/12).

Facts: While Mother and Father were married, Father was in the Army. The family moved often. They lived in Texas for a few years, and their last marital home was in Virginia. After they separated, Father returned to Texas, and Mother remained in Virginia. Mother obtained sole custody of the Children from a Virginia court. Later, Father filed for divorce in Texas. In response, Mother filed a special appearance and requested a dismissal, asserting the Texas trial court lacked both subject-matter and personal jurisdiction. Mother also argued that Texas was an inconvenient forum. After a hearing, trial court found that it did not have jurisdiction over the case or the parties. It further found that Virginia was a more convenient forum and dismissed Father's suit. Father appealed pro se and argued that trial court erred in dismissing his suit.

Holding: Affirmed

Opinion: UCCJEA provides the exclusive jurisdictional basis for making a child custody determination in Texas. Texas has jurisdiction only if it is the home state, if no other state has jurisdiction, or if a state with jurisdiction has declined to exercise it. The Children moved away from Texas in 2000, so Texas was clearly not their home state. Moreover, a prior child custody determination had been made in Virginia, the Children continued to reside in Virginia, and Virginia did not decline to exercise jurisdiction. Texas lacked subject matter jurisdiction over the child custody issues in Father's suit.

TFC 152.207(d) permits a court to retain jurisdiction over a divorce even if it lacks jurisdiction to an incidental custody determination. The language in this section is discretionary, not mandatory. Thus, this section did not require trial court to exercise jurisdiction over the divorce proceedings.

Furthermore, the equitable doctrine of forum non conveniens permits a court to decline to exercise its jurisdiction in favor of a more convenient forum. In making this determination, a court may consider the location of the evidence and witnesses, administrative issues, and concerns regarding the application of foreign laws. Here, Mother and Father had not lived in Texas as a married couple since 2000. Their last married home was in Virginia, where Mother and the Children continued to reside. Moreover, the only property in dispute was located in Virginia. Trial court did not abuse its discretion in dismissing the suit.

Editor's comment: *The trial court's decision could also be sustained under TFC 6.308 and 102.012, the partial jurisdiction statutes, which are likewise discretionary. S.S.S.*

DIVORCE

TEMPORARY ORDERS

RECEIVER WAS PROPERLY APPOINTED BECAUSE HUSBAND REPEATEDLY FAILED TO COMPLY WITH COURT ORDERS TO PAY COSTS, HE HAD SOLE CONTROL OF THE COUPLE'S ASSETS, AND HUSBAND'S CONDUCT CAUSED UNNECESSARY DELAY AND INCREASED THE COSTS OF LITIGATION; RECEIVER'S CONTROL NOT LIMITED TO COMMUNITY PROPERTY

¶12-2-04. ***In re C.F.M.,*** -- S.W.3d --, 2012 WL 252127 (Tex. App.—Dallas 2011, no pet. h.) (01/27/12).

Facts: Husband filed for divorce. Wife alleged that Husband had failed to comply with court orders to pay spousal support, child support, health insurance premiums, health insurance reimbursement, expert fees, and Wife's attorney's fees. Wife filed a Motion for Appointment of a Receiver. After evidence presented at two hearings, trial court found Husband in contempt, sent him to jail, and deferred its ruling on the receivership. At a subsequent hearing, trial court stated that it was ready to rule. Trial court informed the parties that it was not going to have another hearing on the issue. It stated that if the costs were paid in full, it would not appoint a receiver, but if Husband failed to comply with another order, a receiver would be appointed. Subsequently, Wife filed another motion for enforcement, and trial court ordered Husband to pay outstanding fees. Husband failed to pay the remaining amounts due, and trial court appointed a receiver. Husband appealed. After Husband filed his notice of appeal, Wife filed a motion for reconsideration. Trial court held a hearing, at which Wife presented evidence of unpaid child support, doctor's bills, and school bills. Wife also admitted evidence that Husband had been involuntary committed by his family, and his brother was seeking to be named as Husband's guardian. Trial court signed an order concluding that the receiver should remain in his position. In his appeal, Husband argued that trial court lacked authority to appoint a receiver; trial court lacked authority to place his separate property under the control of a receiver; he was denied due process because trial court failed to provide him with notice and a hearing on the issue of a receivership; and trial court erred in failing to allow him to present evidence of the separate character of his property.

Holding: Affirmed

Opinion: TFC 6.502 provides that while a divorce proceeding is pending, a court may order a temporary injunction to preserve the property and protect the parties if the injunction is deemed necessary and equitable. The statute gives broad discretion to the trial court. Here, trial court found that Husband repeatedly failed to comply with court orders, he had sole control of the parties' financial assets and accounts, his support was necessary to protect Wife and the Children, and Husband was incompetent to manage his affairs. In addition, Husband's failure to comply unnecessarily delayed the case and ran up the cost of litigation. An appointed receiver would ensure that payments of fees and costs were timely. A receiver would also ensure that any transfers of property had prior approval.

Trial court held two hearings on the facts and heard testimony from various witnesses, including Husband. Trial court deferred its ruling until after a subsequent hearing on another motion by Wife. When court gave its ruling, all the evidence offered in the earlier hearings remained before the court. Thus, Husband had adequate notice to satisfy any due process concerns. Even if Husband should have been granted one more hearing, husband did not give any indication as to what additional evidence he wished to offer.

TFC 6.502 does not distinguish between community and separate property. If the legislature had intended to limit a receivership to community property, it would have done so. Trial court did not err in placing all the property of the parties under the control of the receiver. Even if Husband could show that certain property was his separate property, it would not have affected what property was put under control of the receiver.

Editor's comment: *The court stated that Husband "had not identified, by clear and convincing evidence, any separate property." Even if he had, could the trial court have characterized Husband's property as separate at an enforcement or receivership hearing? Wouldn't characterization have to be adjudicated at trial or by partial summary judgment? J.V.*

Editor's comment: *I have several problems with this opinion. Although TFC 6.502 may not distinguish between community and separate property, it seems implicit that a receiver appointed in a divorce cannot exercise control over the separate property of a spouse. In addition, the trial court apparently found that the Husband was incompetent to manage his affairs, and that his brother was seeking to be named as Husband's guardian. It appears that instead of waiting for Husband's brother to be named as his guardian, the trial court appointed a receiver. J.A.V.*

Editor's comment: *This case is significant for two reasons. First, it interprets TFC 6.502 to allow appointment of a receiver to protect not just the property of the parties, but also to protect the parties themselves. Second, it interprets the phrase "property of the parties" to include not just the community property of the parties, but each spouse's separate property as well. C.N.*

Editor's comment: *This case has the potential to open the flood gates for receiverships in divorces as it gives the trial court almost unbridled discretion. I am befuddled as to how a person's separate property (assuming there was a modicum of proof that it was separate) can be subject to a receivership. This case also blows out of the water any concept of proper allocation of debts. Now, a trial court can order a receivership and thereby have the community debts, or even a party's separate debts, paid by the other party's separate property, when under normal rules for collection, that party's assets might not be liable. M.M.O.*

DIVORCE
DIVISION OF PROPERTY

TRIAL COURT PROPERLY INSTRUCTED JURY TO DETERMINE HUSBAND'S SEPARATE-PROPERTY INTEREST IN HIS RETIREMENT AS A SPECIFIC DOLLAR AND CENT VALUE, AS OPPOSED TO A PERCENTAGE BASED ON HUSBAND'S TIME EMPLOYED WHILE SINGLE AND WHILE MARRIED

¶12-2-05. ***Sprague v. Sprague,*** -- S.W.3d --, 2012 WL 456936 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (02/14/12).

Facts: Husband worked at Shell for 18 years before marrying Wife. Husband continued to work at Shell another 18 years after marriage before he retired. Husband filed for divorce about 2 years after he retired. Husband received retirement benefits from Shell through 3 different plans. In preparation for the divorce proceedings, Husband hired a forensic accountant to determine which portions of the retirement benefits were his separate property. Husband filed the first expert report before trial court's discovery deadline, and he filed a supplemental report after the deadline had passed. Trial court excluded the supplemental report. During trial, trial court granted Wife's motion to exclude all of Husband's evidence related to the separate character of certain retirement benefits. After hearing the evidence, the jury determined a specific dollar amount that was Husband's separate property. Trial court ordered Husband to liquidate enough of his retirement in order to transfer funds to Wife. At a later hearing, Husband told that court that he was concerned that liquidation could be in violation of a temporary injunction that was still in effect. Trial court issued a handwritten order granting Husband permission to liquidate the funds. Husband liquidated a little more than was necessary and transferred the appropriate amount to Wife. After trial court signed the final divorce decree both parties appealed. Husband argued that trial court erred by instructing the jury to determine his separate property as a dollar amount, as opposed to a percentage. Husband also argued that the benefits he received under one of the three plans should have been wholly characterized as his separate property. Husband challenged trial court's imposition of discovery sanctions excluding his expert's supplemental report and all other evidence of his separate-property interest in his retirement benefits. Further, Husband contended that trial court erred in imposing sanctions for his alleged delay in transferring funds to Wife. Wife filed a motion to dismiss Husband's appeal because he accepted the benefits of trial court's judgment and waived his right to appeal.

Holding: Motion to Dismiss Denied; Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (J. Christopher, C.J. Hedges, J. Frost)

The acceptance-of-benefits doctrine provides that if a litigant voluntarily accepts benefits of a judgment, that litigant cannot then appeal the judgment. However, there are some exceptions, such as when the benefits were accepted due to an economic necessity, or when the litigant accepted cash without prejudicing the appellee. Here, Husband superseded the judgment by posting bonds prior to the appeal. Further, the temporary orders permitted the parties to pay attorneys' fees and pay for reasonable expenses. When this type of temporary order is in place, the acceptance-of-benefits doctrine does not apply. COA denied Wife's motion to dismiss.

TFC 3.007 was repealed in 2009, but it still applies to suits for divorce that were pending between Sept. 1, 2005 and Aug. 31, 2009. Here, Husband petitioned for divorce in 2005, and the case was pending before TFC 3.007 was repealed. TFC 3.007 applies to spouses who were "participant[s] in a defined benefit retirement plan." Although Husband tried to claim that he was no longer a "participant" at the time of his divorce, the plan explicitly referred to "any participant, including one who is retired." Husband referred to no language in the plan that mandated the way a lump-sum distribution should have been characterized years after it was paid. In addition, Husband cited no evidence to support his claim that the statute as applied would be preempted by ERISA.

In *Taggart*, Tex. Sup. Court provided a formula to determine the percentage interest that a community estate would have in retirement benefits. *Berry*, which was decided six years later, addressed the determination of the value of the community's interest in retirement benefits. *Berry* recognized that benefits do not accrue equally over time and that a person may acquire more benefits in the later years of employment than in the first few years of employment. TFC 3.007 provides for "a separate property interest in the monthly accrued benefit" of the plan, which requires a dollar and cent valuation. Because *Berry* provided a formula for assessing value, and *Taggart* did not address value at all, trial court did not abuse discretion in following *Berry* and having the jury assess Husband's separate-property interest in dollars and cents.

Husband and Wife were married in 1985. After the 1986 Tax Reform Act was passed, Shell created its Benefit Restoration Plan to reimburse employees for amounts that would have been payable without the statutory cap that existed prior to the Tax Reform Act. However, this Plan could not have "restored" anything to Husband because his salary never exceeded the statutory cap during the relevant time period. In addition, no evidence was presented that the Senior Staff Plan existed prior to the marriage. Thus, the benefits of each of these plans were community property.

Tex. R. Civ. P. 193.6 provides that a discovery response will be excluded if the response is not timely made, amended, or supplemented, unless the court finds good cause for the delay or that inclusion would not surprise or unfairly prejudice the other parties. Here, trial court entered an agreed docket-control order that set the case for trial and set a deadline for discovery. Husband entered a supplemental expert report one week after the discovery deadline. Trial court reset the date of final trial, but this change had no impact on the discovery deadline. If the discovery deadlines had been determined by the date of trial, then the deadline would have been adjusted when the trial was reset. However, because there was a written scheduling order, the discovery deadline was not dependent on the trial date. Moreover, Husband failed to establish good cause for filing the report after the deadline. The stated reason for the delay was that Husband's counsel did not initially appreciate the significance of the report. "Inadvertence of counsel is not good cause for failure to adhere to discover deadlines." Husband also failed to show that admitting the report would not unfairly prejudice Wife. The report claimed more property as Husband's separate, and Wife likely would not have had sufficient opportunity to prepare legal arguments regarding this claim.

During discovery, Wife had asked Husband identify a percentage of the estate that he was claiming as separate property. Husband never supplied a percentage. When trial court ruled that the supplemental report would be excluded, it noted that its ruling "should not be interpreted to mean that [Husband] could not testify as appropriate." At that pretrial conference, Wife did not ask the court to exclude evidence of the percentage claimed by Husband. By failing to get this ruling, Wife waived her complaint on this discovery dispute. Further, after hearing the excluded testimony, a reasonable juror could have found that some of the funds payable through the Cash Deferral Program were Husband's separate property. Husband would have testified that part of this compensation was for work done prior to the marriage. Thus, trial court's improper exclusion of Husband's testimony was harmful.

Trial courts have inherent power to issue sanctions to prevent and counteract interference with the "traditional core functions of Texas courts." These core functions include hearing evidence, deciding issues of fact and questions of law, and issuing and enforcing judgments. Here, although Husband timely filed a request for findings of fact, trial court failed to issue its findings of fact. Moreover, the record does not support a finding that Husband engaged in bad-faith abuse of the judicial process. The delay between the judgment and Husband initiating the funds transfer was due to gathering information about how to complete the transfer. Also, Husband was reasonably concerned that a temporary injunction prevented him from liquidating the funds. On the same day that Husband obtained an order granting him permission to liquidate the funds, he authorized the transaction. After that, the check was delayed because Fidelity used insufficient postage when mailing it to Husband. As soon as Husband received the check, he had it deposited into his account and authorized the bank to wire transfer funds to Wife's account. Any delays in transferring funds to Wife were not attributable to Husband. Trial court abused its discretion in imposing sanctions on Husband for the delay.

Concurring Opinion: (J. Frost)

When interpreting a statute, a court must start with a reading of the text to determine the legislative intent. If the statute is unambiguous, the court must adopt the interpretation supported by the plain language of the statute's text. Only when a statute is ambiguous may the court use other aids of interpretation to determine

the legislature's intent. Here, in interpreting TFC 3.007, the majority did not follow this procedure. The majority did not quote, or otherwise discuss, subsection (b). The majority did not address all of the parties' proffered interpretations. The majority did not determine whether the statute was ambiguous. Finally, before turning to common law, the majority did not conclude that the statute did not apply.

Editor's comment: *Good job on the part of Husband's attorney by making an offer of proof (see Tex. R. Evid. 103), a/k/a bill of exceptions. J.V.*

Editor's comment: *A motion for rehearing on the exclusion of non-expert evidence issue has been filed. S.S.S.*

Editor's comment: *This is an interesting case. It seems counter intuitive to me to have the jury determine the character of retirement benefits especially as a specific dollar and cent value. J.A.V.*

Editor's comment: *Provides a helpful if brief discussion of the "acceptance of the benefits" doctrine; also provides a good reminder that if the Court provides a written scheduling order, and then the trial date is continued, the discovery deadlines are not reset. One of the main issues in this case – the exclusion of evidence of the separate property portion of his deferred bonus (totaling in the millions) – was actually considered on appeal because husband's trial attorney did the right thing in making an offer of proof of the excluded expert's testimony, the husband's testimony, and the excluded documents and reports. If he had forgotten to do the offer of proof, the appellate court would likely have not be able to decide the issue at all because the record would not have reflected the contents of the excluded testimony and documents. Going to trial soon? Write yourself a note, "OFFER OF PROOF," and stick it in the front of your trial binder. It's a simple step, but often overlooked. R.T.*

DIVORCE

SPOUSAL MAINTENANCE/ALIMONY

COURT COULD NOT ORDER WAGE WITHHOLDING TO ENFORCE PAYMENT OF CONTRACTUAL ALIMONY

¶12-2-06. ***Heller v. Heller,*** -- S.W.3d --, 2012 WL 333776 (Tex. App.—Beaumont 2012, no pet. h.) (02/02/12).

Facts: In the divorce decree, Husband had agreed to pay contractual alimony to Wife. Husband failed to keep up with the alimony payments, so Wife sought a withholding order. Trial court granted a wage withholding order. Husband appealed, arguing trial court erred by ordering income withholding for contractual alimony

Holding: Reversed and Rendered

Opinion: Art. XVI, sec. 28 of the Tex. Constitution disallows wage withholding except for child support and spousal maintenance obligations. In addition, TFC 8.101 allows wage withholding for spousal maintenance. Spousal maintenance differs from contractual alimony in that the former is a legal duty arising out of the status of the parties, and the latter is a debt governed by contract law. Here, although the alimony provision may have resembled spousal maintenance, there was no evidence that Wife was eligible to receive spousal maintenance. There was no evidence in the record indicating the parties intended the obligation to be considered "spousal maintenance." Because the obligation was for contractual alimony, and not spousal maintenance, the order to withhold Husband's wages constituted an illegal garnishment. COA reversed and vacated the wage withholding order.

Editor's comment: *The court's opinion cites In re Green, 221 S.W.3d 645, 648 (Tex. 2007, orig. proceeding) (per curium), quoting a legal treatise, to define alimony as a promise "o pay money to balance the property division and minimize taxes, without regard to the spouse's ability to be self-supporting." In fact, family lawyers often use contractual alimony for a variety of purposes, not just to balance the property division or to minimize taxes. A closer look at Green reveals that the Texas Supreme Court quoted the treatise to differentiate between alimony and maintenance and not to define alimony. J.V.*

Editor's comment: *How many times will the appellate courts have to tell trial courts the difference between court-ordered maintenance and contractual alimony? M.M.O.*

SAPCR
STANDING AND PROCEDURE

MOTHER FAILED TO SHOW TRIAL COURT CLEARLY ERRED IN DECLINING TO EXERCISE JURISDICTION BECAUSE REASONABLE PERSONS COULD DISAGREE AS TO WHETHER TEXAS OR TENNESSEE WAS THE MORE CONVENIENT FORUM FOR THE SAPCR

¶12-2-07. ***In re Moore,*** No. 06-11-00119-CV, 2011 WL 6238760 (Tex. App.—Texarkana 2011, orig. proceeding) (mem. op.) (12/14/11).

Facts: Mother and Father divorced in Texas. The Parents were named JMCs of their Children, and Father was granted the exclusive right to determine the Children's primary residence. After the divorce, Father and the Children moved to Tennessee. Later, Mother filed a SAPCR in Texas. Father filed a motion requesting trial court to decline jurisdiction and determine that Tennessee was a more convenient forum. Trial court granted Father's motion. When Tennessee proceedings had not been initiated in a few months, the Texas trial court dismissed the case. Mother filed a petition for writ of mandamus, asking COA to order trial court to vacate its order declining to exercise jurisdiction and dismissing the case.

Holding: Petition for Writ of Mandamus Denied

Opinion: TFC 152.207 permits a court to decline to exercise its jurisdiction after a finding that Texas is an inconvenient forum and another state's jurisdiction is more appropriate. This section further provides a list of factors to be considered in the court's determination: (1) any occurrences of domestic violence; (2) how long the child has lived in another state; (3) the distance between the two jurisdictions; (4) the parties' financial circumstances; (5) agreements between the parties; (6) the nature and location of evidence; (7) each court's ability to decide the issue expeditiously; and (8) each court's familiarity with the facts and issues in the case. Here, Mother conceded that there was no evidence pertaining to the 1st and 4th factors (domestic violence and finances). In addition, the record did not contain sufficient evidence relating to the 7th factor (expediency) because there was no evidence as to what would be Tennessee's procedures for the handling of the case. The Children lived in Texas for no more than 2 years before moving to Tennessee, where they have resided continuously ever since. Thus, the 2nd factor (time in state) weighs in favor of Tennessee. The distance from the Texas court to Tennessee is "[a]bout 600 miles." Because of this great distance, the 3rd factor (geographical distance) weighs in favor of Texas. Although Father did not object to jurisdiction previously, there was no evidence that Father explicitly agreed that Texas was a more convenient forum. COA concluded that the 5th factor (party agreements) did not favor either state. Mother testified that the Children's maternal family resided in Texas, and the Children had a counselor in Texas. Mother also testified that Father had recently moved within Tennessee. CPS had been involved with the case in both states. COA concluded that the 6th factor (location of evidence) also did not favor either state. Trial court presided over the Parents' divorce and a prior modification, which meant the 8th factor (familiarity) favored jurisdiction in Texas. In conclusion, fac-

tors 1, 4, 5, 6, and 7 did not favor either state; factor 2 favored Tennessee; and factors 3 and 8 favored Texas. COA held that in looking at the totality of the circumstances, reasonable persons could disagree as to which state was the more favorable forum. Thus trial court did not clearly abuse its discretion.

Editor's comment: *Thanks to Texarkana's Chief Justice Morriss for summarizing abuse of discretion in a nutshell: "Because reasonable persons could disagree . . . , the trial court's decision was not arbitrary or capricious and did not constitute a clear abuse of discretion." J.V.*

Editor's comment: *Reversing a family law district court under an abuse of discretion standard is extremely difficult as mother learns here. An abuse of discretion exists when the record establishes that the trial court could have reached only one decision, yet reached another. Likewise, an abuse of discretion does not exist if a trial court bases its decision on conflicting evidence and some evidence reasonably support's the trial court's decision. C.N.*

TFC DOES NOT ALLOW TEXAS TO CLAIM SUBJECT-MATTER JURISDICTION OVER AN UNBORN CHILD; BECAUSE CALIFORNIA WAS THE CHILD'S HOME STATE AND CALIFORNIA HAD NOT DECLINED TO EXERCISE ITS JURISDICTION, TEXAS WAS REQUIRED TO DISMISS EVEN THOUGH THERE WERE NO ONGOING PROCEEDINGS IN CALIFORNIA

¶12-2-08. ***Arnold v. Price,*** -- S.W.3d --, 2011 WL 6415133 (Tex. App.—Fort Worth 2011, no pet. h.) (12/23/11).

Facts: Mother and Father were married but stopped living together after only a few months. Less than a year after they were married, Father filed a petition for divorce. At the time of filing, Father was stationed in Pennsylvania, and Mother was living in California, pregnant with their only Child. Father filed his petition in Texas because their last marital residence had been in Texas. In his petition, Father sought sole managing conservatorship of the Child. Mother filed an original answer, in which she argued that Texas did not have jurisdiction over her unborn Child. Mother did not argue that the court did not have jurisdiction over her. She asked the court to divide the community property, confirm her separate property, enter temporary orders, award attorney's fees, and grant a divorce. Trial court denied Mother's objection to jurisdiction over the Child because neither party had filed for custody in any other state. After a jury trial, trial court appointed Father the sole managing conservator and issued a possession order. Mother appealed, arguing that trial court lacked personal jurisdiction over her and that trial court lacked subject matter jurisdiction over the Child.

Holding: Affirmed in Part; Dismissed in Part

Opinion: Lack of personal jurisdiction may be waived. To challenge personal jurisdiction, a party must follow Tex. R. Civ. P. 120a to properly enter a special appearance. Any appearance not in compliance with rule 120a is a general appearance. If a party requests affirmative relief inconsistent with a claim that the court lacks personal jurisdiction, that party has made a general appearance. Here, Mother filed an answer and requested the court to divide the community property, enter temporary orders, award attorney's fees, and grant a divorce. Mother's original petition did not comply with rule 120a. Mother waived any complaint as to the court's lack of personal jurisdiction over her.

Subject matter jurisdiction cannot be waived and cannot be conferred upon the court. UCCJEA governs jurisdiction over child custody issues in Texas. TFC 152.201 provides the circumstances in which a Texas court may claim jurisdiction over a child custody case. Texas may exercise jurisdiction if (1) Texas is the home state or was the home state within six months before the commencement of the case and a parent still lives in Texas; (2) no other state is a home state, or any state that is the home state has declined jurisdiction and the child and at least one parent have a significant connection with Texas, and there is substantial evidence in Texas concerning the child's care; (3) all other states with jurisdiction under the first two sections have declined to exercise jurisdiction; or (4) no court in any other state would have jurisdiction under the pre-

vious three sections. A child's home state is determined as of the date of the commencement of the child custody proceeding. TFC 152.102 states that if a child is less than six months old, then the home state is "the state in which the child lived from birth with a parent." However, UCCJEA does not authorize jurisdiction over an unborn child. Here, the Child was born in California several months after Father filed his original petition. The Child only lived in California. Because the UCCJEA could not govern the unborn Child's jurisdiction, filing suit in Texas did not affect the subject- matter jurisdiction of the child custody dispute. California was the Child's home state when she was born, and Texas could not exercise jurisdiction over the Child unless California waived its jurisdiction.

Although there was no ongoing proceeding in California, this fact did not permit Texas to exercise jurisdiction over the child custody dispute. The UCCJEA as a whole shows that the legislature contemplated a scenario in which a state could decline jurisdiction even if there was no pending proceeding in another state. TFC 152.207(a) permits a Texas court to decline jurisdiction on inconvenient forum grounds, and there is no requirement that there be a pending case in another state. This section provides that after determining another forum is more appropriate, the trial court "shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state." Because Texas could not claim jurisdiction under TFC 152.201, trial court was required to dismiss the child custody claims for lack of subject-matter jurisdiction.

Editor's comment: *Fort Worth follows (and quotes from) Waltenburg v. Waltenburg, 270 S.W.3d 308, 318 (Tex. App. - Dallas 2008, no pet.), which rejected the same argument from another father because "a party could file suit pre-birth under the UCCJEA provision authorizing jurisdiction when 'no other court has jurisdiction,' and use the 'simultaneous proceeding' provision to control, post-birth, whether the child's home state can ever exercise that 'priority' jurisdiction. We reject this reading of the UCCJEA." J.V.*

PATERNAL AUNT HAD STANDING TO INTERVENE IN MODIFICATION SUIT BECAUSE THE PRESENT CIRCUMSTANCES OF THE CHILD AT THE TIME OF INTERVENTION WOULD HAVE SIGNIFICANTLY IMPAIRED THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT

¶12-2-09. ***In re Chester,*** -- S.W.3d --, 2011 WL 6793696 (Tex. App.—San Antonio 2011, orig. proceeding) (12/28/11).

Facts: Mother was arrested for a DWI while the Child was in the car with her. An agreed order between Mother and Paternal Grandmother was entered granting grandparent access to the Child to Paternal Grandmother. Trial court granted a TRO and appointed Mother and Paternal Grandmother as JMCs and granted Grandmother the exclusive right to designate the Child's primary residence. Maternal Grandmother intervened in the suit with Mother's consent. Trial court later held a hearing regarding the temporary orders, which were set to expire. Mother challenged Paternal Grandmother's standing to pursue the modification suit and sought to have the Child returned to her care. On the second day of the hearing, Paternal Aunt intervened, claiming standing under 102.004(a)(1). After the hearing, trial court appointed Mother, Maternal Grandmother, and Paternal Aunt as JMCs and granted Paternal Aunt the exclusive right to designate the Child's primary residence. Mother was only allowed supervised visits with the Child. Mother then filed a motion to strike Paternal Aunt's plea in intervention. Trial court signed an order denying Mother's motion to strike, and she filed a petition for writ of mandamus. While Mother's mandamus was pending, trial court held a rehearing on Mother's motion and signed an order striking Paternal Aunt's plea in intervention. However, two days later trial court vacated its order. COA and Tex. Sup. Court denied Mother's petition for writ of mandamus. Mother filed a Motion for Reconsideration of Motion to Strike Plea in Intervention. At the hearing on this motion, trial court *sua sponte* entered an order revoking Paternal Aunt's right to designate the primary residence of the Child. Paternal Aunt filed a petition for writ of mandamus, which was granted due to lack of notice and a hearing. The next day, trial court struck Paternal Aunt's plea in intervention based on lack of standing. Paternal Aunt then filed another petition for writ of mandamus, contending that she had standing under TFC

102.004(a)(1). In her response, Mother argued that Paternal Aunt lacked standing to request conservatorship because the original suit was a grandparent access order and not an initial custody determination.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: TFC 102.004(a)(1) grants standing to seek conservatorship to a relative of a child within the third degree by sanguinity if it is shown that "the child's present circumstances would significantly impair the child's physical health or emotional development." The child's present circumstances are determined as of the time that the intervention is filed. Here, Paternal Aunt was related to the Child within the third degree of sanguinity. At the time Paternal Aunt intervened, Mother was seeking to have the TRO dissolved and have the Child returned to Mother's care. The day before Paternal Aunt intervened, testimony established that Paternal Grandmother had 3 prior DWIs. During the hearing, trial court had expressed concern for the Child's safety if the Child were returned to Mother. Moreover, during a prior mandamus proceeding the COA determined "present circumstances" would have significantly impaired the Child's physical health or emotional development. Because Paternal Aunt had standing to file an original suit under TFC 102.004(a)(1), she also had standing to intervene in the pending suit. Thus, trial court abused its discretion in striking her plea in intervention. Furthermore, mandamus relief was appropriate to protect Paternal Aunt's substantive rights from impairment or loss.

Editor's comment: *At the time of her arrest with Child in the car, Mother was on probation for a prior DWI and had at least one other DWI conviction. Maternal Grandmother had three DWIs. It's a good thing Paternal Aunt was allowed to stay in the case. J.V.*

TEXAS LACKED SUBJECT-MATTER JURISDICTION OVER SAPCR BECAUSE KANSAS WAS THE CHILDREN'S HOME STATE, KANSAS HAD NOT DECLINED TO EXERCISE JURISDICTION, AND FATHER FAILED TO ESTABLISH ANY ALTERNATIVE BASIS UNDER WHICH TEXAS COULD CLAIM JURISDICTION

¶12-2-10. ***In re Shurtz,*** No. 03-11-547-CV, 2011 WL 6938502 (Tex. App.—City 2011, orig. proceeding) (mem. op.) (12/30/11).

Facts: Mother and Father had two Children together. The first was born in Texas, and the second was born in Kansas. After the second Child was born, Mother started using methamphetamines and stopped taking her medication for her bipolar disorder. Maternal Grandmother helped Father care for the Children. When Father moved to Texas for work, Grandmother was the primary caregiver of the Children, and Mother was somewhat involved with the Children. Mother did not have a permanent residence and stayed with various friends. At times, she would take the older Child with her to various homes. Father expressed his concern for the Children's safety. Mother contacted Father and asked Father to take the Children for a while to allow her to "get clean" on the condition that Father give Mother $200. They made the exchange, and Father took the Children to Texas. Father then filed a SAPCR seeking sole managing conservatorship. Although he claimed Mother was homeless, Father directed service of citation to Mother to an address in Kansas. Mother and Father jointly appeared, and trial court appointed them JMCs and placed a geographic restriction on the Children's residence. Before the final order was signed, Mother took the Children to Kansas. Father filed a writ of habeas corpus to recover possession of the Children, a motion for enforcement of possession or access and order to appear, a request for writ of attachment, and a SAPCR, in which he asked to be appointed SMC. After being served, Mother returned the Children to Father. Grandmother then filed a response to Father's enforcement action, including a plea to the jurisdiction. Grandmother also sought to be named SMC. After a hearing, trial court denied Grandmother's plea to the jurisdiction. She filed a petition for writ of mandamus, asserting that Kansas had subject-matter jurisdiction to make the custody determination, and Texas did not.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Subject-matter jurisdiction can never be presumed or waived. If a court lacks subject-matter jurisdiction, then any resulting judgment is void. In a child custody proceeding, subject-matter jurisdiction is determined by TFC 152.201. Under this section, a child's home state always has primary jurisdiction. Other states may only exercise jurisdiction if no other state can claim jurisdiction or if the child's home state has declined to exercise its jurisdiction. A child's home state is the state in which the child lived with a parent for at least six months immediately before the commencement of the proceedings. In Father's original SAPCR, he stated that he had been living in Kansas for the "past couple of years," and he and the Children had only been in Texas for about a month before he filed his suit. The Children did not live in Texas the requisite six months, so Texas was not their home state. In addition, Father did not establish that any other state had home-state jurisdiction. In fact, in his pleadings, Father stated that the Children had lived in Kansas for several years. When Father initially left Kansas, the Children remained in Kansas under their Grandmother's care. Despite Father's assertion that Mother was homeless, the petition directed service of citation on Mother at an address in Kansas. Father's pleadings established that Kansas was the home state of the Children. Thus, because Kansas was the home state and it had not declined to exercise its jurisdiction, Texas could not claim jurisdiction under any of the alternative bases for jurisdiction laid out in TFC 152.201. Trial court erred in denying Grandmother's plea to jurisdiction.

GRANDMOTHER'S SAPCR DISMISSED BECAUSE, RATHER THAN INTERVENING IN THE PARENTS' SUIT, GRANDMOTHER FILED HER OWN ACTION AFTER THE PARENTS' HEARING BUT BEFORE TRIAL COURT ENTERED ITS ORDERS; GRANDMOTHER FAILED TO ESTABLISH THAT THE CHILD'S ENVIRONMENT POSED A DANGER

¶12-2-11. ***In re D.W.J.B.,*** -- S.W.3d --, 2012 WL 424386 (Tex. App.—Texarkana 2012, no pet. h.) (02/10/12).

Facts: Mother and Father entered an "agreed parenting plan." Maternal Grandmother ("Grandmother") was present during the hearing at which the agreement was reached. Trial court entered an order that named the Parents as joint managing conservators and granted Father with the exclusive right to designate the Child's primary residence. Trial court ordered Mother to pay child support and ordered Father to maintain the Child's health insurance. After the hearing, but before the order was entered, Grandmother filed a SAPCR in a separate cause number. She asked the court to enforce past due child support owed by Father, to grant a TRO against Father, and to exclude Father from possession of or access to the Child. Grandmother attached an affidavit to her petition, in which she claimed to be "deeply concerned for the safety and welfare" of the Child. She complained of Father's criminal history and accused Father of being an alcoholic. She recited statements she had heard from the Child regarding Father's methods of discipline and Father's drinking habits. Grandmother asserted that the Child had said that Father's girlfriend had spoken unkindly to the Child. Grandmother also alleged that the Child's great-grandmother told the Grandmother that the Child told the great-grandmother about praying that spankings would not hurt so much. Father filed a motion to dismiss, arguing that the same action was pending in a separate cause number. The two cases were consolidated, and a hearing was set on the motion to dismiss. At the hearing, Father's counsel argued that Grandmother had the opportunity to intervene in the Parents' custody suit, and Grandmother chose not to do so. Trial court granted Father's motion to dismiss. Grandmother appealed, arguing trial court erred in failing to allow her to present her evidence prior to the dismissal of her suit.

Holding: Affirmed

Majority Opinion: (J. Moseley, C.J. Morriss, J. Carter)

TFC 156.102 provides that if a SAPCR is filed within one year of a prior order affecting conservatorship, the person filing the suit must attach an affidavit with facts supporting the request. If the person filing the SAPCR is not the person with the exclusive right to designate the primary residence of the child, the affidavit must allege "that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development." The purpose of the section is to promote stability and discourage

relitigation of custodial issues within a short period of time. The affidavit must be based on personal knowledge, not on statements of third parties. In addition, the affidavit must include facts showing that the child is being harmed. Here, many of Grandmother's conclusions were based on statements not within her personal knowledge. In addition, while Grandmother complained of Father's past conduct, she did not raise any facts supporting a claim that the Child was presently in danger. Moreover, any evidence relating to Father's past conduct would have been addressed in the Parents' custodial proceedings.

Concurring Opinion: (J. Carter)

TFC 156.102(c) states that a court shall set a time and date for a hearing only if it determines that the facts presented in the supporting affidavit are adequate. Here, although trial court set a hearing, there was no implicit finding that the facts in Grandmother's affidavit were sufficient. Grandmother's petition appeared to raise a new action, and trial court set the hearing without reference to the previous conservatorship order.

Editor's comment: *The majority wrote that, for example, "the act of drinking in front of the child did not necessarily demonstrate that the child's physical health or emotional development was adversely affected." A TFC 156.102 affidavit must show how conduct harms a child. J.V.*

SAPCR
CONSERVATORSHIP

GRANDPARENTS DID NOT HAVE STANDING TO SEEK CONSERVATORSHIP BECAUSE THEY ONLY HAD CONSENT TO INTERVENE FROM ONE OF THE CHILD'S JOINT MANAGING CONSERVATORS

¶12-2-12. ***In re Lewis,*** -- S.W.3d --, 2011 WL 6141579 (Tex. App.—Fort Worth 2011, orig. proceeding) (12/09/11).

Facts: Mother and Father divorced and were named JMCs of their only Child. Father later filed a SAPCR seeking the right to designate the Child's primary residence and asking that Mother be ordered to pay child support. Mother's parents ("Grandparents") filed a plea in intervention seeking appointment as non-parent JMCs and alleged standing based on Father's consent pursuant to TFC 102.004. Mother filed a motion to strike Grandparents' intervention. After a hearing, trial court denied Mother's motion. Mother filed a petition for writ of mandamus. Mother argued that TFC 102.004(a)(2) could not confer standing on Grandparents without both Mother's and Father's consent. Grandparents countered that the statute only required consent from one managing conservator.

Holding: Petition for Writ of Mandamus Conditionally Granted

Majority Opinion: (J. Gardner, J. McCoy)

TFC 102.004(a)(2) gives standing to a grandparent to seek conservatorship if the grandparent has been given consent to file by "both parents, the surviving parent, or the managing conservator or custodian." A statutory reading that would interpret "the managing conservator" to mean "one of the managing conservators" or "a managing conservator" either adds words or alters the existing words of the statute. Furthermore, the language of this section was first added in 1985. At that time, there could only be one managing conservator, unless there was a contrary agreement by the parties. Thus, the legislature could not have intended for "the managing conservator" to mean "one of the managing conservators because, at that time, the statutory scheme did not provide for more than one managing conservator. Moreover, permitting a grandparent intervention with the consent of only one managing conservator would permit any disgruntled parent to solicit his or her parents to intervene in a SAPCR. Here, Grandparents only had consent from Father. Thus, trial court erred in denying Mother's motion to strike Grandparents' petition in intervention.

Dissenting Opinion: (J. Meier)

The Fort Worth COA has previously held that a grandparent had standing to seek conservatorship when only one managing conservator consented to the grandparent's suit. Moreover, the words "the managing conservator" should not have been interpreted to mean "more than one managing conservator."

SAPCR
CHILD SUPPORT

TRIAL COURT'S FAILURE TO SIGN CONFIRMATION ORDER BEFORE MANDATORY EXPEDITED DEADLINE DID NOT MAKE ORDER VOID; THE DEADLINE'S PURPOSE IS TO ALLOW OAG TO COMPEL ACTION THROUGH MANDAMUS IF NECESSARY

¶12-2-13. ***In re J.A.C.,*** -- S.W.3d --, 2011 WL 6425698 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (12/22/11).

Facts: OAG and Mother negotiated a child support review order (CSRO). Father did not participate in the negotiations or sign the CSRO, so it was designated as "Non-Agreed." The CSRO established Father's paternity of the Child and required Father to pay child support. OAG filed a petition for confirmation of the CSRO. Almost 30 days later, Father filed an answer that included a general denial. A few days later, trial court signed an order stating that no timely request for a hearing had been made and confirming the non-agreed CSRO. Father asserted that he had no notice of the confirmation order until over two months after it had been signed. Father sought a restricted appeal on the basis that trial court signed the confirmation order more than 30 days after the petition was served on Father.

Holding: Affirmed

Opinion: When a CSRO is not agreed, the OAG must file a petition for confirmation. The clerk of the court must personally serve each party entitled to service who has not waived service. If a party wishes to request a hearing, that party has 20 days after service to make the request. TFC 233.0271(a) states that if there has been no timely request for a hearing, the court shall confirm and sign the CSRO by the 30th day after service. Then, the OAG must deliver the confirmed order to each party with a notice of a right to file a motion for a new trial within 30 days of the order's confirmation. Here, trial court failed to sign the confirmation order within 30 days of service on Father. However, "[e]ven if a statutory requirement is mandatory, this does not mean that compliance is necessarily jurisdictional." TFC 233.0271 does not state whether it is jurisdictional, and it does not provide any consequences for a failure to sign the order within 30 days. There is no corresponding statute that requires dismissal of a proceeding for noncompliance with the 30-day requirement. In determining similar statutes prescribing deadlines, other courts have held that the affected party may seek mandamus relief if the deadline is not met, but the court does not lose subject-matter jurisdiction for its failure to meet the deadline. Here, the OAG could have sought mandamus relief to compel a confirmation, but the OAG could also accept the later ruling without affecting the court's subject-matter jurisdiction. Trial court's late confirmation did not render the order void.

The record did not reflect that OAG failed to serve Father with the signed order. However, even if the OAG did not timely serve Father, Father did not show any resulting harm. Although a trial court's plenary power normally expires thirty days after a judgment is signed, Tex. R. Civ. P. 306a provides a method for extending this period. If a party is adversely affected because of lack of notice of the judgment, the time period in which a motion for new trial may be filed "shall begin on the date that such party or his attorney received such notice . . ." According to Father, he first learned of the confirmation 65 days after the confirmation order was signed. Because Father had an avenue for extending his deadline by invoking rule 306a, Father was not harmed by the OAG's alleged failure. To prevail on a restricted appeal, among other requirements,

the party must show that error is apparent on the face of the record. Father failed to show error on the face of the record.

SAPCR
CHILD SUPPORT ENFORCEMENT

TRIAL COURT IS NOT REQURIED TO AWARD ATTORNEY'S FEES FOR A JUDICIAL WRIT OF WITHHOLDING UNDER SUBCHAPTER D OF CHAPTER 138 OF TFC

¶12-2-14. ***Granado v. Meza,*** -- S.W.3d --, 2011 WL 6076029 (Tex. App.—San Antonio 2011, no pet. h.) (12/07/11) replaces opinion issued on 06/08/11.

Facts: In 1982, Father was found to be the biological father of the Child, and Father was ordered to pay monthly child support until the Child turned eighteen. Father was personally served with this order. However, Father claimed to be unaware of the order to pay child support until he was contacted about a decade later by the OAG. Father then paid child support as per the OAG's requests. In 2009, Mother filed liens, freezing Father's assets. Mother then filed a Notice of Application for Judicial Writ of Withholding under subchapter D of chapter 138 of TFC. In this notice, Mother claimed that Father was $54,343.30 in arrears. Father filed a motion to stay enforcement of the liens. In a hearing on this motion, Father became aware of the Notice of Application. Father filed a motion to stay issuance of the judicial writ of withholding. Trial court stayed the enforcement of some of the liens. Mother objected to Father's untimely defenses against the issuance of judicial writ of withholding and requested trial court determine the amount of Father's arrears and award Mother attorney's fees. Trial court found Mother's action was not barred by a statute of limitations and that Father was $500 in arrears plus interest. Trial court also released all liens against Mother and ordered each party to pay his or her own attorney's fees. Both parties appealed. Father argued that the statute of limitation had run on Mother's claims. Mother argued that trial court lacked jurisdiction to consider Father's motion to stay issuance of the judicial writ of withholding because it was untimely filed. Further, Mother argued that the evidence did not support trial court's arrearage determination, and it erred in failing to award her attorney's fees.

Holding: Affirmed

Opinion: Tex. R. App. P. 25.1(c) requires a party seeking to alter trial court's order to file a notice of appeal. Father failed to file a notice of appeal, so he waived his right to raise a statute of limitations defense in his cross-point.

TFC 157.323 provides that an obligor may dispute the amount of arrearages stated in a lien. Thus, regardless of whether Father timely filed his motion to stay, his challenge to the amount in arrears was properly before the court because Mother and Father each requested relief under TFC 157.323.

Trial court failed to comply with Mother's timely request for findings of facts and conclusions of law. However, a presumption of harm to Mother could be overcome if it could be shown that Mother could properly present her appeal and did not have to guess the basis on which trial court made its decisions. Here, in her appellate brief, Mother unambiguously stated that she "[was] not prevented from properly presenting her case to [COA]," and "she [was] not forced to guess the reasons the trial court ruled against her." Thus, Mother could not claim harm for trial court's failure to file its findings of fact and conclusions of law.

In determining the amount in arrears, the burden is on the obligee to show that that the amount owed is greater than the amount paid. The Order in Suit to Establish Paternity of Child ordered Father to make child support payments of $60 monthly until the Child turned eighteen. Mother and Father agree that this order was never modified. Father testified that he was initially unaware of his child support obligations, although evidence was presented showing that Father was personally served with this Order. There was conflicting evidence concerning how much Father had paid after being contacted by the OAG. Mother presented the OAG's payment record showing Father had only paid a small portion of the total child support due; however she did

not establish the completeness of this record. Father testified that the OAG had closed his case because he owed less than $500. Because the COA must defer to trial court's determination of questions of fact, COA could not say trial court's finding was against the great weight and preponderance of the evidence.

Although TFC 157.167(a) states that a court shall award attorney's fees in child support enforcement proceedings, this case is regarding a motion to withhold earnings for child support, which is governed by TFC Chapter 158. Nothing in subchapter D of Chapter 158 requires that a trial court award attorney's fees for filing a notice of application for judicial writ of withholding.

FATHER COULD NOT BE INCARCERATED FOR FAILURE TO PAY CHILD SUPPORT BECAUSE HE CONCLUSIVELY ESTABLISHED AN AFFIRMATIVE DEFENSE UNDER TFC 157.008(c)

¶12-2-15. ***In re Smith,*** -- S.W.3d --, 2011 WL 6217121 (Tex. App.—Dallas 2011, no pet. h.) (12/14/11).

Facts: OAG filed a suit seeking an order requiring Father to pay child support. After a hearing, trial court ordered Father to pay a $1000 lump sum. Father presented evidence showing that he was unable to make the payment. Trial court held Father in contempt and incarcerated him. Father filed a petition for habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: A contempt order is void and subject to collateral attack by habeas corpus if the condition for purging the contempt is impossible of performance. TFC 157.008(c) provides an affirmative defense for failure to pay child support that requires that the obligor show that he (1) lacks the ability to pay; (2) has no property that can be sold or otherwise pledged to raise funds; (3) has made reasonable attempts to borrow money and has failed to do so; and (4) is unaware of any source from which the funds can be legally obtained. Here, Father testified that he was unable to pay a lump sum and addressed each of the four requirements of TFC 157.008(c). OAG did not contradict Father's testimony or produce evidence showing that Father had the ability to pay. Father met his burden to conclusively establish his affirmative defense. Denying Father's petition for writ of habeas corpus would "authorize the trial court to confine [Father] for the balance of his natural life."

Editor's comment: *This decision holds that an obligor can prove inability to pay by a preponderance of the evidence merely by testifying to TFC 157.008(c)'s four defenses. But isn't the trial court the judge of a witness's credibility? What if the trial judge didn't believe the obligor? If this case means what it says, then a trial court must accept an obligor's testimony as true. J.V.*

Editor's comment: *This case is troubling. Normally the testimony of a witness does nothing but raise a fact issue for the trier-of-fact to decide. Evidence becomes conclusive only when it is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted but was not. This is a hard standard to meet, especially when a witness has a clear incentive or motive to not tell the truth, such as when they want to avoid possible jail time. Apparently, anyone seeking to hold another in contempt for failure to pay child support needs to elicit testimony or put on exhibits controverting the obligor's claim that he or she is unable to pay, rather than rely on the trial judge or jury's right to disregard the testimony of a witness based on the witness's demeanor or the witness's motive for lying. C.N.*

CONTEMPT ORDER WAS VOID BECAUSE IT INCLUDED FINDINGS OF TWO ACTS OF CONTEMPT THAT WERE NOT COMPLAINED OF IN THE MOTION FOR CONTEMPT

¶12-2-16. ***In re Claunch,*** No. 01-11-00336-CV, 2012 WL 112772 (Tex. App.—Houston [1st. Dist. 2011, orig. proceeding) (mem. op.) (01/06/12).

Facts: Mother and Father divorced, and Father was ordered to pay child support. Father failed to make some of his payments. Mother filed a motion to enforce child support, in which she alleged that she believed Father would also fail to make future child support payments. Mother asked trial court to hold Father in contempt and fine Father for "each failure to comply with the order of the Court from the date of this filing to the date of the hearing on the petition." After a hearing, trial court found Father in contempt and ordered Father to be confined. However, trial court suspended commitment and placed Father on community supervision under the condition that Father pay child support. Father made additional violations, and Mother filed a petition to revoke the suspension. Trial court found Father guilty on new acts of contempt and signed an order revoking the suspension of commitment. Trial court denied Father's petition for writ of habeas corpus. Father then filed a petition for habeas corpus relief, arguing trial court's order was void because it held him in contempt for acts not complained of in the motion for contempt.

Holding: Petition for Writ of Habeas Corpus Granted

Opinion: A writ of habeas corpus will issue if a contempt order is beyond a court's power or if the relator was not afforded due process of law. Here, Mother filed a motion to revoke, seeking enforcement of trial court's prior child support orders. In her motion, Mother alleged that Father had failed to pay child support for the months of June 2010 through February 2011. Trial court's order found Father in contempt for failing to pay child support from November 2010 through April 2011. Because Father was not put on notice that he was being charged with a failure to pay in March and April of 2011, trial court's order was void. Further, Mother's allegations of future violations in her motion for enforcement were insufficient to support trial court's order because the contempt order was based on the motion to revoke, which contained no allegations of future violations.

Editor's comment: *Really! You really have to be careful in contempt proceedings that everything is consistent. I can certainly understand how this could happen when the Father continued not to pay child support and the temptation to add a few months of unpaid child support is great. J.A.V.*

Editor's comment: *Contempt is a very tricky animal. Much like the specificity of trying a criminal case, with the due process protections. This case addresses the charging instrument (as in a criminal case). You have to be charged with the action to be found guilty of the action. No charge, no guilt. Bottom line, get your pleadings straight, with proper notice, before the hearing, and then make sure your order conforms to the pleadings. Or, the guilty one will get a free pass out of jail! M.M.O.*

CONTEMPT ORDER WAS VOID BECAUSE IT PUNISHED FATHER FOR ACTS FOR WHICH HE WAS NOT HELD TO HAVE BEEN IN CONTEMPT; ATTORNEY'S FEES COULD NOT BE AWARDED AS ADDITIONAL CHILD SUPPORT BECAUSE MOTION TO ENFORCE WAS FILED AFTER THE CHILD TURNED 18.

¶12-2-17. ***In re Corbett,*** No. 02-11-00430-CV, 2012 WL 386744 (Tex. App.—Fort Worth 2012, orig. proceeding) (mem. op.) (02/08/12).

Facts: Mother filed a motion to enforce child support, in which she alleged that Father was in contempt for 277 violations. Mother claimed that Father filed to pay the full amount of additional child support as reimbursement for the Child's health insurance and medical expenses. After a hearing, trial court found Father in contempt for 12 of the violations totaling $741.55. However, trial court ordered that Father be confined until

he paid the full amount he was in arrearages, which was over $40,000 plus interest, as additional child support. Trial court included Mother's attorney's fees in the total arrearages. Father filed a petition for writ of mandamus, arguing that Mother failed to notify him of the medical and insurance expenses, so he could not be held liable for them. In addition, Father complained that trial court abused its discretion in awarding attorney's fees. Father also argued that the contempt order was void because it held him in coercive contempt for the 277 violations alleged instead of the 12 acts for which he was found in contempt. Finally, Father argued that trial court erred in awarding attorney's fees as additional child support because the Child was over the age of 18 before the motion to enforce was filed.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Contempt orders are subject to mandamus relief if there has been a clear abuse of discretion. Here, trial court held that of the 277 violations alleged by Mother, Father was only found in contempt for 12 of them. However, trial court ordered that Father be confined until he paid the total amount for which he was found to have been in arrearages, which amounted to much more than the 12 violations. Because the contempt order assessed punishment for acts not punishable by contempt, the entire contempt order was void.

TFC 154.001(a)(1) provides that a court may order child support until a child is 18 years of age or until the child graduates from high school. Here, the action seeking enforcement was not brought until after the Child had turned 18. Thus, attorney's fees for this enforcement action could not be awarded "as additional child support." Trial court had no jurisdiction to classify the attorney's fees as additional child support.

SAPCR
MODIFICATION

TRIAL COURT'S TEMPORARY ORDER THAT THE CHILDREN REMAIN IN CURRENT COUNTY WAS INVALID BECAUSE THE ORDER MODIFIED MOTHER'S RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE AND THE REQUIREMENTS OF TFC 156.006 WERE NOT SATISFIED

¶12-2-18. ***In re Payne,*** No. 10-11-00402-CV, 2011 WL 6091265 (Tex. App.—Waco 2011, orig. proceeding) (mem. op.) (12/02/11).

Facts: Mother and Father divorced, and they were appointed joint managing conservators of their Children. Mother was granted the exclusive right to designate the Children's primary residence without geographical restrictions. Later, Mother got engaged, and Father learned that Mother intended to move to a different county. Father shared the news with the Children, who were initially "shocked" but, after time, were looking forward to the move. Father filed a SAPCR, seeking either custody or a geographical restriction on the Children's domicile. Mother was married just before trial court held a hearing on the motion. After a hearing, trial court issued temporary orders restricting the Children's residence to their current county. Mother filed a petition for writ of mandamus, seeking a withdrawal of the temporary orders.

Holding: Petition for Mandamus Conditionally Granted

Majority Opinion: (C.J. Gray, J. Davis)

Mandamus is appropriate when seeking relief for temporary orders because temporary orders are interlocutory and not appealable.

TFC 156.006(b) states that a trial court may not modify the designation of the person who has the exclusive right to designate the primary residence of a child unless one of three conditions exists. Here, the parents agreed that the latter two conditions did not apply. Thus, the only subsection that was applicable was 156.006(b)(1), which allows a change if the child's present circumstances significantly impair the child's

physical health or emotional development. No evidence was introduced supporting a finding that (1) was present. Merely finding that it would be in the child's best interest to restrict the move is not sufficient to satisfy the legislative requirement. No evidence was presented to support trial court's temporary orders.

Dissenting Opinion: (J. Scoggins)

The orders did not change the designation of the person with the exclusive right to designate the primary residence of the Child. The order did not give that right to Father. The order only required that the Children not move until the outcome of the final hearing.

Editor's comment: *The dissent contends that a temporary order restricting the children's residence to a specific county, when the divorce decree contained no geographic restriction, does not have "the effect" of changing the designation of the person who has the exclusive right to establish the children's residence. But such a temporary order does have that effect: It permits the court, if not the other parent, to impose a residence restriction. J.V.*

Editor's comment: *I think Justice Scoggins is right on this one. I don't believe that an order requiring the children to remain living in their current county (when mother has no geographic restriction) pending final decision equates to changing the parent who has the exclusive right to determine the primary residence of the children. The trial court should have been permitted to make such an order as requiring the mother and the children to move BACK to their current county after final trial and after they had already moved to their new city is absurd and certainly not in the children's best interest. Many counties like Dallas and Collin have a similar injunction in their respective standing orders (albeit restricting any moves out of State, as opposed to out of the current county), and I wonder whether that would have made a difference, or offered an alternative means to the end. R.T.*

Editor's comment: *Interesting case, holding the domicile restriction along the lines of a conservatorship determination instead of one of the rights of a parent. Taking their logic further, to restrict the primary conservator's right to make educational decisions on temporary order in modification… would that also be a conservatorship determination? This is definitely a case of first impression and I expect there will be more written on this issue. M.M.O.*

TRIAL COURT COULD NOT MODIFY MOTHER'S RIGHT TO DESIGNATE THE PRIMARY RESIDENCE OF THE CHILD BECAUSE FATHER FAILED TO PRESENT EVIDENCE OF CIRCUMSTANCES THAT WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT

¶12-2-19. ***In re Rather,*** No. 14-11-00924-CV, 2011 WL 6141677 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding) (mem. op.) (12/08/11).

Facts: Mother and Father were joint managing conservators of Mother's youngest Child, and Mother was granted the exclusive right to designate the primary residence of the Child without geographical restrictions. Mother moved to a new city with her fiancé, and Father filed a SAPCR, in which he sought either custody of the Child or an order requiring Mother to move back to her former home. Trial court held a hearing, at which it heard testimony from Father and Father's mother ("Mother-in-Law"). Trial court entered temporary orders giving Father the right to determine the primary residence. Mother filed a petition for writ of mandamus, seeking to have the trial court's order vacated.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Mandamus is appropriate when seeking relief for temporary orders because temporary orders are interlocutory and not appealable.

TFC 156.006 provides the conditions under which a court may change the designation of the person who

has the exclusive right to designate the primary residence of a child. Here, the parents agreed that the only subsection that was applicable was 156.006(b)(1), which allows a change if the child's present circumstances significantly impair the child's physical health or emotional development. At trial, there was evidence that Mother-in-Law (1) thought Mother's house was messy and unsanitary; (2) thought that Mother did not provide proper supervision, and (3) once saw the Child outside in sub-freezing temperatures without a jacket or sweater. Father testified that if Mother moved, it would be difficult for him to maintain a relationship with the Child. However, there no evidence presented of Father's current relationship with the Child. Father also expressed concerns that Mother would not have the support of her family if she moved. COA held that there was no evidence of circumstances that would significantly impair the Child's physical health or emotional development. Further, COA held that even if it were to infer that such circumstances existed, there was no evidence indicating that such circumstances would re-occur after a move.

BY SCHEDULING AND CONDUCTING A HEARING ON FATHER'S MOTION TO MODIFY CONSERVATORSHIP, TRIAL COURT IMPLICITLY FOUND FATHER'S TFC 156.102 AFFIDAVIT WAS SUFFICIENT TO SUPPORT HIS ALLEGATIONS SUPPORTING HIS MOTION

¶12-2-20. ***In Re A.L.W.,*** -- S.W.3d --, 2011 WL 6122941 (Tex. App.—Texarkana 2011, no pet. h.) (12/09/11).

Facts: Mother was granted the exclusive right to designate the primary residence of the Child. Less than one year later, Father filed a motion to modify this right. Father claimed that Mother had given the Child to him because police had been called out to her house after a report of domestic violence. Just before the hearing, Mother filed a motion to dismiss Father's petition. At the hearing, trial court stated that it was only addressing the motion to modify, and Mother did not raise the issue of her motion to dismiss. CPS testified that Mother's current husband had abused her and that Mother had threatened to harm herself and the Child. Trial court entered temporary orders in favor of Father. Later, trial court held another hearing on Mother's motion to dismiss and granted her motion, finding that Father's attached affidavit was insufficient to support his allegations. Father appealed, arguing that his affidavit was sufficient and pointing out that a temporary hearing had already been conducted, and temporary orders had already been entered.

Holding: Reversed and Remanded

Opinion: TFC 156.102 provides the requirements that must be satisfied prior to a modification of an exclusive right to designate the primary residence of the child when the motion to modify is filed less than one year after the original order. An affidavit must be attached to the motion, and the affidavit must state that the child's environment may endanger the child's health or emotional development or that the person who has the right has voluntarily relinquished primary care for at least six months and the modification is in the best interests of the child. TFC 156.102(c) states that if the affidavit is insufficient, "[t]he court shall deny the relief sought and refuse to schedule a hearing for modification." Contrarily, if the affidavit is sufficient, "the court shall set a time and place for a hearing." Here, Father's affidavit stated that Mother had voluntarily given the Child to Father and that Father was afraid for the Child's safety if the Child was returned to Mother. Trial court set and conducted a hearing, and by doing so, it implicitly found that the facts in the affidavit were adequate to support Father's allegations. Moreover, Mother failed to bring her motion to dismiss at the first hearing, so her motion was effectively waived.

MOTHER COULD NOT REMOVE GEOGRAPHICAL RESTRICTION ON CHILD'S RESIDENCE BECAUSE DETAILS OF THE CHILD'S LIFE AFTER PROPOSED MOVE WERE UNCERTAIN AND THE CHILD PRESENTLY LIVED IN A STABLE ENVIRONMENT; TRIAL COURT COULD NOT AWARD FEDERAL TAX EXEMPTION TO FATHER BECAUSE THE ORDER CONFLICTED WITH FEDERAL TAX LAW

¶12-2-21. ***In re C.P.L.,*** No. 07-11-00128-CV, 2011 WL 6217426 (Tex. App.—Amarillo 2011, no pet. h.) (mem. op.) (12/14/11).

Facts: Mother and Father had a Child. Parents were married a few months later, but the marriage ended in divorce. In the agreed divorce decree, Father and Mother were named JMCs. Mother was granted the exclusive right to designate the Child's primary residence with a geographical restriction. After an extended job search, Mother found work in Tulsa and filed a motion to modify the decree and remove the geographic restriction. Father filed a counter-motion, in which he sought the right to designate the primary residence of the Child if Mother chose to move. After a bench trial, trial court denied Mother's request to remove the geographic restriction and granted Father the exclusive right to designate the Child's primary residence once the child reached kindergarten or in two years' time, whichever came first. Trial court also granted Father with the exclusive right to the federal income tax child dependency exemption. Mother appealed, arguing trial court erred in denying her request to remove the geographic restriction, in prospectively granting Father the exclusive right to designate the Child's primary residence, and in granting Father the tax exemption.

Holding: Affirmed as Modified

Opinion: When determining whether to modify a geographic restriction on a child's residence, a court may consider a number of factors, including the child's relationship with extended family, the presence of friends and a supportive environment, the financial situation of the parents, and the ability of the noncustodial parent to relocate. Here, Mother did not present any evidence of what life would be like for the Child after moving to Tulsa. In fact, at trial, she could not say whether the detriments of a move would outweigh any benefits. Contrarily, there was substantial evidence of a consistent environment for the Child at her current home. Child had friends, grandparents, an established babysitter, and she attended church with her Father. In addition, Father testified that he believed Mother could find work locally and that he would be "devastated" if the Child were allowed to move. Because of the uncertainty of the consequences of a move to Tulsa, trial court did not abuse its discretion in denying Mother's request to dissolve the geographic restriction on her right to designate the Child's primary residence.

The Internal Revenue Code (IRC) gives a taxpayer an exemption for dependants, which includes a "qualifying child." Under IRC, the parent who has possession of a child for the greater part of the year is the "custodial parent" and is entitled to the exemption. If the child resides with each parent an equal amount of time, the parent with the highest adjusted gross income is entitled to the exemption. If the parent entitled to the exemption signs a written declaration that he or she will not claim the exemption, the other parent may take the exemption. A trial court's order with regard to granting the dependent child exemption must conform to applicable federal law. There was no evidence supporting trial court's order granting Father the exclusive right to claim the federal dependency exemption. Trial court abused its discretion in awarding Father the exemption. COA reformed trial court's order by striking this portion of the order.

TRIAL COURT IN NON-ENFORCEMENT MODIFICATION SUIT HAD JURISDICTION AND AUTHORITY TO ORDER FATHER TO PAY REASONABLE ATTORNEY'S FEES AS ADDITIONAL CHILD SUPPORT

¶12-2-22. ***Tucker v. Thomas,*** -- S.W.3d --, 2011 WL 6644710 (Tex. App.—Houston [14th Dist.] 2011, no pet. h.) (12/20/11).

Facts: Mother and Father divorced and were appointed JMCs of their Children. Mother was granted the exclusive right to designate the Children's primary residence without a geographical restriction. A few years later, Father filed an original SAPCR seeking the exclusive right to designate the Children's primary residence with a geographical restriction. Mother filed a counter-petition seeking appointment as the sole managing conservator. Mother also asked for a modification of Father's possession and an increase in Father's child support obligation. Trial court appointed an amicus attorney to represent the Children's best interests. After a bench trial, trial court denied Father's petition and raised his child support obligation. Trial court ordered each Parent to pay half of the amicus attorney's fees as additional child support and ordered Father to pay Mother's attorney's fees as additional child support. Father filed a motion for new trial challenging trial court's orders regarding the attorney's fees. Trial court denied the motion. Father appealed, arguing trial court erred in awarding Mother attorney's fees, in assessing the attorney's fees as additional child support, and in assessing compound post-judgment interest on the fees. Father also argued that trial court abused its discretion in denying his request for modification because trial court allowed witnesses to be taken out of order and took long breaks during the trial. Father asserted that trial judge did not pay attention during the trial and did not hear or understand the evidence. Additionally, Father contended that trial judge conducted his own investigation by requesting his clerk to obtain information about a prior enforcement petition filed by Father's attorney involving Mother's current husband and her current husband's ex-wife.

Holding: Affirmed in Part, Reversed and Remanded in Part

En Banc Majority Opinion: (J. Frost, J. Seymore, J. Brown, J. Boyce, J. Jamison)

TFC 151.001 states that a parent has a duty to support his child. Further, a parent who fails in this duty is liable to the person who provides necessaries to the child, even if the provider is the other parent. Tex. Sup. Court has found that attorney's fees may constitute necessities and may fall within the duty of support owed by parents. Case law supports an order requiring a parent to pay reasonable attorney's fees in a non-enforcement modification suit.

TFC includes more language of permission than it contains language of prohibition. Legislature has granted family courts with vast power and broad discretion over many matters governed by TFC. No statute expressly prohibits a trial court from ordering a parent to pay reasonable attorney's fees. The absence of a limitation is some indication that Legislature did not intend to restrict this authority. Here, trial court found that the attorney's fees incurred by Mother's attorney and the amicus attorney were reasonable and necessary. Trial court had the authority and jurisdiction to order Father to pay these attorney's fees as additional child support.

TFC 157.167 permits a court to order a parent to pay reasonable attorney's fees if the respondent has failed to make child support payment. In this section, there is no requirement that a trial court find that the fees and costs are child support or necessaries. However, if such a finding is made, this section permits the court to enforce its order by any means available for the enforcement of child support, except for income withholding. TFC 158.0051 states that income may only be withheld after an action to enforce child support. However, nothing in this section reflects a Legislative intent to limit when a court may order a parent to pay attorney's fees as additional child support.

TFC 106.002 permits a court to render judgment for reasonable attorney's fees in any suit under TFC, and the judgment may be enforced by any means available for the enforcement of a judgment debt. This section does not state that such a judgment is a debt or must be a debt. It merely states that the same means are available for enforcing the order.

TFC 107.023 states that an amicus attorney is entitled to reasonable fees and that a court may determine that an amicus attorney's fees are necessaries for the benefit of the child. Further, a parent has a duty to pro-

vide necessaries for his minor children. Here, trial court found that the amicus attorney's fees were necessaries for the benefit of the Children. This finding supported trial court's order that Father pay one-half of these fees in additional child support.

The dissent points to another case decided by this COA, *Daggett*. However, *Daggett* was decided before the above TFC code provisions were enacted. Further, *Daggett* is not on point because it did not discuss attorney's fees in a non-enforcement modification suit.

To support an award of attorney's fees, there must be a finding that the fees were both necessary and reasonable. Here, Mother submitted evidence showing that the fees incurred by her attorney were for necessary legal services benefitting the Children. However, there was no evidence in the record addressing the reasonableness of Mother's attorney's fees. Thus, the evidence was insufficient to support trial court's order that Father pay Mother's attorney's fees. Therefore, this issue is remanded to trial court to determine the amount of reasonable fees incurred by Mother.

Father failed to raise any objection at trial that Mother did not request attorney's fees in their pleadings. Father also failed to raise an objection as to the method for calculating the interest rate. Father did not adequately brief these same complaints with regard to the amicus attorney's fees. Moreover, Father did not raise any objections as to trial court's alleged misconduct, and none of the alleged errors fall into the narrow scope of the fundamental error doctrine. Thus, these complaints are all waived.

En Banc Concurring Opinion: (J. Frost, J. Seymore, J. Brown)

There is a split of authority on this issue between the 1st and 14th COAs. Because Tex. Sup. Court cannot review issues on its own initiative, and this issue has not yet been brought before Tex. Sup. Court, there has been no way to resolve the split. Because there are two COAs that share a jurisdiction, a conflict between these COAs creates serious problems for trial courts, lawyers, and clients within the jurisdiction. When a case is at the trial court level in the 1st and 14th COAs' jurisdiction, the parties and the court cannot foresee which of the two COAs will hear the appeal if there is one. The parties and the court cannot anticipate which law or rules to follow. The concurrence suggested that this problem could be resolved if the two COAs were combined into one court.

En Banc Concurring Opinion: (J. Jamison)

An amicus attorney as an attorney appointed by the court to assist the court in protecting a child's best interests. A court may appoint an amicus if the appointment is necessary to determine the child's best interests, and the amicus must receive reasonable compensation for her services. Here, trial court found that the amicus attorney's expenses were reasonable and necessary. However, even if trial court had not explicitly found the expenses to be reasonable and necessary, the court's appointment of the amicus implies such a finding. If an amicus is necessary, a court must use its available tools to ensure the amicus is paid. By ensuring an amicus is paid, competent attorneys are encouraged to accept amicus attorney assignments. Trial court was within its discretion in finding the amicus attorney's fees to be necessaries for the Children and in ordering Parents to each pay half of the amicus attorney's fees.

En Banc Dissenting Opinion: (J. Christopher, C.J. Hedges, J. McCally)

No statute permits a judgment for attorney's fees as child support in a non-enforcement modification suit. A judgment for child support is enforceable by contempt. However, when there is a judgment for attorney's fees as costs, the judgment may only be enforced by any means available for the enforcement of a judgment for debt. A judgment for costs may never be enforced by contempt. None of TFC sections cited by the majority include the words "attorney's fees," and none of the cited sections provides for an award of attorney's fees taxed as additional child support. There is no textual basis for a presumption that Legislature intended attorney's fees to be taxable as child support in a non-enforcement modification suit. The Legislature fully addressed the subject of attorney's fees in suits affecting the parent-child relationship. Attorney's fees may only be considered as child support in enforcement actions under Chapter 157.

A parent's liability for "necessaries" accrues only upon a failure to fulfill the parent's duty to support his child. A failure to provide support is an issue that arises in enforcement proceedings, not modification suits. In addition, the majority fails to explain why the legislature would permit wage withholding in suits where

there has been no failure of support, but expressly prohibit wage withholding where judicial intervention is "necessary to ensure the child's physical or emotional health or welfare."

The cases cited by the majority refer generally to "necessaries," but there is no indication that "necessaries" and "child support" are interchangeable. *Hardin* is the only cited case that is on point, but it was wrongly decided. No statute was cited in *Hardin*, and the cases cited in it only state that services of an attorney are necessary in certain proceedings. None of the cases cited in *Hardin* state that necessaries are enforceable as child support per se. Moreover, six other Texas appellate courts have held that attorney's fees are never taxable as child support in non-enforcement modification suits.

Finally, the majority ignores this COA's precedent in *Daggett* which held that the characterization of attorney's fees depended entirely on the nature of the underlying proceeding. While fees in an enforcement case may be characterized as "necessities," fees in other types of proceedings could only be considered as "a debt . . . not enforceable by contempt." The majority's test that attorney's fees may be enforceable as child support if "the services performed by the attorney have a relationship to the needs of the child" is no test at all. An attorney's services will always have some relationship to the needs of a child in a SAPCR. The majority attempts to distinguish *Daggett* by stating that it was decided before the enactment of TFC 157.167. However, Tex. R. Civ. P. 308a was in effect at that time. Rule 308a permitted an order of attorney's fees in an enforcement proceeding, but it did not expressly permit the fees to be assessed as child support. *Daggett* is still applicable, and it clearly drew a line between enforcement and non-enforcement type actions. Many courts have held that attorney's fees must accrue in a suit for enforcement before they may be taxed as child support.

Editor's comment: *I have a big problem with this opinion and wholly agree with the dissent. The majority by taking the position that if the Legislature doesn't specifically limit something, the sky's the limit could open the door to all sorts of unintended consequences. Here, the Legislature has specifically allowed attorney's fees* ***only*** *in the limited context of enforcement actions. If it meant to expand the award of attorney's fees to all actions under Title 5, it could have done so. G.L.S.*

Editor's comment: *the majority opinion's reasoning here is nonsensical. I do not envy those colleagues practicing in the Houston area, and trying to grapple with the slippery slope this opinion creates.R.T.*

TRIAL COURT COULD NOT ORDER MOTHER AND CHILDREN TO REMAIN IN TEXAS PENDING COMPLETION OF A SOCIAL STUDY BECAUSE THERE WAS NO GEOGRAPHICAL RESTRICTION ON MOTHER'S RIGHT TO DESIGNATE THE CHILDREN'S PRIMARY RESIDENCE, AND FATHER FAILED TO SPECIFY ANY CIRCUMSTANCES THAT WOULD SIGNIFICANTLY IMPAIR THE CHILDREN'S EMOTIONAL WELL-BEING

¶12-2-23. ***In re Strickland,*** -- S.W.3d --, 2012 WL 117614 (Tex. App.—Fort Worth 2011, orig. proceeding) (01/10/12).

Facts: Mother and Father divorced and were appointed JMCs of their Children. Mother was granted the exclusive right to designate the Children's primary residence, with no geographical restriction. Mother expressed a desire to move to Florida with her new boyfriend, who wanted to support the Children. Mother and the boyfriend intended to marry. Father filed a SAPCR and an application for TRO. Father asked trial court to order a social study and order Mother not to move the Children until the social study could be completed. Trial court granted Father's requests and issued temporary orders requiring the Children to "remain in the area" until the social study was completed. Mother filed a petition for writ of mandamus to have the temporary orders vacated.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: TFC 156.006(b) forbids a trial court from rendering a temporary order that modifies the designation of the person with the exclusive right to designate the Child's primary residence unless one of three excep-

tions is shown. Here, trial court ordered Mother not to move the Children from Texas until a social study could be completed. Because the original decree had no geographical restrictions on Mother's exclusive right to designate the Children's primary residence, trial court's temporary order had the effect of changing this right. Further, the only possible exception that might have applied was TFC 156.006(b)(1), which permits a modification to the exclusive right if it is shown that "the child's present circumstances would significantly impair the child's physical health or emotional development." Here, Father attached an affidavit to his request for TRO. Father alleged that a move would harm the Children because it would separate them from their school, activities, and family. Father expressed concern that Mother had no job, and if she broke up with her current boyfriend, she and the Children would be alone in Florida without a source of income. Father did not allege that Children would suffer any physical impairment, and he did not allege any specific impairment to the Children's emotional development. Emotional distress from separation and loss, by itself, is not enough to trigger the statutory exception. Mother's desire to move the Children out of state was not enough, by itself, to trigger the statutory exception. Because Father did not allege any specific circumstances that would impair the Children's emotional development, trial court erred in ruling that the Children had to "remain in the area" until the social study was complete.

Editor's comment: *Same song, similar verse as to the Payne case above. I still do not see how creating a temporary geographic restriction on the parent who initially had, and still has, the exclusive right to determine the primary residence of the children, is the same as CHANGING the person who has the exclusive right to determine the primary residence. It seems to me like Section 156.006(b) was designed to keep parents out of court and from re-litigating and re-hashing their same fight over primary within a year of their divorce unless one of the exceptions applies (i.e. significant impairment). This situation, and the one in Payne, is different in my mind because there is a new fact – the primary parent is now planning to move hundreds or thousands of miles away. The trial court should have the power to TEMPORARILY keep the children here while they sort out the final decision to avoid a multiplicity of moves. Section 156.006(b) is supposed to be a shield, not a sword. R.T.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

INCARCERATED MOTHER FAILED TO MEET BURDEN OF SHOWING THAT HER APPEARANCE AT TRIAL WAS NECESSARY OR THAT HER RIGHT OF ACCESS OUTWEIGHED THE NEED TO PROTECT THE CORRECTIONAL SYSTEM'S INTEGRITY

¶12-2-24. ***In re D.C.C.,*** -- S.W.3d --, 2011 WL 6076271 (Tex. App.—San Antonio 2011, no pet. h.) (12/07/11).

Facts: Mother was incarcerated during proceedings to terminate her parental rights to the Child. Mother's counsel intended to have Mother appear by video conference. However, Mother was transferred to a new facility just before trial, and video conference arrangements were not made in time for trial. Mother's counsel stated that because of the transfer, counsel was not ready. Trial court decided to continue with the trial. Mother moved for a new trial, but trial court denied her motion. Trial court terminated Mother's parental rights after finding termination was in the Child's best interests and that three of the possible acts listed in TFC 161.001(1) had occurred. Mother appealed, arguing that trial court erred in failing to make arrangements for her participation. In addition, Mother contended that her counsel was ineffective because the evidence did not support one of the three acts in TFC 161.001(1), and counsel did not object to this finding.

Holding: Affirmed

Opinion: When determining whether an inmate has a right to appear, the court must consider a number of factors to weigh the inmate's right of access against the protection of the correctional system's integrity. The burden rests on the inmate to show specific grounds and factual information supporting the necessity of the inmate's appearance in court. Mother did not meet this burden and she failed to argue that her interests outweighed the impact on the judicial system.

A parent in a parental termination proceeding is entitled to the same effective assistance of counsel as a defendant in a criminal defense proceeding. To show ineffective assistance of counsel, the parent must show that counsel's performance was deficient and that the parent was prejudiced by the performance. To terminate a parent's parental rights to her child, it must be shown that the termination is in the child's best interests, and that one of the enumerated acts in TFC 161.001(1) has occurred. Here, trial court found that termination was in the Child's best interest and that three separate acts in TFC 161.001(1) had occurred. Mother did not challenge the best interest finding or the sufficiency of the other two acts. Because a finding of only one was necessary for termination, Mother did not establish that she was prejudiced by ineffective counsel.

Editor's comment: *I have a problem with this case. Mother is mysteriously transferred to a new facility just before trial so she could not appear by videoconference. I have a problem with a Mother being denied the opportunity to appear at a termination proceeding especially since a termination proceeding has constitutional implications. J.A.V.*

CONDITIONS AND TREATMENT OF THE CHILDREN WHILE IN CPS'S CARE WAS NOT RELEVANT TO A BEST INTERESTS INQUIRY IN A TERMINATION SUIT

¶12-2-25. ***In re R.N.,*** -- S.W.3d --, 2011 WL 6125193 (Tex. App.—Texarkana 2011, no pet. h.) (12/09/11).

Facts: CPS filed a suit to terminate Parents' rights to their three Children. During the trial, Parents attempted to introduce evidence regarding their concerns about psychiatric medications prescribed to the Children, an alleged instance of sexual abuse, and injuries sustained by the Children while they were in foster care. A CPS employee told the jury that the allegations of sexual assault was never substantiated, but the Children were moved to a different foster home. An offer of proof was made outside the presence of the jury. The CPS employee explained that the parents objected to the administration of the medication. Parents argued that this evidence went to the breakdown of trust between Parents and CPS, showing that Parents were good parents, and CPS did not handle the situation well. Trial court ruled that the evidence was not relevant to the issue of termination. Outside the presence of the jury, a CASA case supervisor testified that one of the Children had indicated that he had received a "butt massage" from a foster brother. The CASA supervisor also testified that the Children appeared to have been injured while in foster care when the Children were riding bikes through trees. After this offer of proof was made, Parents did not ask trial court to admit the CASA supervisor's testimony into evidence.

Before the trial, trial court granted a motion in limine to exclude evidence of alleged criminal activity by Father. During trial, while a therapist was being cross-examined regarding her analysis of the Parents, the therapist said "due to [Father's] criminal history . . ." Parents objected to the testimony, and trial court sustained the objection. Counsel approached the bench to discuss the testimony and the motion in limine. Parents asked for the jury to be removed because opposing counsel was speaking loudly enough for the jury to hear the sidebar. After the jury was removed, Parents moved for a mistrial for the violation of the motion in limine. Trial court denied the motion because the witness had not testified to the specifics of Father's criminal history. Trial court terminated Parents' parental rights to the Children. Parents appealed, arguing that trial court erred in excluding the testimony of the alleged sexual abuse, the Children's injuries, and the Children's medications. Parents also argued that trial court erred in denying their motion for mistrial.
Holding: Affirmed

Opinion: In order to preserve an appeal regarding the exclusion of evidence, the complaining party must have offered the evidence at trial and received an adverse ruling. Here, Parents made an offer of proof, but they did

not ask the court to allow the introduction of the CASA supervisor's testimony. Thus, court did not rule on the admissibility of the evidence. Without a ruling, the issue was not preserved for appeal.

Trial court could have reasonably found that the allegations of sexual abuse were not relevant to a best interest finding because the Children had been removed from that home. Further, trial court could have reasonably found that the Parents' concerns about the Children's psychiatric prescriptions were inconsequential to a best interest inquiry. Moreover, Tex. R. Evid. 403 states that evidence may be excluded "if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Trial court could have reasonably believed that admitting the evidence could have led to a trial on the best practices of CPS, rather than focusing on the actual issues in the case.

When a party violates an order granting a motion in limine, a trial court has the discretion to grant or deny a motion for mistrial. Here, trial court declined to grant the motion for mistrial because no specifics were mentioned. The witness merely stated that Father had a criminal record. She did not provide any details about Father's criminal past. The Parents failed to move to strike the testimony or to ask trial court to instruct the jury to disregard the testimony. Trial court could have reasonably determined that the violation was inconsequential and that any prejudice could have been cured by an instruction to the jury if one had been requested.

Editor's comment: *so close, yet so far. Make sure you complete ALL steps to an offer of proof, or it's worthless on appeal. Step 1 – offer the evidence; Step 2 – secure the adverse ruling; Step 3 – make the offer of proof by putting the testimony on the record. R.T.*

IF A PARENT APPEARS IN OPPOSITION TO A TERMINATION PROCEEDING WITHOUT AN ATTORNEY, THE TRIAL COURT IS REQUIRED TO ASK WHETHER THE PARENT WISHES TO PROCEED WITHOUT THE BENEFIT OF COUNSEL

¶12-2-26. ***In re J.M.,*** -- S.W.3d --, 2012 WL 335859 (Tex. App.—Amarillo 2011, no pet. h.) (02/01/12).

Facts: The Department filed an original petition seeking the termination of Mother's parental rights to her Child. In its petition, the Department asked trial court to appoint an attorney ad litem to Mother if she appeared in opposition to the proceedings without counsel and was found to be indigent. At the initial hearing, Mother had agreed to temporary orders that named the Department as temporary managing conservator and named her as temporary possessory conservator. Because Mother was not in opposition, trial court deferred its finding on whether Mother was indigent. A few weeks prior to the initial proceeding Mother had been arrested and the criminal record was made a part of the record in the termination proceeding. Mother was eventually found guilty and sentenced to six years' confinement. At the final hearing in the termination proceeding, Mother was pending transfer to serve her criminal sentence. Trial court asked Mother if she was ready to proceed and whether she understood the issue before the court. She replied "yes" to both questions. Trial court moved forward with the hearing. Mother's bill of costs from the criminal proceedings was entered into evidence. This document indicated that Mother had been found indigent for the criminal proceedings and had been appointed counsel. After the final hearing, trial court terminated Mother's parental rights to the Child. Trial court then appointed an attorney ad litem to represent Mother on appeal. In her appeal, Mother argued that trial court committed a reversible error in failing to appoint trial counsel. The Department contended that trial court had no duty to inquire into whether Mother was indigent because she failed to ask for the assistance of counsel. The Department argued that because Mother said that she was ready and did not ask for an attorney, she waived her right to counsel.

Holding: Reversed and Remanded

Opinion: A termination proceeding is one of constitutional nature, and parents involved in a termination suit are entitled to representation. TFC 107.013(a) requires a court to appoint counsel to "[a]n indigent parent of the child who responds in opposition to the termination." If a parent claims to be indigent and requests appointment of counsel, the court must determine whether the parent is, in fact, indigent and appoint counsel if it finds the parent indigent. There is no reversible error if an indigent parent retains counsel, fails to request

appointment of counsel, and is not offered representation. However, here, Mother was not represented by counsel at the final hearing, and it was clear that Mother was opposed to the termination of her parental rights of the Child. Trial court did not ask Mother if she wanted to request appointment of counsel. In a criminal proceeding, an indigent defendant may waive right to counsel, but only if the waiver is made voluntarily and with knowledge of the potential consequences of proceeding without an attorney. Nothing in the record indicated that Mother was aware that she had a right to representation. Moreover, the Department's original petition asked trial court to determine the indigent status of a parent who appeared in opposition without counsel. Trial court initially deferred its finding because Mother did not appear in opposition at the first hearing. Further, trial court should have been alerted to the possibility that Mother was indigent. The bill of costs from her criminal prosecution indicated that she had been declared indigent in those proceedings. Also, her Lone Star Card for government food assistance had been depleted when the Child was taken into custody by the Department. Because Mother appeared in opposition to the termination proceeding without representation, trial court was required to inquire whether she wanted to proceed without the benefit of counsel.

Editor's comment: *While I certainly don't know all of the underlying circumstances, this seems like a no brainer especially since a termination proceeding has constitutional implications. J.A.V.*

THE DEPARTMENT FAILED TO SHOW THAT IT HAD MADE REASONABLE EFFORTS TO RETURN THE CHILD TO MOTHER, SO TRIAL COURT WAS OBLIGATED TO RETURN THE CHILD TO MOTHER AFTER THE TFC 262.201 ADVISORY HEARING

¶12-2-27. ***In re Allen,*** -- S.W.3d --, 2012 WL 6747481 (Tex. App.—Texarkana 2012, orig. proceeding) (02/08/12).

Facts: The Department received a report that Mother was unwilling to care for her Child and that she mistreated the Child. The Department sent an investigator to investigate the situation. At trial, the investigator testified that there were two pillows and two blankets in the crib and a large coat hanging over the side of it. The investigator stated that she was concerned that the Child could be smothered while sleeping. The investigator also testified that the baby's bottle was filled with a thick rice cereal that could cause the baby to choke. After the investigation, the Department removed the Child from Mother's care. The same investigator had been involved during a prior termination of Mother's parental rights to an older child. At the advisory hearing, the investigator testified that during the prior proceedings, Mother failed to understand or show appropriate parenting skills. The investigator testified that the current allegations mirrored those in the prior case. During the prior proceedings, Mother had been diagnosed as bipolar. The investigator testified that Mother had anger issues when she did not take her medication. Mother was not taking her medication during the current proceedings. After the hearing, trial court entered temporary orders granting temporary conservatorship to the Department. Mother filed a petition for writ of mandamus, arguing that trial court abused its discretion in issuing the temporary order because the evidence was insufficient to support its findings.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Mandamus relief is appropriate when there has been a clear abuse of discretion and there is no adequate remedy by appeal. Because temporary orders in a SAPCR are not appealable, mandamus is an appropriate relief if there has been a clear abuse of discretion. TFC 262.201 provides that after a full advisory hearing, a trial court must return a child to the parents unless the court finds there was a danger to the health and safety of the child caused by an act or omission of the person in possession of the child; that removal of the child was urgently required to protect the child; and that reasonable efforts were made to reduce the risk of danger and return the child to the home. Here, there was no evidence that the Department made any effort to return the Child to the home. TFC 262.2015(a) provides that a court may waive this requirement if it "finds that the parent has subjected the child to aggravated circumstances." TFC 262.2015(b)(5) states that a court may find aggravated circumstances if the parent's parental rights to another child were terminated based on TFC 161.001(D) or (E). These subsections apply when the parent knowingly placed or knowingly allowed the

child to remain in dangerous conditions or persons who engaged in dangerous conduct. Here, the only evidence relating to the prior termination was the Department's testimony that Mother did not understand basic parenting skills and child development. This testimony did not provide support for TFC 161.001(D) or (E). There was no proof of "aggravated circumstances." Thus, the Department was required to show reasonable efforts to return the Child to the home, and it did not. Trial court erred in failing to return the Child to Mother.

Moreover, even if reasonable efforts had been made, the Department also failed to show that there was an urgent need to protect the Child or that there was a danger to the physical health and safety of the Child. Although trial court noted that its findings of fact were based on an affidavit accompanying the petition, the petition was never introduced as an exhibit at trial, and the judge did not take judicial notice of its content. The only evidence before the court regarding the prior termination was the testimony, which did not provide much detail on the termination. It was error for trial court to consider the information in the affidavit because it was not evidence at the trial.

JURY WAS FREE TO MAKE ITS OWN CREDIBILITY ASSESSMENT OF CHILD'S TESTIMONY REGARDING ALLEGED ABUSE; IMPEACHMENT EVIDENCE WAS PROPERLY EXCLUDED BECAUSE IT WOULD HAVE BEEN CUMULATIVE

¶12-2-28. ***In re E.A.G.,*** -- S.W.3d --, 2012 WL 651605 (Tex. App.—San Antonio 2012, no pet. h.) (02/29/12).

Facts: Mother had two Children, a Daughter and a Son, before she married Father. After marriage, they had four Younger Children. The Oldest Daughter accused Mother of being physically abusive and accused Father of fondling her. The six Children were removed from the Parents' care until the Oldest Daughter recanted her outcry and the Department's investigation did not find any signs of abuse. Later, the two Oldest Children alleged that Mother had threatened to burn down their home with the Children inside. The Department again removed the Children from the Parents' care. The Department sought to terminate the Parents' parental rights to all six Children. During trial, the Oldest Daughter testified that her Mother hit her on the head, threw objects at her, pulled her hair, and treated her like a maid. She also testified that Father touched her private parts and once put her hand under his shorts. Oldest Daughter testified that she had previously recanted her allegation of sexual abuse because she did not want Father's family to dislike her. Both the Oldest Children testified that the Parents' did not abuse the Younger Children. The Oldest Son testified that Oldest Daughter frequently ran away because she did not like to be reprimanded. When asked if he knew anyone who had been inappropriately touched, Oldest Son named a friend of Oldest Daughter. Both Parents denied abusing the Children and stated that Oldest Daughter was lying. A Department representative testified that during visitations, all the Children appeared happy to see Parents and Oldest Daughter even sat next to Father. Oldest Daughter ran away multiple times while in foster care. Mother testified that when Oldest Daughter ran away, she would return to Parents. Oldest Daughter admitted to using drugs while in the Department's care but denied posting provocative photos to Facebook. After two counseling sessions, Parents' counselor did not recommend family reunification. Based on all the evidence, the jury found that Parents had violated three of the enumerated acts in TFC 161.001(1) supporting termination and that termination was in the Children's best interests. Trial court terminated the Parents' parental rights to all six Children. Both Parents appealed, arguing that the evidence was not legally or factually sufficient to support trial court's findings. The Parents also argued that trial court erred in permitting their counselor to give her opinion that she "believed" Oldest Daughter's accusations. They further contended that trial court erred in admitting certain evidence that had not been timely disclosed in discovery. Mother argued that trial court erred in admitting a video of an interview Oldest Daughter because the video was in Spanish and the translator had not been certified. Both Parents argued that trial court erred by not allowing impeachment evidence against Oldest Daughter. Finally, Father argued that trial court should have severed the termination suit of the Younger Children from the termination suit of the Older Children.

Holding: Affirmed

Opinion: Here, trial court determined that the Parents violated TFC 161.001(1)(D), (E), and (O). TFC 161.001(1)(D) supports termination if the parent knowingly placed or allowed the child to remain in dangerous surroundings. This section focuses on the child's living conditions, not on whether the child actually suffered an injury. In contrast, TFC 161.001(1)(E) supports termination if the parent engaged, or knowingly placed the child with someone who engaged, in conduct that endangered the child. Under this section, it does not matter whether the endangerment of the child is a direct result of the parent's conduct, and the conduct does not have to be directed at the child. Here, the Oldest Daughter's testimony was contradicted by other witnesses. However, the jury was free to make its own credibility assessment and to believe the Oldest Daughter's claims of abuse. Further, abuse of one child in a home can support a finding of endangerment of the other children. Thus, trial court did not err in finding that termination was supported by a finding that Parents violated TFC 161.001(1)(E). Because only one act under TFC 161.001(1) is required to support a termination, COA did not address the sufficiency of trial court's findings of violations under TFC 161.001(1)(D) and (O).

The admission or exclusion of evidence is within the sound discretion of the trial court. To show that a reversal based on excluded evidence is required, an appellant must show that trial court's ruling was in error and that the error led to an improper judgment or prevented the appellant from properly presenting the case to the COA. Here, trial court overruled an objection to the counselor's testimony that she believed Oldest Daughter's claims of abuse. Trial court should have sustained the objection and issued a curative instruction to the jury. However, this error probably did not lead to an improper judgment. The jury heard the testimony from the Oldest Daughter and was able to make its own credibility assessment. Further, because the counselor had no personal knowledge of the alleged acts of abuse, her testimony when on to the best interest finding. Neither Parent challenged the best interest finding on appeal.

Tex. R. Civ. P. 193.6 permits a court to exclude evidence that was not timely disclosed in a discovery response. A trial court may choose not to exclude the evidence if the failure to respond did not unfairly surprise or unfairly prejudice the other party. Here, the record showed that the counselor had been Parents' counselor for some time before trial, so they should not have been surprised that she had information relating to the case. Trial court also admitted a letter from the counselor that had not been timely produced in discovery. Even if admitting this letter was an error, there was no harm because the letter would have been used to support termination under TFC 161.001(1)(O) and the evidence was sufficient to support termination under TFC 161.001(1)(E).While Mother objected to the admission of seven different witnesses' testimony, she did not object until after five of the witnesses had already testified. Mother failed to preserve error for this issue. Finally, although Father argued that the Department violated 193.6 by failing to serve discovery on him, Father failed to allege how this failure caused him harm.

Mother moved to introduce a video of an interview with the Oldest Son. The video was in Spanish and was translated into English by a translator. The same translator translated a video interview of the Oldest Daughter. Mother waived any complaint to the translation of Oldest Daughter's video by moving to have Oldest Son's video introduced.

Tex. R. Evid. 403 permits a court to exclude relevant testimony "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Here, trial court prevented cross-examination of the Oldest Daughter regarding her prior perjury and regarding some provocative Facebook photos. Trial court held that because Oldest Daughter had already impeached herself by admitting that she had recanted prior outcries, there was no need to further impeach her during cross. In addition, trial court held that the photos would be more prejudicial than probative. The excluded impeachment evidence was cumulative and properly excluded.

Tex. R. Civ. P. 41 grants a court broad discretion in deciding whether to sever any claim. A claim is severable when it involves more than one cause of action, the severed claim could be independently asserted, and the severed claim is not interwoven with the remaining action. Here, the Department sought termination of the Parents' parental rights to all six children. The facts and issues underlying the termination were closely interwoven. Trial court did not abuse its discretion in deciding not to sever the termination of the two Oldest Children from the termination of the four Younger Children.

MISCELLANEOUS

DIVORCE DID NOT RELIEVE HUSBAND OF CONTRACTUAL OBLIGATION CREATED BY AFFIDAVIT OF SPONSORSHIP OF AN ALIEN SEEKING RESIDENCY IN THE UNITED STATES

¶12-2-29. ***In re Marriage of Kamali*,** -- S.W.3d --, 2011 WL 6076865 (Tex. App.—Texarkana 2011, no pet. h.) (12/07/11).

Facts: Husband sponsored the immigration of Wife from Iran to the United States and executed an affidavit for sponsorship for Wife. A few years later, Husband filed for divorce. In the final divorce decree, trial court ordered Husband to pay Wife the monthly amount required in the affidavit for sponsorship for the next 36 months. Wife appealed, arguing trial court erred by limiting the obligation to 36 months.

Holding: Reversed and Rendered; Affirmed as Modified

Opinion: A sponsor of an alien seeking residence must sign an affidavit that states that the sponsor will provide support to the alien. The sponsor must provide at least 125% of the United States poverty level for an unlimited period, which will only terminate if one of five specific events occurs. A divorce is not one of the five specific events. Here, Husband sponsored Wife for citizenship and signed the appropriate affidavit. No event had occurred that would relieve Husband of his obligation to support Wife, and this obligation was enforceable as a contract. Nevertheless, the divorce decree only required Husband to pay Wife for 36 months after the final divorce decree. The divorce decree "[ran] afoul of the terms of the contract." COA struck the 36-month provision and substituted language stating that Husband was obligated to Wife as per his sponsorship affidavit.

Editor's comment: *I don't know exactly why but this decision seems wrong. I realize there are other policy issues involved and Federal Law probably preempts Texas law but I still don't like it. J.A.V.*

TRIAL COURT LACKED JURISDICTION TO ORDER COUNSEL NOT TO FILE NOTICE OF APPEAL

¶12-2-30. ***In re J.R.J.*,** -- S.W.3d --, 2011 WL 6260861 (Tex. App.—Fort Worth 2011, orig. proceeding) (12/15/11).

Facts: Trial court terminated Father's parental rights to his Child. At the trial, Father was represented by court-appointed counsel. Father did not appear at trial. After the trial, Father's counsel filed a motion for substitution of counsel because Father's appointed counsel was not on the appellate appointment list. Father's counsel admitted that he had not been able to contact Father. The Department objected to the motion, arguing that appellate counsel should not be appointed until Father expressed a desire to appeal. Trial court denied the motion for substitution and ordered Father's counsel not to file a notice of appeal unless Father expressed a desire to appeal. Father's counsel filed a petition for writ of mandamus and a motion for temporary relief. COA requested a response and issued an order staying trial court's portion of the order concerning the notice of appeal. Father's counsel then timely filed a notice of appeal. Father argued that trial court abused its discretion in ordering his counsel not to file a notice of appeal.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Mandamus is an appropriate remedy when a trial court has clearly abused its discretion and the party has no remedy by appeal. Tex. Gov't Code 22.221(a) permits a COA to issue a writ of mandamus to en-

force the jurisdiction of the court. A COA may invoke its writ power to protect its jurisdiction. "If there is a question concerning the right to appeal certain matters, it is a matter within the jurisdiction of the court of appeals to decide and not within the jurisdiction of the trial court to decide." While the question of whether or not to file an appeal rests with the client, as opposed to the attorney, the question of whether counsel has *authority* to file a notice of appeal rests with COA, not trial court. Trial court abused its discretion in ordering Father's counsel not to file a notice of appeal, and Father would not have an adequate remedy by appeal if the order was not vacated.

HUSBAND COULD NOT ATTACK DIVORCE DECREE COLLATERALLY BECAUSE THE DECREE WAS UNAMBIGUOUS

¶12-2-31. ***In re M.M.,*** -- S.W.3d --, 2012 WL 181641 (Tex. App.—El Paso 2011, no pet. h.) (01/18/12).

Facts: Husband and Wife were married for 12 years. Husband served in the army throughout the marriage and after the divorce. In the divorce decree, trial court awarded Wife an interest in Husband's military retirement benefits. Almost 15 years later, just before Husband retired from the army, Husband filed a Motion to Clarify and/or Modify Domestic Relations Order. Husband argued that the decree was ambiguous and, because of the ambiguity, Wife was erroneously getting paid benefits from his separate property. Trial court denied Husband's motion, holding that the decree was not ambiguous. Husband appealed.

Holding: Affirmed

Opinion: If a decree is unambiguous, then it must be enforced as written. Here, the decree provided a formula to use in determining what benefits would be distributed to Wife. While trial court arguably may have given Wife more than it should have, the decree was not ambiguous. Husband's remedy for any substantive error was by direct appeal, not a collateral attack.