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

Summer is here, and I hope that everyone is going to take a nice break away from their law practice for a vacation. The Advanced Family Law Course will be in Houston on August 6-9, 2012, at the Hilton Americas. Jim Loveless and I are the Course Directors, and we have planned a fabulous course and hope that you will join us for the most intensive CLE of the year.

The Family Law Section has been busy working with the Supreme Court Advisory Committee Solutions 2012 in trying to find a resolution to the controversial forms issue. We will continue to provide you with updates as they become available. I would like to thank the Pro Bono Committee for all their hard work in providing Family Law CLE to lawyers for free if they take two pro bono family cases in the upcoming year. Family Law lawyers are some of the most giving attorneys of their time and expertise and that is what makes our Section so special.

The Legislative Committee of the Family Law Section has prepared the legislative package for 2013, and we have 12 proposed bills. Steve Bresnen, the lobbyist for the Texas Family Law Foundation, will be finding bill sponsors for each of our proposed bills. If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. Thank you to the Legislative Committee and all of those who donated their time to the Texas Family Law Foundation to make our legislative efforts successful.

In addition to the Advanced Family Law Course, our upcoming CLE seminars include:

- New Frontiers in Marital Property Law – October 3-4, 2012, New Orleans, Course Directors: Warren Cole and Rick Robertson
- Family Law in Technology: No Tech to Hi Tech in Two Days – December 13-14, 2012, Austin at the AT&T Center, Course Director: Sherri Evans
- Texas Academy of Family Law Specialists Trial Institute – February 15-16, 2013, at the Broadmoor in Colorado Springs, Course Directors: Cynthia Barela Graham and Jeff Anderson
- Marriage Dissolution – April 18-19, 2013, Galveston

In closing, I want to than Tom Ausley, Immediate Past Chair for all of his hard work on behalf of the Family Law Section. This has been a very busy and challenging year, and I promise to work hard to continue representing our Section. I hope you have a great summer and look forward to seeing you at the Advanced Family Law Course in Houston.

----------**Diana Friedman, Chair**

EDITOR'S NOTE

I want to personally than Tom Ausley for doing an amazing job this past year as the chair of our section. He has spent countless hours on behalf of all of the family law lawyers in Texas and each of you should thank him personally when you have an opportunity. I look forward to working with Diana Friedman, who has also given an amazing amount of time representing our section this last year, and I anticipate that she will continue the wonderful job that she has been doing.

I am also welcoming aboard my newest law clerk, Jaime Winchenbach, a third-year law student at Texas Wesleyan. She will be doing the bulk of the summaries of the cases this year.

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

Information Alert - Effective June 1, 2012 all Income Withholding Orders requiring an employer to withhold payments, including those issued by court and private attorneys, must direct payments to the State Disbursement Unit

What is an IWO?

Commonly known as an income withholding order, the Income Withholding for Support (IWO) is the Office of Management and Budget-approved standard form that must be used by **all** entities to direct employers to withhold income for child support payments.

What is the SDU?

The State Disbursement Unit (SDU) is a centralized collection and disbursement unit for child support payments from employers, income withholders, and others. An SDU is responsible for:

- Receiving and distributing all payments
- Accurately identifying payments
- Promptly disbursing payments to custodial parents
- Furnishing payment records to any parent or to the court

Why were standard forms and payment directions developed?

Under provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress required the use of a standard withholding process to increase child support collections for all families, promote self-sufficiency for low-income families, and reduce the burden on employers. States were also required to establish and maintain SDUs to receive child support payments from employers and other sources for all IV-D cases and for all non-IV-D cases with support orders initially issued on or after January 1, 1994 payable through income withholding.

Are there exceptions to income withholding?

Yes, § 466(a)(8)(B)(i) of the Social Security Act allows two exceptions as stated below:

> "The income of a noncustodial parent shall be subject to withholding, regardless of whether support payments by such parent are in arrears, on the effective date of the order; except that such income shall not be subject to withholding under this clause in any case where (I) one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding, or (II) a written agreement is reached between both parties which provides for an alternative arrangement."

How is income withholding ordered?

When entering a child support order, judicial and administrative officials must enter an IWO. Some states use the following language in the child support order: "reference is hereby made to a separate income withholding order, the entry of which is required of this (Court) (Agency) by law and specifically incorporated herein as part of this (Court's) (Agency's) order in this case."

Is use of the OMB-approved IWO Required?

The IWO form has been required since August 22, 1996 for orders issued or modified on or after January 1, 1994. **After May 31, 2012, IWOs not on the OMB-approved form will be returned to the sender by employers.**

All IWOs that order an employer to withhold payments, including those issued by court and private attorneys, must direct payments to the SDU. Effective June 1, 2012, employers/income withholders will return the IWO to the sender if payment is not directed to the SDU.

All entities or individuals authorized under state law to issue income withholding orders to employers must use the OMB-approved IWO form and direct payments to the SDU.

The revised IWO form with accompanying instructions and a revised process flow was published on May 16, 2011. (See Action Transmittal 11-05.) A fillable version of the form is available at http://www.acf.hhs.gov/programs/cse/forms/OMB-0970-0154.pdf.

National Center for State Courts (NCSC)

The NCSC has recognized the issue and considers it to be a high priority. It is proactively communicating with chief justices, court administrators, and other leadership it serves to bring focus to the issue and to the actions that need to be taken to prevent problems that may occur after May 31, 2012.

For more information, contact Kay Farley at kfarley@ncsc.dni.us.

Additional resources

Section 466 of the Social Security Act

Action Transmittal 11-05 (AT-11-05)

45 CFR 303.100 - Procedures for income withholding

Intergovernmental Referral Guide (IRG) - State's IWO procedures

State Contact and Program Information - State-specific information and contacts for questions

Employer Services - Private sector and federal agency employer processes for the IWO notice, withholding calculations and examples.

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Family Law for the Non-Family Specialist: How to Master Conversations on Family Law, Kelly **McClure** & Chris **Meuse,** 58 THE ADVOC. (Texas) 8 (2012).

Inheritance Rights of Posthumously Conceived Children in Texas, Allison Stewart **Ellis**, 43 ST. MARY'S L.J. 413 (2012).

LEAD ARTICLES

Fathering Court: A New Model for Child Support Enforcement, Judge Milton C. **Lee** Jr., 51 No. 2 JUDGES' J., at 24 (Spring 2012).

A Family Law Perspective on Parental Incarceration, Sarah **Abramowicz**, 50 FAM. CT. REV. 228 (2012.)

Actualizing Intimate Partnership Theory, Alicia Brokars **Kelly**, 50 FAM. CT. REV. 258 (2012).

Flourishing Families, Clare **Huntington**, 50 FAM. CT. REV. 273 (2012).

The First Father: Perspectives on the President's Fatherhood Initiative, Jessica Dixon **Weaver**, 50 FAM. CT. REV. 297 (2012).

Improved Assessment of Child Custody Cases Involving Combat Veterans With Posttraumatic Stress Disorder, Evan R. **Seamone**, 50 FAM. CT. REV. 310 (2012).

Functional Parenting and Dysfunction Abortion Policy: Reforming Parental Involvement Legislation, Maya **Manian**, 50 FAM. CT. REV. 241 (2012).

Family Drug Court Helps Families Reunify, Saves Money, 31 NO. 3 CHILD L. PRAC. 46 (2012).

Navigating Gender in Modern Intimate Partnership Law, Alicia Brokars **Kelly**, 14 J.L. & FAM. STUD. 1 (2012).

The Role of Equipoise in Family Law, Deborah **Cantrell**, 14 J. L. & FAM. STUD. 63 (2012).

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The Client With A Personality Disorder, Robert E. **Ernard**, 34 FAM. ADVOC. 16 (Spring 2012).

Same Sex, Different Rights: Amending U.S. Immigration Law to Recognize Same-Sex Partners of Refugees and Asylees, Elise S. **Dunton**, 50 FAM. CT. REV. 357 (2012).

Understanding & Managing Difficult Clients, Kathleen **McNamara**, 34 FAM. ADVOC. 20 (Spring 2012).

Reconfiguring Sex, Gender, and the Law of Marriage, Deborah A. **Widiss**, 50 FAM. CT. REV. 205 (2012).

The Impact of a Parent's Personality Disorder, Edward C. **Budd**, 34 FAM. ADVOC. 34 (Spring 2012).

Thinking Inside-the-Box, Krill v. Cubist Pharmaceuticals: *Does FMLA Need To Be Amended to Address Gestational Surrogacy and How Should Companies Address Paid "Maternity" Leave?,* Jeffrey D. **Enquist**, 14 J. L. & FAM. STUD. 137 (2012)

The Judge's Role In Ensuring Quality Representation For Parents, Elizabeth Thornton & Judge R. Michael **Kay**, 31 NO. 3 CHILD L. PRAC. 33 (2012).

Marriage: Civil, Religious, Contractual, And More, Joel **Nichols**, 50 FAM. CT. REV. 222 (2012).

Sexuality In Child Custody Decisions, Kim H. **Pearson**, 50 FAM. CT. REV. 222 (2012).

Let's Go To the Videotape: Why the Forensic Interviews of Children in Child Protective Cases Should Be Video Recorded, Orly **Bertel**, 50 FAM. CT. REV. 344 (2012).

The Price of Sperm: An Economic Analysis of the Current Regulations surrounding the Gamete Donation Industry, Anetta **Peitrzak**, 14 J. L. & FAM. STUD. 121 (2012)/

The Topography of Legal Recognition of Same-Same Relationships, Edward **Stein**, 50 FAM. CT. REV. 181 (2012).

Same-Sex Divorce In A DOMA State, Mary P. **Byrn** & Morgan L. **Holcomb**, 50 FAM. CT. REV. 214 (2012).

Getting Divorced Online: Procedural and outcome Justice In Online Divorce Mediation, Martin **Gramatikov** & Laura **Klaming**, 14 J. L. & FAM. STUD. 97 (2012).

In Re Adoption of Baby E.Z.: E.Z. Duz It, Joseph A. **Gatton**, 14 J. L. & FAM. STUD. 153 (2012).

ASK THE EDITOR

Dear Editor*:** I just got hired by a client in Japan. He has been served with divorce in Texas, and the answer is due on Monday. I need to file a Special Appearance as part of the answer, which has to be verified. I cannot get an original answer by Monday. Will a scanned copy of the signature page suffice? ***Wondering in Winnsboro

***Dear Wondering in Winnsboro*:** Yes, under Texas Rule of Civil Procedure 45(d), a scanned copy of the signature page attached to the verification will suffice for authenticity. TEX. R. CIV. P. 45(d). Furthermore, the signature is considered a formality and may be corrected by amendment if necessary. *O'Donnell v. Chambers,* 163 S.W. 138 (Tex. Civ. App.—Amarillo 1914, writ refd).

> Texas Rule of Civil Procedure Rule 45 provides in pertinent part as follows:
>
> Pleadings in the district and county courts shall
> . . .
>
> (d) be in writing, on paper measuring approximately 8 1/2 inches by 11 inches, and signed by the party or his attorney, and either the signed original together with any verification **or a copy of said original and copy of any such verification** shall be filed with the court. The use of recycled paper is strongly encouraged.
>
> *When a copy of the signed original is tendered for filing, the party or his attorney filing such copy is required to maintain the signed original for inspection by the court or any party incident to the suit, should a question be raised as to its authenticity.*

TEX. R. CIV. P. 45(d).

JUST FOR FUN

Members of the judiciary* share some of their recent pro se proveups (yes, they did have forms):

- My marriage has become insupp… insupp…..he doesn't support me.
- My marriage has become insufferable.
- There is no hope of recon.
- There is no hope of being reconnected.
- …..that has destroyed the illegitimate ends of the marriage relationship.
- ….that has destroyed the legible ends of the marriage relationship.
- The Respondent [husband] is not now pregnant.
- My spouse has exed a Waiver of Citation.
- Pro se, who had previously been on the court's CPS docket, came into to do a proveup. When she came up with her "no children" divorce, I said, "don't you have children?" She said yes, she does, but the forms said to choose whether you were filing with or without kids and she's choosing to do her divorce without. I said, well, I'm choosing to include the kids, so you're excused.

*If you hear something funny down at the courthouse, please share it with the rest of us.

IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Child support: An Oregon trial court did not err when it increased an obligor's income, for child support purposes, by $2,083 per month over three years to take account of the obligor's $75,000 inheritance even though the obligor had spent the inheritance to pay down debt. *In the Matter of the Marriage of Lief*, 266 P.3d 165 (Ore. App. 2011). A New York trial court correctly refused to include cash gifts from a party's mother in income for child support purposes when the cash gifts "were sporadic in nature, rather than regular and expected." *Rooney v. Rooney*, 92 A.D.3d 1924, 938 N.Y.S.2d 724 (N.Y. App. Feb. 17, 2012). A New York trial court that crafted an "exceedingly unusual" order for "parallel legal custody" required the father to pay child support, despite the fact that the father had custody of the child the majority of the time, because the father was the "moneyed" parent and if he did not pay child support, the child would be deprived of "needed resources" while in his mother's care. *M.R. v. A.D.*, 35 Misc. 3d 619, 940 N.Y.S. 2d 808 (N.Y. County, Feb. 29, 2012).

Federal issues: The United States Supreme Court reversed and remanded a case in which the State Department refused to follow a federal statute allowing Americans born in Jerusalem to list "Israel" as their country of birth on their passports, holding that the political question doctrine did not bar the courts from determining whether the statute should be given effect. *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (Mar. 26, 2012). A New Mexico United States District Court granted the IRS summary judgment on defendant couple's claim that the innocent spouse rule (26 U.S.C. § 6015) absolved the wife from the husband's tax liability because, among other reasons, New Mexico is a community property state such that each spouse is liable for tax on one-half of all income received by the other spouse during marriage. *United States v. Melot*, 2012 WL 1354532 (D. N.M. Mar. 21, 2012). An Alabama appellate court refused to credit an ex-husband's claim that the dismissal of the ex-wife's bankruptcy petition post-divorce should "validate" the trial court's division of the parties' property in violation of the automatic stay because acts taken in violation of the automatic stay are void for all purposes. *Dudley v. Dudley*, ___ So.3d ___, 2012 WL 6117922 (Ala. Civ. App. Dec. 9, 2011).

In vitro fertilization: The United States Supreme Court held infant twins born in Florida via in vitro fertilization eighteen months after their father's death not entitled to Social Security survivor benefits because whether the twins were the father's "children" for Social Security purposes depended upon whether children born post-mortem were entitled to inherit from the father under state intestacy law which Florida did not permit. *Astrue v. Capato*, ___ S.Ct. ___, 2012 WL 1810219 (May 21, 2012). A Pennsylvania trial court did not abuse its discretion when it awarded a wife frozen pre-embryos upon divorce because, even though ordinarily the party wishing to avoid procreation should prevail, in this case utilizing the pre-embryos were the cancer-victim wife's only opportunity "to achieve biological parenthood and her best chance to achieve parenthood at all." *Reber v. Reiss*, ___ A.3d ___, 2012 WL 1202039 (Pa. Super. Apr. 11, 2012).

Non-paternity suit: The Connecticut Supreme Court held that neither equitable estoppel nor public policy barred a putative father's suit against his daughter's biological father, which sought as damages the cost of raising the child, because the putative father did not know during the marriage that he was not the child's father and did nothing to cause either the child or his former wife to rely on him to their financial detriment. *Fischer v. Zollino*, 35 A.3d 270 (Conn. 2012) (reviews "competing approaches from other jurisdictions").

Relocation: A Florida trial court erred as a matter of law when it entered a "temporary order" allowing an ex-wife to relocate from Florida to Australia for a three-year period. *Alinat v. Curtis*, ___ So.3d ___, 2012 WL 1366732 (Fla. App. Apr. 20, 2012). An Idaho magistrate court did not abuse its discretion by failing to order a mother to continue to reside in Idaho because "an Idaho court may not dictate where a parent will live." *Markwood v. Markwood*, 274 P.3d 1271 (Ida. App. Apr. 17, 2012). Although complimentary of a trial court's detailed findings and conclusions, a Massachusetts appellate court rejected the trial court's conclusion that children should be relocated to New Hampshire and laid out a detailed custody order of its own. *Prenaveau v. Prenaveau*, 912 N.E.2d 489 (Mass. App. Mar. 26, 2012).

Settlement: The New York Court of Appeals declined to grant an ex-husband's request to reopen a divorce settlement in light of the Bernie Madoff Ponzi scheme because at the time of the divorce, the scheme had not yet collapsed such that there could be no "mutual mistake" about the value of the ex-husband's Madoff account at that time. *Simkin v. Blank*, ___ N.E.2d ___, 19 N.Y.3d 46 (N.Y. Apr. 3, 2012). A Delaware trial court did not err when it modified a settlement agreement that included a lifetime alimony award to terminate alimony upon cohabitation when the ex-husband had no lawyer,

was trying to reconcile, and the ex-wife's lawyer drafted the agreement. *Stewart v. Stewart*, 41 A.3d 401 (Del. Mar. 15, 2012). An Illinois trial court did not err when it set aside a settlement agreement as unconscionable because the ex-wife had not been represented, the ex-husband falsely understated his income, the ex-husband failed to disclose the appraised value of his Jimmy John's franchises and told the ex-wife that the Jimmy John's franchises "were worth little to nothing." *In re Marriage of Roepenack*, ___ N.E.2d ___, 2012 Ill.App.3d 110198 (Ill. App. Mar. 2, 2012).

Valuation: A New York trial court's findings that valued a wife's business interests were clearly erroneous because the trial court discounted the businesses' values for lack of marketability and control when the wife did not intend to sell her interests in the businesses. *Caveney v. Caveney*, 960 N.E.2d 331, 81 Mass.App.Ct. 102 (2012). An Alabama trial court abused its discretion by adopting a liquidation value for the wife's interest in her family's closely held business because, despite the lack of a market for shares in the business, when "a divorce court does not contemplate the sale of a business in which one of the spouses holds a minority interest but, instead, intends that the business shall remain a going concern, it makes little sense to determine fair value by the measuring stick of a hypothetical sales price." *Wilson v. Wilson*, ___ So.3d ___, 2011 WL 5607 (Ala. Civ. App. Nov. 18, 2011).

COLUMNS

CONFRONT MENTAL HEALTH TESTIMONY WITH TWO PERSPECTIVES

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

Organizing and analyzing mental health experts' records and reports can be difficult. Voluminous records may contain unfocused interview notes and hard-to-understand test profiles. Reports often include commonly used, yet abstract, psychological terms—emotional trauma, self-esteem, attachment—that convey little specific meaning about the examinee. And applying *Robinson/Daubert* principles to gauge the quality of experts' work and testimony increases the confusion: Error rates? Testability? Peer review? General acceptance?

To cut through these problems, distinguish two perspectives inherent in mental health testimony: the legal perspective and the psychological perspective. The legal perspective comprises caselaw-derived "tools"— *Robinson/Daubert*-related factors and principles—to gauge the quality of expert testimony. The psychological perspective comprises psychology's research and professional literature as well as professional ethics codes and practice guidelines developed by national mental health organizations.

Lawyers' most common mistake is relying on only one of the two perspectives when they examine mental health experts. For example, confronting mental health testimony from just the legal perspective results in shallow, "checklist-like" cross- or direct-examinations—composed primarily of the *Robinson/Daubert* factors—that provide the court with little substantive information. For example: "Dr. Smith, Is your opinion generally-accepted in your field?" Next question: "Is your opinion testable?", etc. The problem is two-fold. First, *Robinson/Daubert* caselaw emphasizes that the factors do not comprise a checklist that must be satisfied. The factors are merely guides the court should consider when determining the testimony's reliability. Second, to be used effectively, the factors must be considered in the context of the science on which the testimony is based—e.g., error-rate issues have different implications for psychological test results than for engineering measures.

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

Confronting mental health testimony from just the psychological perspective presents other problems. This approach results in confusing direct- or cross-examination questions that offers the court minimal legal guidance about how to consider expert testimony. Abstract verbiage; arcane test data; research findings. Focusing experts' examinations solely on experts' psychological assertions drains energy and understanding from those examinations.

So, merely distinguishing the legal and psychological perspectives is not enough. To deal with experts' work and testimony most effectively, view the perspectives as two sides of the same evidentiary coin. Then apply the perspectives separately *and* jointly.

For the legal perspective, don't get stuck in *Daubert*'s minutiae. *Daubert* states that "the test of reliability is flexible." Use that flexibility by enlarging your pool of reliability factors to test the quality of an expert's work and testimony. *Daubert* emphasizes that its four factors are nonexclusive "general observations"— none dispositive—to aid the court's decision about whether the testimony is reliable. Some factors will fit a particular case; others won't. In addition, *Daubert*-related caselaw identifies other reliability factors to help guide a judge's admissibility decisions—e.g., *Robinson* adds two factors; *Joiner* adds another; Fed. R. Evid. 702 advisory committee notes several others. View reliability factors as the trial judge should view them: as suggested means, not required ends, with which to determine the testimony's reliability and quality. In this way, the factors provide useful hooks for organizing examinations of experts and for structuring oral or written legal arguments.

For the psychological perspective, know how psychology addresses issues on which the mental health expert's testimony focuses—e.g., testing; DSM-IV diagnoses; personality disorders; parent alienation. There is no substitute for knowing the science. To meet this demand, draw from psychology's research and professional literature, ethics codes, practice guidelines, and state licensing board regulations. If you are unfamiliar with these resources, consider retaining a consulting expert who can analyze how the experts' materials and potential testimony address relevant psychological issues in the case and how each piece of information addresses *Daubert*-related factors.

Finally, once you have addressed the legal and psychological perspectives separately, apply both perspectives jointly to compose compelling oral or written legal arguments. Use the legal perspective to structure the argument's framework; then fill-in that structure with information gained from the psychological perspective. Two sides; same evidentiary coin.

HOW MUCH RISK CAN YOU HANDLE?

by Christy Adamcik Gammill, CDFA[2]

Abstract: The composition of your investment is controlled by many factors, including the ability to tolerate the risk of losing money.

Every investment portfolio is different because everyone has different goals, time frames, and financial circumstances. While you may want to seek advice from friends and family, you should avoid imitating their investment decisions without considering your unique situation. Sometimes, to make sure the information you get is objective and focused, it is helpful to seek the guidance of a financial professional who can provide information on the different investment categories and help you determine an investment strategy that clearly reflects your goals and circumstances.

Some factors you should consider when deciding how you will invest include:

- Your investment objective - whether it's retirement, children's education, or other specific goals;
- Your investment time horizon, or how long your money can stay invested before you will need to start withdrawing it;

[2] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC (NY, NY, 212-314-4600), member FINRA, SIPC. Investment advisory products and services offered through AXA Advisors, LLC, an investment advisor registered with the SEC. Insurance and annuity products are offered through AXA Network, LLC. CBG Wealth Management, is not owned or operated by AXA Advisors or AXA Network. Christy@CGBwealth.com or 214-732-0917. GE 62666 (05/11)

- Your financial situation or how much you can put aside, how regularly you can do so and the likelihood you will need the money before your objectives are reached.

In addition to these objective criteria, there are also subjective factors, how comfortable are you about your knowledge and ability as an investor and how much risk you can tolerate? Basically, there are three general risk tolerance categories: conservative, moderate, and aggressive.

Conservative
The conservative investor is usually more comfortable with a portfolio that aims for capital preservation and a low degree of risk. This type of investor is usually most comfortable with investing in fixed income investments that promise to repay the amount invested if held to maturity. Conservative investors usually have a short time horizon, are in or near retirement and are highly averse to risk.

Moderate
The moderate investor is generally comfortable with a diversified portfolio that seeks a balance between stocks, bonds, and fixed income investments, and is usually comfortable with accepting a moderate degree of risk in exchange for potentially higher returns. Moderate investors tend to avoid risks inherent in international investments and seek to preserve and grow capital.

Aggressive
The aggressive investor is generally comfortable with a portfolio that focuses on maximum growth and can tolerate the risk associated with investing heavily in equities, including international equities, in exchange for potentially greater returns. This approach is best suited to individuals with a substantial time horizon (ten years or more) who are willing to risk short-term losses in order to benefit from the equity markets' potential long-term historical growth.

Investments are subject to market risk, which may fluctuate and lose value. International securities carry additional risks, including currency exchange fluctuation, and different governmental regulations, economic conditions or accounting standards.

For more information or to help you determine the type of investment strategy that is right for you, please contact your financial advisor.

AXA Advisors, LLC and its affiliates do not provide legal or tax advice. Please consult your tax or legal advisor regarding your individual situation.

WHAT PRICE IS RIGHT?

By Jeff Coen[3]

One of the biggest components of the US economy today is the sale of pre-existing homes. Reporting a lower than expected number in monthly single family home sales can cause panic in the world equity markets.

Additionally, the media barrages us with the need for the private sector to create more jobs. The biggest creator of jobs is "small businesses." The U.S. Small Business Administration estimates that there are 2.2 million small businesses in Texas and the number is growing.[4] Many of those small businesses own commercial real estate.

While the subject of this column is neither political nor economic, it is important because an increasing number of people who come knocking on your office door for a divorce are homeowners and small business

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[3] Jeff Coen is a board certified family law attorney, former family court associate and district judge and full time mediator/arbitrator in North Texas. He can be reached at jeffco@airmail.net or 214-748-9211.

[4] Statistics as of 2010 from *2012 SBA Small Business Profile,* SBA Office of Advocacy, found at http://www.sba.gov/sites/default/files/tx11_0.pdf

owners. They also own business-related personal property and a large percent own commercial real estate used to conduct their family businesses. In many instances, if they have invested wisely or are simply luckily, both their residence and commercial real estate are the major assets of the marital estate. What tools can you use to give the court a creditable idea of the fair market value of each? Remember, that the "fair market value" of property is what a willing buyer will pay a willing seller, but one who is not forced to sell by external circumstances such as a divorce.

1. Appraised Value for Ad Valorem Taxes

The easiest valuation to obtain is the local appraisal district's tax value, which every owner receives in the mail and in most metropolitan areas is available on line. Because it is a governmental record (or quasi-governmental record), it would be admissible as an exception to the hearsay rule (the admissibility of a hard copy of an appraisal district website is a topic for another day).

As any value you obtain, the appraisal district value is an expert opinion and therefore subject to the TEXAS RULES OF EVIDENCE 702 and 703. The question posed regarding appraisal district values is are they "relevant" and "reliable." To be admissible the opinion must pass a *Daubert* Test. Texas courts have consistently ruled that if objected to, evidence of an appraisal district value is not admissible (presumably because it is not reliable). *Housing Authority v. Brown*, 256 SW2d 656, 659 (Tex. Civ. App.—Dallas1953, no writ). The use of such value by the trial court has been held to be so against the great weight and preponderance of the evidence to be clearly wrong or manifestly unjust. *Scott v. Scott*, 117 SW3d 580, 585 (Tex. App.—Amarillo 2003, no pet.).[5]

2. "Market Analysis" Provided by Real Estate Agent

Realtors commonly give their prospective sellers an opinion of the value of their real estate in the hopes that the seller will sign them as the listing agent entitled to a commission on sale. Based on the competing motivations of making a commission vs. expressing a reliable FMV of the property, one is again left with the *Daubert* standard in allowing the opinion into evidence. A realtor's market analysis based on a comparison of sales of similar property in a specific period of time has been held admissible because it's use of historical data. *Devenney v. Devenney*, 2001 WL 789308 (Tex. App.—Dallas 2001, no pet.).

3. Owner's Value

Owners of residential property have long had the ability to give the court their idea of the fair market value of their homes, though unless the owner is a realtor or appraiser it has questionable credibility. Commonly known as the "Property Owner Rule" it allows the owner to opine on the FMV of his or her property just as if they had qualified as an expert witness. In theory an owner of real estate is familiar with the value of his or her own property. *Porras v. Craig*, 675 S.W.2d 503, 504-05 (Tex. 1984). But the ability to give an opinion is limited to the fair market value, not some intrinsic or personal value. *Id.* The fact that the home is close to work, the golf course or the grandchildren is not a valid indication of value. If you client is going to testify as to the fair market value make sure he or she understands the meaning.

Recently the Texas Supreme Court has adopted the "Property Owner Rule" for commercial realty. *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 849 (Tex. 2011). Now a business owner (officer, director or manager with actual knowledge of the real property) can give the court an opinion of the fair market value of the business real estate. *Id.* For the first time your client can refute the value of a business appraisal if the appraisal includes the value of the commercial real property. There are limitations, and your witness must have some knowledge of the manner in which they arrived at the value. *Id.* Again the more articulate your witness, the more creditable their testimony. Are they aware of the methods of arriving at FMV and which did they use to form their opinions? Just like residential property limitations the opinion must be based on FMV.

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[5] Reliance on this case seems questionable when considered in light of TEX TAX CODE §23.001, "*(a) Except as otherwise provided by this chapter, all taxable property is appraised at its market value as of January 1. (b) The market value of property shall be determined by the application of generally accepted appraisal methods and techniques*...." However, TEX TAX CODE §23.23 limits the amount of any increase in value in any given year so there may be a difference between the "market value" and the "taxable value". See *Dallas Cent. Appraisal Dist. v. Cunningham*, 161 S.W.3d 293 (Tex. App. Dallas 2005).

A final note on the "Property Owner Rule" in regard to the admission of inventories of opposing parties. Sworn Inventories and Appraisals fall under this rule. Admit inventories of either party at your own risk. Inventories may be subjective vague opinions of a party, but remember the burden to attack an abuse of discretion decision in a property division is very difficult. Admission of the opposing party's inventory, though not creditable, is probably just enough to sustain an adverse division by the trial court on appeal

Just because you can use any of the above described modes of presenting value to the court, why do you choose to do so? The key questions should be cost and utility. If you have the time and funds (usually less than $500 for residential appraisals) why not name an expert in discovery, obtain a written appraisal from a reputable expert and introduce it? The use of an expert appraisal is the gold standard. All other methods of establishing value should be considered only if you can't use a reputable expert. And then there is always the lingering suspicion that when neither side uses the most reliable method of establishing value of real property, that neither is willing to admit the true market value. If the court is left with wildly varying values from less than creditable sources your client is putting much at risk, or even worse, faces the practice of "averaging" which no court admits, yet most use out of frustration when left with little real evidence of value.

CONFLICTS OF INTEREST AND ETHICAL CONSIDERATIONS REGARDING NON-LAWYER EMPLOYEES

By Kay Redburn[6]

Consider the case of two attorneys representing about 3,000 of the 7,500 Norplant birth control plaintiffs who have cases pending in four South Texas counties. (I know, it's not family law, but continue reading). In August, 1997, just days before the first Norplant case was set for trial, the Supreme Court postponed trial to consider the defendants' motion to disqualify the lead plaintiff's lawyer and his co-counsel, because they had *improperly allowed a paralegal who had once worked for the defense to work on the plaintiff's case.*

In an 8-1 majority, the Supremes held that the paralegal had worked for the defense in connection with the Norplant litigation and that her employment triggered the legal (albeit rebuttable) presumption, established by the court in *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994) that paralegals and secretaries who work on a case share "confidences and secrets" when they are hired by opposing counsel in the case. To overcome the presumption, the plaintiffs' lawyers had to demonstrate they took precautions against the paralegal's disclosure of confidences, but according to the court, they failed. "After [the paralegal] was retained by plaintiffs," the court held, "she continued to work in the Norplant litigation. No effort whatsoever was made to deter her from doing so. Disqualification was required under these circumstances."

Even though the above is not a family law case, and one doesn't see mass tort litigation taking place in the domestic relations arena, the Norplant situation is demonstrative of what can happen if care is not taken in hiring a paralegal who has been employed by a firm who represented the other side in pending litigation (or subsequent modification litigation). The family law community is a small, relatively closed group. In the *Phoenix Founders* case and *Don Grant, et al v. The Thirteenth Court of Appeals*, 888 S.W.2d 466 (Tex. 1994), the Supreme Court decided that "... disqualification is not required if the rehiring firm is able to establish that it has effectively screened the paralegal from any contact with the underlying suit." *Phoenix*, id, at 831. In the *Grant* case, the law firm was disqualified because they failed to effectively screen the Legal Secretary from working on the conflicting case, and further stated, "...we recognize a rebuttable presumption that a non-lawyer who switches sides in ongoing litigation, after having gained confidential information from the first firm, will share the information with members of the new firm. The presumption may be rebutted upon a showing that sufficient precautions have been taken to guard against any disclosure of confidences." *Grant* at 467.

It is well established that the "Chinese Wall" theory DOES NOT APPLY TO LAWYERS. If a lawyer changes firms, then absent the written agreement of all parties, the Chinese Wall cannot exist, and the lawyer with the conflict, and the firm, is prohibited from representing that client. This is the fundamental difference

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between lawyer conflicts and paralegal conflicts. The Supreme Court recognized that if paralegals were held to the same stringent standards as lawyers, then those paralegals who had been in the business for a while who specialized would be virtually unemployable by most firms if they wanted to remain in their field of speciality. Lawyers have licenses, and can work for themselves. In this state, paralegals must work under the supervision of an attorney, and do not have the career flexibility that licensed attorneys have.

Ethical Considerations

Rule 5.03 of the Texas Disciplinary Rules of Professional Conduct concerns responsibilities regarding nonlawyer assistance. This Rule governs secretaries, investigators, law students, interns and paraprofessionals employed by lawyers. The lawyer who has direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. *Rule 5.03(a)*.

The lawyer will be subject to discipline for the conduct of a nonlawyer who would be in violation of these Rules if engaged by the lawyer if:

a. The lawyer orders, encourages, or permits the conduct involved; or
b. The lawyer:
    1. Is a partner in the law firm in which the person is employed, retained by, or associated with; or
    2. Is the general counsel of the government agency's legal department in which the person is employed, retained by or associated with; or
    3. Has direct supervisory authority over such persons and

c. With knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable or remedial action to avoid or mitigate the consequences of that person's misconduct.

Rule 5.03(b).

A law firm is not disqualified from representing a client where a legal assistant or secretary has taken employment of a party adverse to a client of the paralegal's former employer, if the supervising lawyer of the legal assistant or secretary ensures the nonlawyer's conduct is compatible with the professional obligations of a lawyer. Ethics Committee Opinion 472 (June, 1991).

Rule 5.04 of the Texas Disciplinary Rules of Professional Conduct: "Professional Independence of a Lawyer" states that a lawyer or a law firm is prohibited from sharing or promising to share legal fees with a nonlawyer except as follows:

a. An agreement by a lawyer with the lawyer's firm, partner, or associate, or a lawful court order may provide for the payment of money, over a reasonable period of time, to the lawyer's estate for the benefit of the lawyer's heirs or personal representatives, beneficiaries, or former spouse, after the lawyer's death or as otherwise provided by law or court order;

b. A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

c. A lawyer or law firm may include non-lawyer employees in retirements, even though the plan is based in whole or in part on a profit sharing arrangement.

Rule 5.04(a).

The reasons for these limitations are to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law. Rule 5.04(a) does not necessarily mandate that employees be paid only on the basis of a fixed salary. The good news for paralegal is that the payment of an annual or other bonus does not constitute the sharing of legal fees if the bonus is neither based on a percentage of the law firm's profits or on a percentage of particular legal fees, nor is given as a reward for conduct forbidden to lawyers.

A lawyer is prohibited from forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. *Rule 5.04(b)*. A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. *Rule 5.04(c)*. This situation arises frequently when a third party is paying the legal fees for another. The lawyer should always exercise his professional judgment solely on behalf of the client, regardless of who is paying the fees.

The lawyer is prohibited from forming a professional corporation or association authorized to practice law for profit under the following circumstances:

a. A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
b. A nonlawyer is a corporate director or officer thereof; or
c. A nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule 5.04(d).

If you have any questions regarding your non-lawyer staff, ethical issues or conflicts of interest, the Paralegal Division of the State Bar of Texas offers an abundance of resources at www.txpd.org.

ARTICLES

A TEXAS-SIZED MESS:
Same-Sex Couples and Homestead Rights in the Lone-Star State

By Maggie Cheu[7]

I. Why Same-sex Couples Need Contracts

Gus McCrae: Reach in that drawer there. Find me something to write on. I want to leave a couple notes to Lori and Clara.
Woodrow Call: [*hands Gus paper and pen*] You want me to do anything about those Indians that shot you?
Gus McCrae: We got no call to be vengeful; they didn't invite us here.
Gus McCrae: [*writing*] It's a dangerous business, writing to two women at the same time. I'm so lightheaded I can hardly remember which one's which. Now this one, this one's for Lori. And this one here, my God...
Woodrow Call: You want me to help you with that?
Gus McCrae: What would you know to say to a woman? [*falls asleep writing*]
Woodrow Call: [*Thinking Gus has passed away, places hand on Gus's chest*] Augustus.
Gus McCrae: [*Looks up*] My God, Woodrow. It has been quite a party, ain't it?
Woodrow Call: Yes, sir.[8]

Not many fictional characters represent the Lone Star State as iconically as *Lonesome Dove*'s Texas Rangers: the competent but emotionally stunted Captain Woodrow F. Call, and his partner, Captain Augustus McCrae, an incorrigibly playful romantic. Fiercely adventurous, and a bit sassy, these old cowboys roamed Texas clearing out "all the Indians and bandits so the bankers could move in" until they "killed off everybody made this country interestin'!"[9] Although Woodrow and Gus are clearly characterized as relentlessly hetero-

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[8] *Quotes for Augustus 'Gus' McCrae*, THE INTERNET MOVIE DATABASE, www.imdb.com/character/ch0021878/quotes (last visited Oct. 28, 2011).

[9] *Memorable Quotes for Lonesome Dove*, THE INTERNET MOVIE DATABASE, www.imdb.com/title/tt0096639/quotes (last visited Oct. 28, 2011).

sexual, the story of *Lonesome Dove* pivots on their interactions with, and love for, one another.[10] It is not too far a stretch to imagine—as we will—their life together as best buddies in the state they loved so well. If Gus had survived and the pair had returned to Texas, they would have lived together on a ranch, like true retired Texas Rangers. In that case, their legal problems with Texas homestead law would have modeled the issues facing same-sex couples today. Therefore, for the duration of this piece, we envision Woodrow and Augustus as best buddies, with legal issues similar to those faced by a growing number of Texans who are identified as living in a same-sex relationship.[11] The 2010 Census found that, not only were the number of same-sex couples in Texas higher than the 2000 Census, but that Austin's Travis County ranked 13th nationally for percentage of same-sex couple households.[12]

Despite the evidence strongly suggesting that same-sex couples continue to migrate to, and live in Texas, the state retains an inhospitable body of laws under which they must live. One of these is the oft-referenced provision in the Family Code specifying that Texas marriage licenses "may not be issued for the marriage of persons of the same sex."[13] Another section states outright that "a marriage between persons of the same sex or a civil union is contrary to the public policy of this state," and disallows any arm of the state from "giv[ing] effect to…any public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction."[14] And finally, just to make sure there is no confusion on the subject, a 2005 Amendment to the Texas Constitution clarified further by reiterating, "marriage of this state shall consist only of the union of one man and one woman," and then specifying that "the state may not recognize any legal status identical or similar to marriage."[15] Of course, it goes without saying that business partnerships between same-sex individuals living together on a ranch are totally sanctioned, barring the homestead problems discussed in the body of this article.

With the ban on same-sex marriage in Texas thoroughly sealed, homosexual couples and best buddies find themselves bereft of the protections and defaults that generally spring into action upon the commencement of a heterosexual Texas marriage. These privileges include—among others—the presumption of community property rights,[16] the defaults granted through intestate succession,[17] and homestead rights against creditors upon the death of one's spouse.[18] Without the ability to gain these protections and defaults through marriage, same-sex couples can imitate them through contracts, wills, and powers of attorney.[19] The Houston Court of Appeals solidified this as the preferred, and indeed the only, option available to same sex couples in a 2006 case in which the estranged son of the deceased, acting as his executor, sued his father's male partner to recover assets.[20] The partner claimed that the items were jointly acquired and asked the court to adopt a "marriage-like relationship" equitable remedy in his favor.[21] The court refused, holding that because a marriage-like relationship between two men is against Texas public policy, "same-sex couples must address their particular desires through other legal vehicles such as contracts or testamentary transfers."[22] In general, with good planning and some creative contracting, this is a somewhat reasonable alternative for same-sex couples. However, there is at least one area of the law that simply does not properly apply to same-sex couples, and

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[10] LARRY MCMURTRY, LONESOME DOVE (Pocket Books , 1988).

[11] Juan Castillo, *Numbers of same-sex couples rise in Central Texas, new census data show,* STATESMAN.COM (Sept 30, 2011, 11:56 AM), www.statesman.com/news/local/numbers-of-same-sex-couples-rise-in-central-1816321.html.

[12] *Id.*

[13] Tex. Fam. Code § 2.001(b) (West).

[14] Tex. Fam. Code § 6.204

[15] Tex. Const. art. I, §32. A number of commentators have noticed that this clause technically eliminates heterosexual marriages as well, as those relationships are themselves *identical* to marriage. *E.g.*, Dave Montgomery, *Texas' gay marriage ban may have banned all marriages*, MCCLATCHY (Nov. 18, 2009), http://www.mcclatchydc.com/2009/11/18/79112/texas-gay-marriage-ban-may-have.html. However, Attorney General Greg Abbott has put his stamp of approval on the amendment. Greg Abbott (Oct. 27, 2005), https://www.oag.state.tx.us/opin/prop2letter.pdf.

[16] Tex. Fam. Code §3.003 (West).

[17] Tex. Prob. Code Ann. §38(b) (West).

[18] Tex. Prob. Code Ann. §271(a) (West).

[19] *See* Tex. H.R.J. Res. 6, § 2, 79th Leg., R.S. (2005).

[20] Ross v. Goldstein, 203 S.W.3d 508, 510 (Tex. App. 2006).

[21] *Id.* at 514.

[22] *Id.*

cannot be approximated through testamentary transfers or powers of attorney. To wit, Texas homestead rights. Although rarely touted as the liveliest of topics, in the context of same-sex couples homestead rights truly become what can only be termed a Texas-sized mess.

II. Why Homestead Rights are as Texan as Spurs on a Rancher

"Don't seem right, Captain. A man ought not to leave his land and his people."

—Joshua Deets, *Lonesome Dove*[23]

It is a fact, surely realized by all Texans with the utmost of pride in our state, that Texas was the very first entity to conceive of the idea of homestead rights. "Nothing like [a homestead act] was ever known to the common law of England, nor had it been recognized by any state of the United States, nor had received approval by any other nation,"[24] before the infant Republic of Texas first passed it in 1836.[25] Judge John Dillon once referred to the act as a "great gift…to the world, [which] invests the era which originated and sustains it with a halo of true glory."[26] His effusive characterization of homestead law sprang from his appreciation for the fact that it shielded a family's home from forced sale, and therefore operated in protection of family stability. Despite almost 200 years worth of changes to the Texas law, homestead rights now protect not only families, but also single adult persons, from losing their homes to creditors' claims.[27] Although most modern readers likely think Judge Dillon's estimation a bit of an overstatement, the fact remains that the notion of a homestead is a uniquely Texan invention that represents an impressive addition to American jurisprudence.[28]

Today, the Texas Constitution itself provides for homestead rights, declaring that the "homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts."[29] This protection from forced sale is referred to as the "homestead exemption," but it does not apply to those debts incurred through purchase money liens, taxes, owelty liens,[30] refinancing, materialmen's liens, home equity, a reverse mortgage, or a lien secured by a manufactured home.[31] The homestead right is also codified—in much less elaborate detail—by the Probate Code, which grants surviving spouses and minor children continuing homestead rights upon the death of their partners, including protection of the homestead from the deceased general creditors of the deceased.[32] Homestead exemptions are also codified by reference in both the Family Code[33] and the Property Code.[34] The Family Code, understandably, deals with homestead rights as they apply to marriage, while the Property Code enumerates them as they apply to the homestead itself:

> (a) If used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.
>
> (b) If used for the purposes of a rural home, the homestead shall consist of:

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[23] *Supra* note 2.

[24] JOHN HAMILTON BICKETT, ORIGIN OF SOME DISTINCTIVE FEATURES OF TEXAN CIVILIZATION 39 (1946).

[25] *Id.* at 41.

[26] *Id.*

[27] *Infra* note 21.

[28] Joseph W. McKnight, *Homestead Law*, TEXAS STATE HISTORICAL ASSOCIATION, http://www.tshaonline.org/handbook/online/articles/mlh02.

[29] Tex. Const. art. XVI, § 50.

[30] *Id.* at §50(a)(3). Owelty liens are an option granted to spouses under the Homestead Act. They allow a spouse to gain a lien on the homestead where the homestead is inequitably divided upon divorce. Unmentioned by the Constitution are owelty liens available to co-tenants.

[31] In 1997, the 75th Texas Legislature greatly expanded the Texas homestead exemption, adding home equity loans and reverse mortgages to the list of liens exempted by the homestead provision. *Home Equity, Reverse Mortgage, & Home Improvement Lending in Texas: Resources and Information*, THE FINANCE COMMISSION OF TEXAS (January 27, 2010), http://www.fc.state.tx.us/homeinfo/homeindex.htm.

[32] *See* Tex. Prob. Code Ann. § 270-71 (West).

[33] *See* Tex. Fam. Code Ann. § 5 (West).

[34] *See* Tex. Prop. Code Ann. § 41.002 (West).

(1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

(2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.[35]

It is the Property Code that is crucial to an assessment of Texas homestead rights as they apply to Woodrow and Augustus, or to same-sex couples, because—as discussed above—the last thing one could call such couples in Texas is married.[36]

III. Why the Devil's in the Details

"It's an accident she's even on this trip!
I never notice you having accidents with ugly girls."

—Augustus McCrae and Clara Allen, *Lonesome Dove*[37]

Unfortunately—although many citizens across the state would like it—homestead rights do not spring magically into being upon the mere purchase of a piece of property.[38] Neither does simply living on a tract of land for a set amount of time establish a homestead exemption.[39] Rather, in order to do so, a family or single adult must show "both overt acts of homestead usage and the intention on the part of the user to claim the land as a homestead."[40] In order to demonstrate overt acts of homestead usage, the potential homestead holder has the burden of proving that the property was used for some purpose typical for homes, "either by cultivating it, using it directly for the purpose of raising family supplies, or for cutting firewood and such like."[41] In a 1989 case, for example, the Dallas Court of Appeals held that a tract of land used for "family recreation and enjoyment, which included family picnics . . . games, and company picnics" did not satisfy the requirement of overt acts of homestead usage.[42] On the other hand, in a 1983 case the Houston Court of Appeals determined that the overt acts requirement had been met based on testimony that the property holder had kept all of his personal property on the premises, that he "used it as a person normally would a home," and that he "never made any attempt to conceal from anyone the fact that the townhome was his home."[43]

Beyond establishing the existence of a homestead, the homestead exemption as laid out in the Property Code expresses two primary factors in determining the type of homestead right an individual holds: (1) whether the homestead is characterized as a single person's homestead or a family homestead; and (2) whether the homestead is characterized as urban or rural.[44] Each of these issues will be discussed in turn.

A. The Single or Family Distinction

Traditionally, the homestead exemption was only extended to those households that the law characterized as a "family."[45] This all changed in 1973 with the addition of a homestead for a "single adult person" to the exemption. Perhaps due to the fact that the term "single, adult person" leaves very little to be interpreted, there has been almost no case law clarifying the exact qualifications for access to a single adult person's homestead exemption. This is with the exception of *Matter of Hill*, in which the Fifth Circuit clarified that the 1973 addition of a single person's homestead exemption was "intended to grant *additional* homestead rights" to those single adults who would otherwise be unable to claim a family homestead right; it was *not* intended to strip homestead rights from those single adults whose living situations allow them access to a family homestead characterization despite their unmarried status, such as a family unit in which the parent is divorced

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[35] *Id.*
[36] *See supra* notes 6-8.
[37] *Supra* note 2.
[38] Silvers v. Welch, 127 Tex. 58, 62, 91 S.W.2d 686, 688 (Comm'n App. 1936).
[39] *See* Hilliard v. Home Builders Supply Co., 399 S.W.2d 198, 201 (Tex. Civ. App. 1966).
[40] Sims v. Beeson, 545 S.W.2d 262, 263 (Tex. Civ. App. 1976).
[41] Autry v. Reasor, 102 Tex. 123, 128, 113 S.W. 748, 748 (1908).
[42] Van Brunt v. BancTexas Quorum, N.A., 804 S.W.2d 117, 122 (Tex. App. 1989).
[43] Dodd v. Harper, 670 S.W.2d 646, 649 (Tex. App. 1983).
[44] *Supra* note 26.
[45] TEXAS HOMESTEAD LAW, J. THOMAS OLDHAM 18 (3rd ed. 2006).

or widowed.[46] In the absence of further guiding case law, the statute requires that the homestead holder be: (1) an unmarried adult; and (2) ineligible for a family homestead.

While the requirements for a single adult person's homestead exemption strike as eerily simple, the requirements for a family homestead exemption are not. But, upon examination, neither of these definitions appear to contemplate the notion of same-sex couples, and do not seem to apply properly in the same-sex context. "Family" is a term of art in Texas jurisprudence.[47] The Texas Constitution fails to statutorily define the term for purposes of the homestead exemption, suggesting that the framers intended it to mean more than a simple enumeration of the acceptable constituent members.[48] In response to this lack of guidance from the Texas Constitution, the Texas Supreme Court enumerated three prongs for a family relationship in *Roco v. Green*: (1) that the family relationship is one of status, not of mere contract; (2) there is a legal or moral obligation on the head of the household to support the others; and (3) a corresponding state of dependence on the part of the other members exists for this support.[49]

The first prong—a relationship of status—contemplates whether or not the group operates under "one domestic government."[50] In modern jurisprudence, this prong is generally viewed as redundant, itself proven by showing the presence of the second prong—a moral or legal obligation to support.[51] However, the first prong does make clear that multiple persons living together due only to a business association, for example, two people living together in an apartment above the storefront they own together, or on a cattle ranch, does not constitute a family.[52]

The second prong, requiring a moral or legal obligation on a member of the household to support another rmember, is satisfied either by the necessity for care and support, or a legal obligation based on a parental or marital relationship.[53] For example, where a brother lives with and is financially responsible for his unmarried sister, there exists a necessity—and therefore a moral obligation—that he care for her.[54] However, there exists no moral obligation for a mother to support her two able-bodied, adult children, because her intervention is not necessary for their general well-being.[55] Thus, the former is a family homestead, while the latter may be the homestead of a single adult person, but not of a family.

The third prong, requiring a corresponding dependence on the supporting member of the household, must be present, but need not be absolute.[56] For example, the Texas Supreme Court in *Wolfe v. Buckley* held that Mrs. Buckley acted as the head of a family household based on the fact that her step-daughter's children depended on her for "moral training, and for at least a portion of their support and maintenance."[57] Therefore, despite the fact that the children did not depend of Mrs. Buckley *absolutely* and for *everything*, did not bar the group from a family classification.

Because of this broad interpretation of the three *Roco* prongs, "family" isn't limited to traditional household models of Mother, Father, and 2.5 children. Rather, many and varied combinations of people fall into this dynamic category. For example, families that include children with single parents;[58] divorced parents who do not have primary custody of the children, but are required to support them financially;[59] and groups of

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[46] Matter of Hill, 972 F.2d 116, 120 (5th Cir. 1992),
[47] Matter of Hill, 972 F.2d at 120.
[48] 43 Tex. Jur. 3d Homesteads § 75.
[49] Roco v. Green, 50 Tex. 483, 490 (1878).
[50] Henry S. Miller Co. v. Shoaf, 434 S.W.2d 243, 244 (Tex. Civ. App. 1968).
[51] PaineWebber, Inc. v. Murray, 260 B.R. 815, 824 (E.D. Tex. 2001).
[52] *See* Plough, Inc., v. Moore, 56 S.W.2d 681, 681 (Tex. Civ. App. 1933).
[53] Cent. Life Assur. Soc. (Mut.) v. Gray, 32 S.W.2d 259, 260 (Tex. Civ. App. 1930).
[54] *See id.*
[55] *See* Stout v. Anthony, 254 S.W.2d 879, 881 (Tex. Civ. App. 1952).
[56] Gray, 32 S.W.2d at 261.
[57] Wolfe v. Buckley, 52 Tex. 641, 649 (1880).
[58] *E.g.*, Renaldo v. Bank of San Antonio, 630 S.W.2d 638, 640 (Tex. 1982) ("A divorced parent's right to a family homestead derives from the relationship to his or her children.").
[59] *E.g.*, White v. Edzards, 399 S.W.2d 935, 937 (Tex. Civ. App. 1966); Patterson v. First Nat. Bank of Lake Jackson, 921 S.W.2d 240, 246 (Tex. App. 1996) ("A family unit entitled to a homestead may consist of a divorced person and a dependent child, even though the custody of the child may have been awarded to the other spouse, as long as the obligation for support continues and a genuine parent-child relationship exists.").

adult siblings[60] all fall under the family homestead exemption. Even a widow who continues to live in the home where her adult children grew up (but no longer live) falls into this category of homestead holder.[61]

Although the family relationship is very inclusive, this does not necessarily mean good tidings for same-sex Texan couples seeking homestead exemption rights. The seemingly never-ending breadth of Texas family homestead classification ends at households comprised of unmarried couples, as "the claim of a homestead is not maintainable by a man and a woman living together in an unmarried state."[62] Even in the case where a heterosexual couple claims to the court to be common-law married, but the court finds that they are not, a family homestead exemption will not be extended to that couple.[63] The reasoning behind this rule is not offered, perhaps suggesting that it represents a public policy stance that unmarried couples should not be granted the status of married couples merely because they cohabit.

B. The Urban or Rural Distinction

The second factor for determining a person's homestead rights is an assessment of whether the property in question is urban or rural. It is unnecessary, in the context of this piece, to cover the details of this distinction. What is both interesting and relevant to same-sex couples seeking homestead exemptions, however, is the fact that the Property Code would allow them a rural homestead of up to 200 acres if they were found to constitute a family, but only 100 acres if they were to be granted a single, adult person's homestead exemption.[64] This enormous difference in their potential rights highlights the importance of how Texas classifies a family versus a single adult seeking homestead rights. This distinction falls especially hard on same-sex couples.

IV. Why Same-Sex Homesteads are a Texas-Sized Mess

> "Well, Gus, there you go. I guess this will teach me to be more careful about what I promise people in the future."
>
> —Woodrow Call, *Lonesome Dove*[65]

With the rules and regulations of homestead classification laid out in bright array before us, an assessment of where same-sex couples might fall in the mix is in order. The specific issue of how to classify cohabiting same-sex couples seeking homestead exemptions is, unsurprisingly, an unlitigated topic in the Lone Star State. A sharp look at the potential consequences of applying the current Texas homestead law likely produces a result in conflict with the historic importance placed Texas's homestead rights, suggesting that, as the number of same-sex couples residing in Texas increases, the need for reform or clarification will become more and more pressing.

Same-sex Couples and the Family Homestead

With a full battery of statutes and constitutional amendments condemning both marriage and any relationship status approximating marriage between persons of the same sex, it is likely that a trial court or administrative ruling granting a cohabiting same-sex couple family status for purposes of the homestead exemption would be struck down on any number of grounds.[66]

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[60] *See e.g.*, Gray, *supra* note 49 at 260-62.

[61] Tex. Prob. Code Ann. §283 (West).

[62] Tremaine v. Showalter, 613 S.W.2d 35, 37 (Tex. Civ. App. 1981).

[63] *See* United States v. Tellez, EP-08-CV-303-KC, 2011 WL 2183296 (W.D. Tex. June 6, 2011). Interestingly, in this case, the court found—almost as a technicality—that the couple was not common law married. Of the three-pronged test for showing a common law marriage, the couple presented evidence of two and simply failed to present evidence of the third. Despite the fact that this third requirement generally follows from the other two, the court refused to recognize their asserted marriage.

[64] *See supra* note 27 at §41.002(b); *see also* Matter of Moody, 862 F.2d 1194, 1201 (5th Cir. 1989) (holding that the distinction between the homestead rights of married and single persons is not unconstitutional on equal protection grounds, but instead has a rational basis).

[65] *Supra* note 2.

[66] *See supra* notes 6-8.

First, same-sex couples would likely find it difficult to show that there exists a legal or moral obligation for one member to support another member, as is required by the *Roco* test discussed above.[67] Absent a parent-child relationship or a marital relationship, same-sex couples have no legal obligation to support. Further, historically, the only way to show that there exists a moral obligation to support is to demonstrate a relationship by blood or affinity, in which one member requires the care and support of another member for health or financial reasons. Same-sex couples could claim to be acting in support of each other as companions or friends, but Texas jurisprudence does not currently grant family status to friends living in the same home.

Even more indicative of the likely difficulty same-sex couples would face in seeking family status is the established rule against granting family homestead status to cohabiting heterosexual couples.[68] The reasoning behind this rule goes unexplained, suggesting that it represents a policy choice upheld by Texas jurisprudence that unmarried couples should not be granted privileges awarded to married couples. If this is so, same-sex couples face an even greater uphill battle in recognition both of Texas's statutorily codified public policy against same-sex marriages or civil unions and the constitutional amendment clarifying that the state will not recognize any relationship between two people of the same sex that is similar to marriage.

Although it is unlikely that a Texas authority would grant family status to a same-sex couple alone, a same-sex couple *with a child* presents an altogether different story. As with unmarried, widowed, or divorced parents, the relationship to the child alone can create a family status and allow a householder to claim a family homestead exemption. If a same-sex couple both adopt the same child—a practice which has been recognized in Texas[69]—the *Roco* test would apply and succeed, even in the event that one parent dies, or the relationship dissolves.

Same-sex Couples and the Single Homestead

Although the family homestead exemption would be preferable for a number of reasons—including protection in the case of death of a partner, relief in the case of dissolution of the relationship, and an extra 100 acres in the case of rural homesteads—it seems unlikely that a same-sex couple with no child would be able to secure one. Based on this assessment, we explore single person homestead exemptions as a possible alternative. As an initial matter, there is no reason why one homosexual Texan should be unable to secure a homestead exemption on her homestead as a single adult. Homosexuality alone is not a legitimate ground for refusing a person homestead rights in the case that she meets all other requirements for the establishment of a homestead. Trouble begins, however, upon realizing that a single homestead-holder does not protect both members of the couple equally, leaving gaping vulnerabilities in the homestead rights of the non-holder.

In effect, the partner who is not the homestead-holder—we'll call him Sad Woodrow—has no protection at all. He is vulnerable to the whims of the homestead-holder—we'll call him Holder Augustus—whose greater protections and rights could leave Sad Woodrow at a great disadvantage. Lacking a homestead exemption, Sad Woodrow is vulnerable to creditors claiming his interest—if any—in the ranch. Similarly, in the event that Holder Augustus had to claim bankruptcy or the bank forecloses on the home, Sad Woodrow would lose any small investments he may have made in the property, lacking protection from Holder Augustus's creditors as completely as he lacks protections from his own. Further, in the case of Holder Augustus's death, Sad Woodrow would obviously lack survivorship rights generally granted to surviving spouses with family homestead rights, and could not retain the former homestead free from creditors' claims. The dissolution of the relationship would also present a challenge, because Sad Woodrow would not be eligible to take a spouse's owelty lien against the property if Holder Augustus chooses to claim it as his own. As mentioned above, an owelty lien allows a spouse to gain a lien on the homestead where the homestead is inequitably divided upon divorce, giving them financial protection and interest in the home itself. Without this option, non-homestead holder same-sex couples are left vulnerable upon dissolution of the relationship.

Having eliminated a family homestead claim as a likely possibility for child-free same-sex couples, the core of the Texas-sized mess is identifying a legal method to protect both partners and properly imitate the homestead rights they would enjoy under a family homestead exemption. The simplest and most obvious so-

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[67] *See supra* note 42.

[68] *Supra* note 56.

[69] *See* Hobbs v. Van Stavern, 249 S.W.3d 1 (Tex. App. 2006).

lution would be to grant both partners a homestead right in the same home. However, in Texas, the legality of this plan is unclear.

The Many and Varied Responses to Two Homesteads in One Home

As discussed previously, the homestead exemption did not exist at common law,[70] but rather was invented by the founders of the Republic of Texas in the nineteenth century in order to protect families from creditors hoping to collect debts by foreclosing on the home of the debtor, leaving families on the street.[71] As a result, the homestead laws in effect today are governed by state constitutions, which delineate the homestead exemptions available in that state.[72] These varied laws result in a split among states regarding the permissibility of two people holding independent homestead rights in the same property. In most states, however, the availability of this option is based largely on percentage of ownership in the home. A survey of responses to this issue will allow proper assessment of the likelihood that both members of a Texas same-sex couple would be allowed to claim a homestead right in the same home. Most likely, this will require legislative action in order to ensure the validity of a same-sex family homestead right.

For example, the United States Bankruptcy Court found in *Matter of Roush* that, under Nebraska law, two unmarried persons who held their home in joint tenancy could each assert homestead exemption rights in their shared property.[73] The court held that, because a fee simple interest is not required to claim homestead rights, and the Nebraska exemption has been broadly construed to apply to any interest in property, "exclusivity of occupancy of the property is not required."[74] Further, the fact that this rule allowed the unmarried couple to "invoke two homesteads with respect to the same real estate under circumstances in which they could not assert dual homestead exemptions if they were married to each other," was found to be irrelevant.[75]

This broad interpretation of state law represents an alternate route that Texas could follow. Under this reasoning, unmarried persons each holding some interest in a piece of property that they both occupy could both assert independent homestead rights in that property.

The United States District Court of Arizona used similar reasoning in *First National Bank of Don Ana County v. Boyd*, where the court contemplated whether a single mother and her son as the householder for his family could both assert homestead rights to the same property.[76] Using reasoning similar to Nebraska's in *Roush*, the court found that nowhere in Arizona law does it specify that the practice would be unacceptable.[77] Therefore, the court found that the same property could be claimed by two different homestead holders.[78]

Because Arizona, like Texas, also allows single, adult persons to claim homestead rights, *Boyd* could be persuasive in shaping Texas law, which has not yet contemplated the issue of two joint tenants both claiming independent homestead exemptions in the same piece of property. If Texas were to follow the Nebraska and Arizona models, adoption of that policy would allow same-sex couples a high degree of protection.

In opposition to the permissive stance taken in both Nebraska and Arizona, an Appellate Court of Illinois found that a piece of property held in joint tenancy by husband and wife was found to support a homestead right by only one of the two.[79] Ordinarily, this would be a natural conclusion, as the homestead claimed would be characterized as a family homestead. The court goes on, however, reasoning that "mere ownership of the premises . . . does not create an estate of homestead" and that, "two separate homestead estate [*sic*] cannot coextensively exist . . . at the same time."[80] Although this case is distinguishable from a case involving a same-

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[70] 76 Am. Jur. Proof of Facts 3d 1 (Originally published in 2004).
[71] *Supra* note 17.
[72] *See e.g.*, Sanchez v. Telles, 960 S.W.2d 762, 768 (Tex. App. 1997).
[73] Matter of Roush, 215 B.R. 592, 594 (Bankr. D. Neb. 1997).
[74] *Id.*
[75] *Id.* at 594-95.
[76] First Nat. Bank of Dona Ana County v. Boyd, 378 F. Supp. 961, 962 (D. Ariz. 1974).
[77] *Id.* at 964.
[78] *Id.* It should be noted in the interest of specificity that the Arizona court allowed two different claims on one piece of property *provided that the property is of sufficient value so that the claims do not overlap.* That is to say, in Arizona the homestead exemption is measured in dollars, not in acres as it is in Texas. For that reason, the Arizona court specified that the property had to be valuable enough to support both homestead exemptions.
[79] Dixon v. Moller, 42 Ill. App. 3d 688, 691, 356 N.E.2d 599, 602 (1976).
[80] *Id.*

sex couple, as the latter would not be married, the reasoning would not allow a same-sex couple holding joint tenancy to both claim homestead exemption in the same property.

Unsurprisingly, because of California's domestic partnership system,[81] its policy on same-sex homestead rights stands somewhat apart from those previously discussed, and provides an interesting perspective in a discussion regarding the many and varied ways states deal with joint owners wishing to claim independent homestead exemptions on the same property. In *In re Rabin*, the Ninth Circuit held that registered domestic partners received the same privileges as spouses with regard to homestead exemptions.[82] Therefore, because domestic partnership status suggests that both partners operate under a single economic unit, partnerships—like marriages—are only awarded a single homestead exemption.[83] The court does recognize, in a footnote, the anomaly of law resulting from the fact that, in California, people with common interests in a property who are neither married nor registered as domestic partners would be able to claim two separate exemptions, but that domestic partners may only claim one.[84] In spite of this, the court upheld its finding, resulting in a Sad Woodrow character, who lacks a homestead right, and therefore lacks protection from creditors regarding the interest or investment that he has in the home.

Texas, You're a Mess

In Texas, as in other states, this question is governed by case law. Somewhat unique to Texas, however, is the relatively recent addition of the single person's homestead, which calls into question the applicability of century-old case law contemplating the feasibility of multiple *family* homesteads on a single tract of land. In most litigated cases, the situation at bar contemplates the rights of a widowed parent occupying a home to which he or she has homestead rights, and a child, who became a tenant in common upon the death of his other parent. For example, the 1921 case of *Massillon Engine and Thresher Co. v. Barrow* is one such decision.[85] There, the court found that, where a widowed mother occupied the same house she had lived in with her husband, her present possessory rights to the home and a homestead exemption precluded those of her son, Clarence, even though he became a tenant in common upon his father's death.[86] The court reasoned that because Clarence attempted to claim as his homestead the very same tract of land claimed by his mother, his claim was invalid.[87] However, the claims made by Clarence's brothers—who were also tenants in common—were valid because they claimed as homestead land on the same property, but not on the same exact tract, as that which their mother claimed.[88] Thus, the court found that when joint owners live in separate buildings on the same property, each may claim a homestead right to that which is his. However, they may not claim multiple homestead exemptions for the exact same parcel of land.

In *Johnson v. Prosper State* Bank, the Dallas Court of Civil Appeals ruled on very similar facts and upheld the *Massillon* decision, stating outright that "[t]he constitutional privileges of homestead are not accorded to two claimants, coextensive with each other, on the same tract of land."[89] This would seem to bar absolutely the ability of both members of a same-sex couple to assert equal homestead rights over the exact same property. However, a separate line of Texas cases exists suggesting, as the Nebraska and Arizona courts found in *Roush* and *Boyd*, respectively, that because sole ownership is not a requirement for homestead exemption rights, multiple parties could have equal claim to such a right.

In 1937, for example, the Austin Court of Civil Appeals decided *Cooper Co. v. Werner*, where two brothers, each owning a one-sixth undivided interest in a property, both asserted business homestead rights on that property.[90] The court found that this was acceptable, as "justice and reason will not deprive one of such

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[81] *Domestic Partners Registry*, CALIFORNIA SECRETARY OF STATE, (2011), http://www.sos.ca.gov/dpregistry/.

[82] In re Rabin, 359 B.R. 242, 248 (B.A.P. 9th Cir. 2007).

[83] *See id.*

[84] *Id.*

[85] Massillon Engine & Thresher Co. v. Barrow, 231 S.W. 368, 369 (Tex. Comm'n App. 1921).

[86] *Id.*

[87] *Id.*

[88] *Id.* at 370.

[89] Johnson v. Prosper State Bank, 125 S.W.2d 707, 709 (Tex. Civ. App. 1939) aff'd, 134 Tex. 677, 138 S.W.2d 1117 (1940).

[90] Cooper Co. v. Werner, 111 S.W.2d 823, 826 (Tex. Civ. App. 1937). Business homestead rights are merely another type of homestead. There are few relevant differences between business and personal homestead rights necessary to know for the scope of this piece.

homestead rights or interests on the ground that he does not own the whole of the property."[91] The court did, however, add the caveat that the homestead rights held by a tenant in common are subject to those rights of partition and division of the property.[92] Thus, a tenant in common can assert homestead rights, but they may not exceed the rights of her co-tenants and therefore may not preclude co-tenants from occupying the land or partitioning it.

In perfect opposition to *Johnson*'s outright ban on multiple homestead rights attaching to the same property, *Cooper* assures same-sex couples that they can, in fact, both claim a homestead exemption based on the same home. The distinction between the two cases may lie in the fact that the claimants in *Johnson* did not have perfectly equal possessory rights in the property on which they both attempted to have a homestead. However, the blanket ban asserted in *Johnson* was not contingent on this fact pattern. Similarly, the finding in *Cooper* may have been specific to business homesteads, but the holding did not clarify any such caveat, and the finding that tenants in common may only hold homestead exemptions subject to the greater rights of their co-tenants has been upheld in numerous other cases.[93]

Further complicating the question is the fact that none of these earlier cases takes into account the 1973 addition of single, adult homesteads. Same-sex couples are left standing in the dark, with no further instruction regarding how best to seek homestead protection identical or similar to those accorded to families.

V. Why Same-sex Couples Can't Get No Satisfaction

"Well, adios, boys. Hope you won't hold it against me. Never meant no harm."

—Jake Spoon, *Lonesome Dove*[94]

After concluding that a family homestead is unlikely for a child-free same-sex couple in Texas, and finding that the acquisition of two single, adult homesteads is—at best—a questionable tactic, they must contemplate the possibility that same-sex couples in Texas may find themselves either homestead-less, or stuck with homestead situations in which one partner is a homestead holder and the other is vulnerable. Luckily, the realm of possible consequences is relatively small, as homestead rights become important only when specific disruptive events occur. These events include bankruptcy on the part of one partner, but not the other; dissolution of the relationship; and the death of one partner, but not the other.

Lacking homestead protection against creditors' claims, the bankruptcy or indebtedness of one or both partners could tie up that partner's interest in bankruptcy court. Because the "interest of a joint tenant is a property interest subject to the jurisdiction of the bankruptcy court," co-tenancies are not immune from the possibility of partition.[95] Further, this vulnerability represents a crapshoot on the part of the couple, who may own the property together, or live in a home owned by only one of the partners. There are a number of different possible outcomes in the case of bankruptcy, depending on who owns what interest in the property at hand. But, it is clear that a number of those combinations result in loss of investment, despite the fact that one of the partners was in no way at fault.

In the case of dissolution of the relationship, a same-sex couple may have less protection than a married couple who, upon divorce, can evoke an owelty lien in order to develop an equitable division of assets.[96] Even without being married, though, a same-sex couple can use an owelty lien if they are co-tenants to the property.[97] Issues, however, will arise in cases where the deed for the couple's shared home was never adjusted to reflect co-tenancy. In that case, the partner not represented on the deed has no recourse for recovering any investment made in the property. This inequity would exist even in the case that the partners were both parents of the same child; while the group would have all other homestead rights under the family classification,

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[91] *Id.*

[92] *Id.*

[93] *See e.g.*, Clements v. Lacy, 51 Tex. 150, 162 (1879); Massillon, 231 S.W. at 370; Sayers v. Pyland, 139 Tex. 57, 62, 161 S.W.2d 769, 772 (1942); Travelers Ins. Co. v. Nauert, 200 S.W.2d 661, 664 (Tex. Civ. App. 1941).

[94] *Supra* note 2.

[95] *See* Mangus v. Miller, 317 U.S. 178, 183, 63 S. Ct. 182, 185, 87 L. Ed. 169 (1942).

[96] The Homestead Provision in the Texas Constitution extends owelty liens only to spouses in the case of divorce. *See supra* note 23 for a short explanation of owelty leins.

[97] Sayers, 161 S.W.2d at 772.

upon dissolution of the relationship the ejected partner has no right to an owelty lien unless he or she is listed as a co-tenant.

Lastly, without the spousal protections granted to married couples under the Property Code's homestead rights,[98] the death of one partner does not guarantee that the surviving partner will be able to continue living in the home, free of creditors claiming the home in satisfaction of the deceased partner's debts. Specifically, if only one partner is able to secure homestead rights, upon the death of the homestead holder, the other partner has no protection from creditors of the deceased. The homestead is not set apart and protected, as it is when a spouse dies. If the same-sex partners are both parents of the same child, the issue is solved, because homestead protection applies to minor children just as readily as it applies to surviving spouses. But barring this, surviving partners will be vulnerable to loss of the home in a manner similar to that discussed in the case of bankruptcy.

In general, no one solution prepares same-sex couples for all three of these circumstances with the same consistency enjoyed by a married heterosexual couple with a family homestead exemption. However, there are a few possibilities for approximating that relationship as closely as possible.

VI. Solution Exploration

"I'm just tryin' to keep everything in balance, Woodrow. You do more work than you got to, so it's my obligation to do less."

—Augustus McCrae, *Lonesome Dove*[99]

After such a long adventure through homestead rules, regulations, and their application to same-sex couples, the most likely answers are relatively simple, but require execution in various combinations in order to plan for two, if not all three, of the possible disruptive events.

One possibility is for same-sex partners to list themselves as co-tenants and file for independent homestead rights in the same property. As discussed, this may not work if the courts decided to apply the old rule that no two people may hold homestead rights in the same property. However, if Texas courts were to follow Arizona in allowing multiple single, adult homesteads on one tract of land, same-sex couples could be protected from bankruptcy and the death of one of the partners through their concurrent homestead rights. Their co-tenancy would grant them access to an owelty lien in case of dissolution of the relationship.

An alternate—but often untenable or unwanted—solution is for same-sex partners to share a child in common and list themselves as co-tenants of the homestead. For some, a child will be seen as a bigger problem than the lack of homestead rights, but for others, knowing to argue that having a child gives them family homestead rights with regard to bankruptcy, and rights of survivorship upon the death of one partner, could quite possibly save the homestead. Owning the property as co-tenants allows the creation of an owelty lien upon dissolution of the relationship, should it occur.

Failing these two options, the next best solution is to own the property as joint tenants, allowing the partners to gain access to owelty liens, and some protection upon the death or bankruptcy of one partner. If the partners each own one half interest in the property, creditors seeking satisfaction could only potentially reach the one half owned by the debtor or the deceased.

The solution most likely on the horizon would involve a home held in joint tenancy by both partners, where one partner is the homestead holder, owns the mortgage on the home, and is responsible for the financial solvency of the home. The other partner would hold a secured note against the first, loaning money to help pay mortgages without actually having taken out the original mortgage. This arrangement would allow the second partner to lend money as if through a home equity loan, securing that partner in the event of any one of the three possible disruptive events. It would take advantage of the contracts available to same-sex couples in the way *Ross v. Goldstein* suggests, but it is the subject of an entirely different project and we will not discuss it further here. Having laid the foundation for a solution, I leave that for another article.

VII. The Future for Homestead

"I guess it's our fault. We should've shot sooner.

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[98] *See supra* note 27.

[99] *Supra* note 2.

I don't want to start thinking, Woodrow, of all the things we should have done for this good man."
—Woodrow Call and Augustus McCrae, *Lonesome Dove*[100]

None of these proposed solutions is perfect, none gives same-sex couples as much protection as marriage and a family homestead right would, and none is able to imitate homestead rights in the way the court in *Ross v. Goldstein* likely envisioned.[101]

Although marriage in Texas same-sex couples is unlikely any time in the near future, as more and more same-sex couples migrate to the Lone Star State, this issue will become significantly more prevalent. This will doubtless spur better solutions to protect homestead rights, Texas's greatest jurisprudential legacy. Those efforts may even give homestead relief for the likes of two old Texas Rangers, running cattle on a ranch they own together, growing old in their beloved state.

Professional Sports and Violence against Women: Using League Authority to Confront Unique Issues in the MLB, NBA, and NFL

By Miten Patel

Abstract

Issues relating to violence against women in the world of American professional sports require unique solutions. This environment has arguably attracted some athletes who may potentially be more likely to commit violent acts against women, and even provides a lifestyle that seemingly tends to escalate such violent tendencies where they do exist. Acting under the blanket of public trust and admiration, these same athletes are often able to escape criminal punishment that would otherwise be proportionate to their crimes against women. This article exposes such preferential treatment of athletes by examining the cultural and legal issues that act to sanction professional athletes' acts of violence and, as a result, indirectly contribute to the problem of repeat offenses. By examining some of the barriers to justice in our criminal justice system, we are able to recognize the seriousness of the problem. Still, there is hope in achieving deterrence and better holding players accountable for reprehensible acts of violence against women. This requires strengthening commissioner powers in the three major American sports leagues—powers that have already been used to achieve measurable successes in the National Football League (NFL) and National Basketball Association (NBA). By proposing certain modifications to the NFL's Player Conduct Policy, and using it as a model for policy implementation in the NBA and Major League Baseball (MLB), these sensitive issues can be even better confronted by the unique world of professional sports that exists in American culture. Ultimately, the article is optimistic that such policy modification and implementation by all three of these leagues can lead to a substantial increase in the number of professional athletes who are disciplined for their acts of violence—in turn, providing for the corrective justice and recidivism that appears to be absent in our criminal justice system.

I. Introduction

A survey conducted in 1997 revealed that 76% of adults in the United States and 82% of teens felt that it was bad for society to allow professional athletes[102] to continue their sports careers when convicted of a violent crime.[103] The same survey found that only 14% of adults and teens thought that allowing athletes to go

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[100] *Supra* note 2.

[101] *See supra* note 13.

[102] The term "professional sports" will generally be used throughout to reference those professional league sports in America. Likewise, the term "professional athletes" will generally be used to reference players in those professional sports.

[103] Anna L. Jefferson, The NFL and Domestic Violence: The Commissioner's Power to Punish Domestic Abusers, 7 Seton Hall J. Sport L. 353, 354 (1997) (citing David Diamond, Victory, Violence and Values Out of Bounds, USA Weekend, Aug. 25, 1996, at 4).

Upon first glance, it may appear that this survey is outdated and, therefore, might hold little relevance to the current public perceptions regarding league treatment of players who are linked to allegations of violence against women. However, this 1997 survey serves as a good starting point for discussion because it was not until 1997, in the aftermath of O.J. Simpson's murder trial, that the NFL began viewing these reprehensible crimes as implicating its "best interests." This so-called "best interests" concept will be thoroughly explained in Part III of the discussion. At this early point, it suffices for the reader to simply know that the "best interests" concept tends to relate to the integrity or public image of the sport—a subjective evaluation that is made by owner-appointed league

unpunished was "good because it shows people deserve a second chance."[104] While MLB, the NBA, and the NFL generally do not release information regarding individual player arrests, a series of external studies were conducted to investigate the issue in response to the significant media attention and public interest garnered by the infamous O.J. Simpson murder trial during the late 1990s.[105] One of the external studies that received noteworthy public attention was conducted by Jeff Benedict, the former Director of Research at the Center for Sport in Society.[106] This study found that 172 professional athletes were arrested for sex felonies between 1986 and 1995, but only 31% of those arrests resulted in successful conviction—in stark contrast to the 54% national conviction rate that existed during the same time period.[107] The study also found that 150 athletes had domestic violence complaints filed against them between 1990 and 1996, but only 19% of those complaints resulted in convictions and many states chose not to prosecute the majority of them.[108]

The mainstream media attention given to the O.J. Simpson murder trial, as well as the publication of external studies, resulted in the NFL adopting the Violent Crime Policy in 1997.[109] Additionally, within weeks of the first reporting of the murder allegations, former NFL Commissioner Paul Tagliabue had counselors sent to training camps of 28 of the then-existing 30 teams[110] to discuss issues of violence against women with their

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commissioners in consideration of individual and collective team owner interests. The collective bargaining agreements (CBA) of the NFL, NBA, and MLB all contain similar "best interests" clauses.

Since the Simpson trial brought so much negative attention to the NFL, from both the media and the public-at-large, it is fairly easy to see why the league began treating such criminal conduct as implicating its "best interests." The negative public image suffered by the NFL during this time period pressured the league into recognizing the connection between its players' commission of these criminal acts and the protection of its "best interests." It was not until later that the NBA began following in the NFL's footsteps. Sadly, the MLB has not followed in these footsteps and continues its appalling track record of having never once disciplined a player for the commission of violent acts against women.

[104] *Id.*

[105] Elliot Almond & Gene Wojciechowski, Domestic Violence Comes Out of the Closet; Discipline: Once an Issue that Was Hushed Up When Athletes Were Involved, Now It's Front-Page News, L.A. times, Sept. 12, 1995, at C1. The trial brought Simpson's previous 1989 arrest on domestic abuse charges to the forefront of the media spotlight, emphasizing his wife's previous complaints to the police that eight 9-1-1 calls had resulted in no action against Simpson. Bill Brubaker, Violence in Football Extends Off Field, Wash. Post, Nov. 13, 1994, at A1. In that situation, he allegedly kicked and punched her while screaming "I'll kill you." *Id.* Simpson's plea of no contest resulted in only two years' probation, counseling, 120 hours of community service, a $500 donation to a battered women's organization, and a $200 fine. *Id.* Additionally, he was not punished by the NFL or his team and maintained his endorsement deals with Hertz and NBC Sports. *Id.*

[106] Jeff Benedict, Public Heroes, Private Felons: Athletes and Crimes against Women 80 (1997).

[107] *Id.*

[108] *Id.* Upon first glance, Benedict's external study may appear to be outdated but it actually serves a very useful purpose in beginning the discussion. The relevance of these findings in relation to the current prevalence of acts of violence against women committed by professional athletes is not direct, but, rather, contextual and relative.

First, these numbers help illustrate the seriousness of the problem of preferential legal system treatment of professional athletes that existed prior to the Simpson murder trial. These statistics also help provide an introductory context to the viewpoint that the legal system's previous failures seem to be the result of a troubling intersection that lies between the appropriate administration of criminal justice and a unique sports culture that can be characterized as affording too much reverence to professional athletes. We can very easily discern how serious the problem was, prior to the Simpson trial, in that the criminal justice system afforded remarkably low conviction rates to professional athletes. More importantly, as thoroughly detailed in Part II, there is strong case-by-case evidence suggesting that this preferential legal treatment continues to exist to this very day. This further helps illustrate the viewpoint that our criminal justice system is not only biased towards professional athletes, but has *also* been stagnant in addressing and correcting such biases over the past couple of decades.

Because these legal system biases appear to still exist, despite significantly increased public awareness of the sensitive issues involved, this article also finds additional support in its contention that league action is necessary to confront the problems of violence against women that involve their sports stars. In fact, the external studies helped gauge a growing public perception of NFL players as recipients of preferential legal treatment, inevitably implicating the NFL's "best interests." Unfortunately for the NFL, studies like Benedict's probably also helped contribute to the public pressure that was placed on the NFL to begin recognizing a duty to take disciplinary action against such players where the criminal justice system had failed to do so. This point should not be taken lightly, and will become even more clear in Part III, which details why it is in all three of the major sports leagues' "best interests" to discipline its players for acts of violence against women.

[109] Robert Ambrose, The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity, 34 Wm. Mitchell L. Rev. 1069, 1086-87 (2008).

[110] The Note is uncertain as to which two teams held training camps that were not visited by league-appointed counselors, or the reasoning for why those teams were not visited. The Houston Oilers relocated its franchise to Tennessee in 1997, which may serve as a clue toward at least partial resolution of this confusion. In any case, it makes no substantive difference to this commentary and is only being mentioned for the sake of the reader's clarity.

players.[111] Notwithstanding the NFL's creation of the Violent Crime Policy, and its current enforcement of the Personal Conduct Policy,[112] incidents of violence against women suffered at the hands of NFL stars still appear to frequent media headlines. The same can be said for NBA and MLB stars who are alleged to have committed such violent acts.

However, despite the perceived frequency of off-field violence in the mainstream media, the argument has been made that evidence is actually inconclusive as to whether athletes are currently more likely to commit acts of violence against women.[113] For example, supporting rationale for this point of view can be found in a San Diego Union-Tribune study that concluded that the NFL's arrest rate since 2000 was actually better than that of the rest of society.[114] This study was based on examination of news reports and public records from January 2000 to April 2007, and also concluded that the biggest problems for NFL players were the same as those of the general population—drunken driving, traffic stops, and repeat offenses.[115] Upon first look, this may suggest to an individual that issues of violence against women involving NFL players should not raise special cause for concern from the American public.

Yet, as argued in Part II of the Note, there is strong case-by-case evidence suggesting that professional sports figures are still not being punished in the criminal justice system as harshly or consistently as other aggressors in the general population. Equally troubling is evidence of significantly delayed reporting of violent crimes, often due to fear of increased media publicity, and a high frequency of criminal charges being dropped upon victim request.[116] Accordingly, incidents of violence against women in the context of the "big three" professional sports seem to present unique cultural and legal issues. Therefore, consideration should be given to strengthening each league commissioner's authority to discipline those players who have managed to circumvent criminal punishments that would be otherwise be proportionate to their violent crimes. For that reason, Part III begins by explaining why the MLB has failed to make that same "best interests" connection that the NFL and NBA have, and why it might be in their best interests to do so. Part III also explains why the necessity of such persuasion is moot for the NFL and NBA, as both leagues have openly acknowledged the connection between violence against women and the protection of their respective "best interests." More importantly, Part III will outline the exact scope of the "best interests" powers that are granted to each individual commissioner, as well as conduct a comparative analysis between those commissioner powers.

Finally, Part IV outlines a few proposals for how to strengthen the disciplinary authority of the NFL Commissioner through revision of the current Player Conduct Policy. The Player Conduct Policy enables the NFL to be more effective in confronting issues of violence against women than the NBA and MLB, neither of which currently has such a formal league policy in place. However, there are areas of the Player Conduct Policy that can be restructured to better address issues involving violence against women, and specific recommendations for modification are given. By implementing these proposed changes to the NFL Player Conduct Policy, and using it as a model for formal policy implementation in the NBA and MLB can more effectively address these uniquely problematic issues.

I. "Rogues Gallery": Falsely Accused or Above the Law?

> I want to apologize directly to the young woman involved in this incident. I want to apologize to her for my behavior that night and for the consequences she has suffered in the past year. Although this year has been incredibly difficult for me personally, I can only imagine the pain she has had to

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[111] *Id.*

[112] As a point of clarification, the "Violent Crime Policy" was later renamed the "Personal Conduct Policy" in 2000. The article only refers to the policy as the "Violent Crime Policy" when discussing it in the context of original inception in 1997. Otherwise, the article will refer to the current policy as the "Personal Conduct Policy." Also, as will be discussed later, the Personal Conduct Policy was later strengthened through modification in 2007.

[113] Brent Schrotenboer, Arresting Image; As Concerns Grow over Player Conduct Rise, A review of Crime Reports Shows Arrest Rates Are Consistent with General Population, and DUIs Dominate, San Diego Union-Trib., Apr. 22, 2007, at C1.

[114] *Id.* Specifically, the report found that there was approximately one arrest per forty-seven players per year relative one arrest per twenty-one per year for the general population. *Id.*

[115] *Id.*

[116] Brubaker, *supra* note 5.

> endure. I also want to apologize to her parents and family members, and to my family and friends and supporters, and to the citizens of Eagle, Colorado. I also want to make it clear that I do not question the motives of this young woman. No money has been paid to this woman. She has agreed that this statement will not be used against me in the civil case. Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter…I understand that the civil case against me will go forward. That part of this case will be decided by and between the parties directly involved in the incident and will no longer be a financial or emotional drain on the citizens of the state of Colorado.
>
> —NBA Superstar Kobe Bryant

A. But The Glove Fits Damn It!—Legal System Biases, Media Fears, and Powerful Attorneys[117]

Conviction rates for athletes charged with sex-related crimes are markedly low compared to the arrest statistics.[118] For example, in 1995, domestic violence cases involving professional athletes resulted in a 36% conviction rate, which was equal to only half of the 72% conviction rate for the alleged abusers in the general population.[119] Although there has been some evidence that the responsiveness of law enforcement and prosecution to sexual assault complaints involving professional athletes has actually been favorable, there also seems to be indication of an off-setting pro-athlete bias among juries that has probably contributed to lower conviction rates for accused professional athletes.[120] There are even instances where preferential legal treatment—in the family law, civil divorce, or criminal justice systems—may very well be the result of judicial biases.[121]

Fear of the media attention surrounding athletes accused of acts of violence against women, particularly sexual assault, may also discourage victims from wanting to report incidents or formally file charges.[122]

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[117] It should be emphasized that perceptions of the relative influences of legal system biases, media attention, superior legal counsel, and player agents on legal outcomes can only be derived from the analysis of actions taken or statements made in past cases that have been reported. No concrete method actually exists to *conclusively* determine whether a legal outcome is the result of legal system biases, superior legal defense, media scrutiny, or some combination of all these influences. The only thing that one can truly do is analyze the facts and outcomes of individual cases and draw conclusions.

[118] Michael O'Hear, Blue-Collar Crimes/White-Collar Criminals: Sentencing Elite Athletes who Commit Violent Crimes, 12 Marq. Sports L. Rev. 427, 431 (2001). (referring to Linda Nicole Robinson, Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts, 73 Ind. L.J. 1313, 1330 (1998)).

[119] *Id.*

[120] *Id*. Out of 217 sexual complaints involving athletes from 1986 to 1995, at least 54% resulted in formal charges, which compared favorably with sexual assault cases in the general population. *Id.* However, in this same study, only 15% of the cases that proceeded to trial actually resulted in conviction. *Id.*

Admittedly, the 1995 domestic violence and the 1986 to 1995 sexual assault statistics appear to be somewhat outdated. Nevertheless, the article must rely on these statistics to illustrate its contentions because the NFL, NBA, and MLB do not generally release such statistics regarding its players. This could very possibly be the result of the leagues' desires to actually protect their respective public images, as opposed to damaging them. Additionally, the only major external studies that are currently available, aside from the aforementioned San Diego Union Tribune study, were conducted during the immediate aftermath of the Simpson murder trial. No major external studies appear to have been conducted in recent years. This could possibly be linked to public concern or disdain simmering down subsequent to the NFL's implementation the Violent Crime Policy, because the policy was initially enacted with the purpose of quelling those negative public perceptions.

An NFL spokesman offered another explanation for the NFL's lack of transparency regarding public release of the number of domestic violence cases against its players: many of the charges are ultimately dropped. Gerry Dulac, NFL Finds Domestic Violence Difficult to Gauge; Dropped Charges, Few NFL Penalties, Pittsburgh-Post Gazette, Mar. 12, 2008, http://www.post-gazette.com/pg/08072/864335-66.stm#ixzz1frV7X6PH). For example, high-profile NFL players James Harrison, Randy Moss, Santonio Holmes, and Larry Fitzgerald have all had domestic violence charges against them dropped. *Id.*

[121] William Nack & Lester Munson, Special Report: Sports' Dirty Secret, Sports Illustrated, Jul. 31, 1995, at 68. Regarding lenient sentencing for athletes convicted on criminal charges, judicial biases might be perceived as being a significant problem. However, it should be mentioned that judges may have restricted sentencing powers in criminal cases in which juries choose to convict professional athletes on lesser offenses.

[122] Jeff Benedict, Out of Bounds: Inside the NBA's Culture of Rape, Violence, & Crime 47 (2004). One example that is revealing as to why abuse victims of star athletes may avoid incident reporting or claim filing involves a domestic violence case that was brought

Another significant obstacle for victims to overcome is the exceptionally high standard of legal representation available to athletes, in contrast to the typical abuser who usually lacks comparable financial resources.[123] These expensive, highly-skilled attorneys are often particularly experienced in the art of leveraging the media attention to strengthen their clients' images at the expense of victims.[124] As a result, there are instances where victims may withdraw their complaints, either to prevent inevitable media attention from disrupting their private lives or to avoid suffering public character damage that may reduce the ability to successfully obtain a conviction.[125]

These highly-skilled attorneys also include player agents with legal backgrounds.[126] In fact, in the NBA alone, over 400 agents are certified to represent players, amounting to almost one agent for every roster spot in the NBA.[127] Today, player agents are responsible for much more than the negotiation of multimillion-dollar contracts, acquirement of endorsement deals, and management of players' finances[128]—the same job duties characteristic of the player agent lifestyle that was glamorized in the popular movie *Jerry Maguire*. These days, an agent's most critical role is arguably the handling of legal crises encountered by player clients, as legal conflict has become a constantly manifesting epidemic in the world of professional sports.[129]

In the modern American culture of sports celebrity, it is part of an agent's job to ensure that his or her clients, especially high-profile ones, exercise extreme caution to avoid the pitfalls that often accompany enjoyment of such a fast-paced culture—a culture that affords sports stars an abundance of money, fame, power, sexual promiscuity, and opportunities for engagement in criminal activities. Of course, these sports stars often still find ways to step into serious legal trouble, specifically when the fast-paced environment that accompanies celebrity status synergizes with already pre-existing violent tendencies against women.[130] When legal

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against NBA star Jason Richardson. *Id.* at 182. In a 2003 dispute with Roshondo Jacqmain, former girlfriend and mother of Richardson's daughter, police responded to a call by Jacqmain made two hours after Richardson allegedly shoved her head through a wall and then kicked her while she was down as he left the room. *Id.* When police arrived at her apartment, they noticed the hole in the wall where the incident was found to have taken place and took a photograph of it to preserve evidence. *Id.* at 183.

However, Jacqmain said that she only wanted the incident documented and begged the officers to not arrest Richardson because "she knew the arrest would be a magnet for publicity and that she would be hounded by reporters." *Id.* Nevertheless, police did subsequently arrest him and he was subsequently found guilty at trial and sentenced by the judge to one year of probation and ordered him to complete forty hours of community service and to complete a batter-intervention program. *Id.* at 184. After Richardson's arrest became public, her fear of the media was validated as reporters began camping outside of her apartment complex and harassing her for comments on the matter. *Id.* at 183. The 6'6", 220 pound Richardson was found guilty after he testified that he grabbed and pushed the 5'3" victim in an act of self-defense. *Id.* at 184.

[123] *Id.* at 47.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 48.

[129] *Id*

[130] Although the article focuses the bulk of its analysis on legal issues and the use of league authority to punish athletes for their crimes, there are some interesting cultural issues that might be worth briefly discussing. Discussion of some of those issues may help answer some possible questions the reader might have regarding the role that the unique lifestyle of a sports celebrity plays in the increasing the potential for the commission of violent acts against women. Michael Messner, sociologist and former head of the Department of Sociology and Gender Studies at the University of Southern California, has posited that the two most common traits found among athletes charged with domestic violence are a previous history of criminal behavior against women and present-time indulgence in promiscuous, but otherwise legally permissible, sexual behavior. Michael A. Messner & Donald F. Sabo, Sex, Violence & Power in Sports: Rethinking Masculinity 34 (1994). He is also of the view that sexist, macho and violent attitudes present in the culture of competitive male sports play a significant role in the creation of these criminal or sexual tendencies by conditioning athletes to hold chauvinistic and aggressive views toward women from a young age. *Id.*

Jeff Benedict has attempted to clarify Messner's views by providing a larger, more descriptive context of the unique world of professional sports culture in America. Benedict, *supra* note 6 at 25. Importantly, he contends that violence against women is a pervasive societal problem that tends to only receive the attention that it deserves when discussed in relation to accused celebrities. *Id.* This disproportionate attention paid to accused celebrities, relative to aggressors in the general population, has only grown larger as the *perceived* frequency of such accusations appears to have increased significantly over the years. *Id.* As a result, Benedict believes that there has been increased scrutiny from sociological researchers attempting to draw links between competitive team sports and violence against women. *Id.* However, he argues that despite the possible existence of such links, society should be careful not to oversimplify the relationship between athletic participation and violence against women. *Id.* at 26. While conceding that the culture of competitive male sports (i.e. - sexist locker room remarks, rewarding aggressiveness, etc.) may help sustain negative views of women where they

issues do arise, particularly criminal matters, is when it becomes time for the agent to step up to the plate and play ball.

Often, this requires the identification and hiring of the best criminal defense attorneys available or even direct participation in legal defense strategies.[131] Other times, an agent may be responsible for the creation and management of entire public-relations strategies in order to manage and leverage the powers of the media in furtherance of desired legal outcomes.[132] However, if the legal issues are of a substantial enough magnitude, there is a good chance that the agent may have to engage in all of these activities, or, at least, some combination of them.[133] Even without a criminal conviction, the mere mention of a high-profile athlete in connection with a sex crime or dating violence allegation can trigger a tremendous amount of negative publicity.[134] For this reason, when athletes are accused of sex offenses, the legal and public-relations strategies for opposing the allegations can accurately be referred to as "containment."[135]

A few cases that help illustrate the uphill battle that alleged victims often must face against such legal system biases and high-quality legal representation involve star athletes Barry Bonds, Brandon Marshall, and Ruben Patterson, as set forth below.

1. Batterer Up: Barry Bonds' Divorce from Susann Branco

Instances of domestic violence reportedly culminated in the divorce of Barry Bonds and his former wife, Susann ("Sun") Branco.[136] After the divorce, Barry requested a reduction in his family-support payments to his ex-wife and two children, and claimed financial hardship during the baseball strike as justification.[137] The requested reduction was from the current amount of $15,000 to $7500, a fairly reasonable compromise for a multimillionaire.[138] Not only did the county superior court judge grant the request, but he also immediately thereafter asked Bonds for an autograph![139] During the lengthy, chaotic divorce trial that subsequently conducted to determine the enforceability of a prenuptial agreement, Branco detailed several incidents of abuse.[140]

Some of these alleged instances included: being pushed into a bath tub while holding the couple's infant child, being shoved to the ground and kicked while eight months pregnant, and being locked out of their apartment without any clothes on during the middle of the night.[141] Branco also testified that in 1993 she had called the police department and reported to them that Bonds grabbed her by the neck, dragged her outside,

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already exist, he argues that sports participation does not, in and of itself, cause violence against women. *Id.* Instead, he believes that athletic participation and membership in this unique sports culture can "help to incite such transgressions in those athletes who are predisposed toward such acts." *Id.*

Further, Benedict argues that the stronger link between professional athletes and violence against women is more directly related to celebrity status and the off-field socialization process of celebrity athletes. *Id.* Specifically, the unique social climate of professional sports is said to expose famous athletes to exceptional amounts of promiscuous behavior, especially in the form of sexual activity. *Id.* He proposes that those professional athletes who are already "inclined to sexual and physical violence" seem to have extensive opportunity to take advantage of women because celebrity status is often accompanied by an increased sense of power, as well as a public perception of sports stars as revered members of society. *Id.* Therefore, Benedict persuasively concludes that, among those athletes who do have violent tendencies toward women, fame from athletic success may accelerate the exhibition of abusive attitudes, thus increasing the apparent frequency of the commission of violent acts. *Id.* He argues that, operating under an increased sense of power and the protection of public trust, athletes inclined toward sexual and physical violence have abundant opportunity to exploit women who may mistake them as upstanding members of society due to their celebrity statuses. *Id.* However, Benedict cautions that this is "less of a function of athletics per se than a reflection of the modern athlete's status as an icon of pop culture." *Id.*

[131] Benedict, *supra* note 22 at 48.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] Nack & Munson, *supra* note 21.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Ken Hoover, Sun Bonds Tells Court Barry Beat Her Often, San Francisco Chronicle, Dec. 7, 1995, http://articles.sfgate.com/1995-12-07/news/17822993_1_sun-bonds-phase-divorce-trial. It is worth noting that her attorney claimed that she was unable to work because of her suffering from battered woman syndrome as a result of Bonds' violence. *Id.*
[141] *Id.*

threw her into the side of a car, and then kicked her once she hit the ground.[142] However, after police officers arrived at the couple's home to investigate the matter, she decided not to cooperate with the police investigators in filing charges against Bonds due to strong concerns regarding inevitable media scrutiny.[143] Branco also described a domestic dispute that occurred during a family trip to Sweden in 1991 that allegedly culminated in Bonds assaulting her by forcing her into a closet until her stepfather was able to step in and help restrain him.[144]

Once Bonds took the stand, he countered, "I did not ever physically abuse Sun…Sun hurt my trophies…Sun put holes in walls."[145] During his testimony, he also gave a thoroughly different account of the 1993 incident that led to police being called to their home.[146] Regarding that incident, he stated, "She grabbed my shirt, and then she kicked me in the groin, so I grabbed her leg, and I kicked her in the butt."[147] Bonds also testified that he had to intervene when a dispute between Branco and mother had erupted into a "fist fight" during a family trip to Sweden in 1991.[148] According to him, Branco then left the house and, upon later returning that same day, they later began "struggling" over a set of keys to a rental car.[149] He added, "I took the keys, and in the process of taking the keys we slipped and fell into the closet."[150] This statement reportedly resulted in laughter from audience in the courtroom.[151]

The couple had already divorced in 1994 and the divorce proceedings were for the purpose of determining if the former couple's prenuptial agreement would be upheld, or if Branco would have instead been entitled to half of Bonds' property in the community property state of California.[152] The state Supreme Court's decision to uphold the agreement overturned a 1999 state Court of Appeal decision that found the agreement to be invalid.[153] Though she did not have a lawyer at the time she signed the prenuptial agreement, the court rationalized that she understood the consequences of signing the prenuptial agreement the day before the wedding and voluntarily gave up all of her community property rights.[154] The state Supreme Court also found that requiring each side to have an independent attorney would result in a floodgate of litigation opening up into the California court system.[155] All seven justices ruled in his favor.[156]

2. Criminal Defense that is Out of Bounds? Ruben Patterson and the "*Alford Plea*"

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[142] *Id.*

[143] *Id.* According to a police report, officers who responded found no red marks on Branco's neck to support her allegations that she had been choked. *Id.* However, Branco said that officers had never actually checked for them. *Id.*

[144] Eve Mitchell, Bonds Counters Ex-wife's Charges; Giants Star Testifies in Divorce Case that She Kicked Him and Broke His Trophies, San Francisco Chronicle, Dec. 16, 1995, http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1995/12/16/NEWS14045.dtl.

[145] *Id.*

[146] *Id.*

[147] *Id.* He also claimed that he kicked her with his bare feet. *Id.*

[148] *Id.* He stated, "I saw Sun take a swing at her mom. I grabbed both of them and split them apart. I grabbed Sun and pushed her to the steps and said to knock it off." *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] Harriet Chiang, State's High Court Upholds Bonds Prenup, San Francisco Chronicle, Aug. 22, 2000, http:// articles.sfgate.com/2000-08-22/news/17657708_1_sun-bonds-prenuptial-premarital.

[153] *Id.* The Court of Appeal stated that where each side does not have an attorney, courts must "closely scrutinize" and the circumstances surrounding the contract. *Id.* Therefore, in its analysis, the court emphasized that while Branco only possessed limited English proficiency and only brought a brought a friend who was also limited in her English proficiency. *Id.* Meanwhile, Bonds brought two lawyers and a financial adviser the signing of the prenuptial agreement. *Id.* The court also took into account the troublesome fact that the prenuptial was not signed until one day before the wedding, and that the agreement itself was poorly drafted. *Id.*

[154] *Id.*

[155] *Id.* In support of the floodgate rationale, Chief Justice Ronald George stated, "In a majority of dissolution cases in California at least one of the two parties apparently is not represented by counsel…and…having a lawyer is merely one factor among several" that a court should consider when determining if the agreement was voluntarily entered into. *Id.*

[156] *Id.* This was not the last time that Bonds would be accused of violence against a woman. In 1994, while he was still married to Branco, Bonds allegedly began a tumultuous, nine-year affair with former Playboy Playmate Kimberly Bell. Nathaniel Vinton, Kimberly Bell Testifies About Bonds' Shrunken Testicles, is Brought to Tears on Witness Stand, New York Daily News, Mar. 28, 2011, http://articles.nydailynews.com/2011-03-28/sports/29375769_1_kimberly-bell-balco-doping-ring-elbow-injury. This past year, during Bonds' trial for alleged steroid use, Bell testified that his steroid use caused Bonds to become increasingly aggressive toward her. *Id.* On the witness stand, she claimed that he had previously threatened to "cut my head off and leave me in a ditch" and "tear out my breast implants because he had paid for them." *Id.* She added, "He was just increasingly aggressive, irritable, agitated, very impatient…It was emotional and verbal to at one point physical." *Id.*

Ruben Patterson's agent, Dan Fegan, a Yale Law School graduate and one of the top-ranked sports and entertainment lawyers in the country, played a large part in the handling of a sexual assault charge brought against Patterson by the former nanny of his children, Jenny Stevens.[157] However, when Fegan realized that he could not "contain" Patterson's dilemma on his own, he hired John Wolfe, a criminal defense attorney with expertise in helping high-profile professional athletes defuse high-stakes.[158] His well-known reputation was also linked to his reputation of being able to get most of his clients' cases dismissed before ever making it to trial.[159]

Wolfe began by hiring a Seattle area private investigator who oversaw a top-level team of investigators consisting of former Seattle area police officers with various backgrounds in surveillance, general criminal investigations, and sex crimes investigations.[160] In these situations, the role of the investigator is to uncover anything that could discredit the accuser or her version of what happened between her and the accused.[161] After the investigation failed to turn up anything that could discredit her, Wolfe decided that the best case scenario for Patterson would be to get the charge reduced, keep him out of prison, and dispose of the case without any publicity.[162]

Normally, defense attorneys wait until a client has been charged before talking with prosecutors.[163] However, Wolfe's famous client—a wealthy NBA player who had earned a well-known reputation as the "Kobe stopper" for his aggressive defensive abilities—was under investigation for a felony sex crime that threatened to ruin his image.[164] Therefore, Wolfe initiated talks with the county deputy prosecutor, Lisa Johnson, before any charges were even filed.[165] He originally sought to get the charge downgraded to a misdemeanor, avoid prison time, and keep public exposure to a minimum.[166] A plea bargain was reached in which Patterson would enter a guilty plea under the "*Alford doctrine*" in exchange for a conviction on the misdemeanor charge.[167] As a result, Patterson was allowed to deny guilt while admitting sufficient facts for a jury to convict him.[168]

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[157] Benedict, *supra* note 22 at 48. In his efforts to "contain", Fegan allegedly went as far as to instruct the head of the nanny agency that employed Stevens to "offer her ten thousand dollars to just go away." *Id.* at 51. He also contacted a Seattle businessman with ties to the Seattle Supersonics organization in an attempt to show that Stevens had previously falsified a sexual complaint against him. *Id.* However, the police did not believe the businessman's version of the incident. *Id.* at 52. The businessman alleged that Stevens had previously lied to Shannon Patterson, Ruben Patterson's former wife, about an alleged act of sexual harassment involving himself. *Id.* Specifically, the businessman stated that Stevens had told Mrs. Patterson that he had placed her hand against his penis. *Id.* Stevens immediately told her about what had happened and Mrs. Patterson confronted him at the social event where the incident allegedly took place. *Id.* When confronted, the businessman denied committing the alleged act. *Id.*

[158] *Id.* at 58. Wolfe became the lawyer of choice for criminally accused athletes in the Seattle area after successfully defending Seattle Seahawks quarterback Gale Gilbert in 1987. *Id.* Gilbert had been charged twice with sexual assault within a six-month period and faced separate trials for raping one woman and sexually molesting another. *Id.* After winning an unlikely acquittal in the rape trial, Wolfe disposed of the second case for Gilbert two days later by convincing prosecutors to let the quarterback plead guilty to second-degree attempted assault. *Id.* Finally, Wolfe succeeded in convincing the judge to spare Gilbert any jail time, and instead sentence him to 240 hours of community service. *Id.*

[159] *Id.* Another situation illustrating Wolfe's prowess involved former NBA All-Star Chris Mullin. In 1994, he was being investigated for the sexual assault of a woman at a hotel. *Id.* at 55. Mullin's agent flew Wolfe in from Canada, where he was vacationing, via helicopter. *Id.* at 56. While police were investigating the incident, Wolfe launched his own investigation uncovering information from the accuser's past that would challenge her credibility. *Id.* at 57. Prosecutors subsequently dropped the charge four months after the filing of the complaint without any explanation as to why. *Id.* Wolfe's representation resulted in no charges being filed and even allowed Mullin to completely avoid any form of publicity regarding the allegations during that four-month investigation period. *Id.* Even the decision to drop the charges did not receive press attention when that decision was made. *Id.* From Mullins' and Wolfe's perspectives, the whole case just seemed to disappear. *Id.*

[160] *Id.*

[161] *Id.* at 58.

[162] *Id.* Interviews were conducted with people close to Stevens, including her past employer. *Id.* Records were checked to find out if she had ever previously accused anyone of sexual assault, whether she had a criminal record, and whether she owed anyone money—from creditors to someone who may have won a judgment against her in a lawsuit. *Id.* She was even allegedly put under surveillance and followed, although Wolfe denied that he or Dunn had any role in the surveillance. *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 60.

[167] *Id.* at 69.

[168] *Id.*

Wolfe referred to the "*Alford plea*" as a "problem-solving mechanism" and everyone, including Stevens,[169] seemed to view the outcome as desired.[170] Since Washington treats an "*Alford plea*" as a guilty plea, the state was able to guarantee a conviction against him and require him to register as a sex offender.[171] However, Patterson was allowed to publicly insist that he did not commit the underlying crime and received a conviction on a misdemeanor charge.[172] Patterson had his highly-reputable agent conducting his own investigation from the outset of the investigation, and was also represented by one of the best criminal defense attorneys in Seattle.[173] This was a direct result of Patterson's status and income, and it is rare for an accused sex offender to receive such high-quality legal defense.[174]

3. Several Fumbles Later … and Brandon Marshall Still Wins

In 2008, two-time Pro Bowl wide receiver Brandon Marshall was charged with two misdemeanor battery charges against his ex-girlfriend, Rasheedah Watley.[175] According to an Atlanta police report, "Marshall threw her on the bed, grasped her head with his hand and began to slap her."[176] Although the alleged incident took place in March of that year, the charges were not officially filed until six months later.[177] After filing of the charges, Marshall stated, "We've been waiting six months for those charges to be filed, and it's finally here. That's what I've got Harvey Steinberg (his attorney) for. He's a great guy and he's great at what he does."[178]

During the course of the trial, Watley detailed numerous incidents of abuse by Marshall including an allegation that he once punched her and cut her thigh.[179] There were also 9-1-1 dispatch tapes in which she was recorded frantically screaming about Marshall attacking her car while she was trying to escape from him.[180]

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[169] *Id.* Wolfe managed to orchestrate the timing of the plea to coincide with the filing of the indictment in order to prevent the possibility of extended media coverage of the situation. *Id.* This made Stevens happy because she had a desire to avoid trial that grew from a fear of extensive media coverage. *Id.* She also claimed to have been tired of being followed around by Wolfe's investigative team. *Id.* The one goal she shared with Patterson was to keep the incident out of the newspapers and was happy to finally be able to prevent the incurrence of further stress that was caused by the investigation of the case. *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.* Conviction on the felony sexual assault could have resulted in Patterson serving eight years in prison. *Id.* The judge ended up sentencing him to one year in prison, suspending all of it but fifteen days. *Id.* He also imposed a two-year period of supervised probation and ordered him to commit no criminal acts during that time. *Id.* Patterson was allowed to serve his fifteen day sentence in his off-season home in Ohio, with time knocked off for good behavior. *Id.*

[173] *Id.*

[174] However, Patterson's troubles did not end after he managed to avoid serving prison time on the sexual assault conviction. *Id.* at 76. He was subsequently involved in a domestic dispute with his wife that revealed a long history of spousal abuse. *Id.* In November 2002, Mrs. Patterson called 911 and reported being assaulted by her husband. *Id.* According to police reports, when officers arrived at the residence, Mrs. Patterson was crying and holding a cell phone with blood dripping from her finger. *Id.* Shattered glass was lying on the floor behind her and she reported that her husband had put his hands around her neck before being shoved into a pantry area and held against her will. *Id.* The fighting continued upstairs where she reported being grabbed by her throat and smothered by a pillow, preventing her from breathing. *Id.* Mrs. Patterson also told the police that he had been physically abusing her for six years and that she had finally reached her breaking point. *Id.* While admitting to restraining her in the kitchen and bedroom, he claimed that he was forced to because she was destroying property inside the house. *Id.* at 77.
He was arrested and charged with felony assault under Oregon's Domestic Violence Abuse Prevention Act. *Id.* Had he been convicted, he could have been sentenced to five years in prison and a $100,000 fine. *Id.* However, after some convincing by Wolfe and Tim McGee, Mr. Patterson's manager, Mrs. Patterson decided to request the District Attorney to drop the charges. *Id.* She issued a formal statement to the media saying that she had "made a statement that was accurate, but in the heat of the moment was incomplete. I want the public to know that Ruben did not assault me." *Id.* Without her cooperation, the District Attorney decided to comply with the request and close the case. *Id.* While Patterson has managed to stay out of legal trouble since this incident, Mrs. Patterson did divorce him soon after the charges were dropped. *Id.*

[175] Lindsay H. Jones, Marshall Charged in March Case, Denver Post, Sept. 19, 2008, at CC1. While this was the first time that Marshall had actually faced trial on domestic violence charges, police had previously been called to his home on seven different occasions involving allegations domestic violence. Lindsay H. Jones, Marshall's Transgressions, Denver Post, June 29, 2008, at C4. He was charged with false imprisonment and domestic violence for the events that precipitated one of those incidents, but those charges were later dropped. *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] John Barr, Timeline of Events: Brandon Marshall, Entertainment and Sports Programming Network (ESPN), Mar. 31, 2009, http://sports.espn.go.com/espn/otl/news/story?id=4216417.

[180] *Id.*

The jury eventually acquitted him in August 2009, despite the fact that prosecutors had seven photographs of injuries to her mouth, face, neck, eye, and thigh admitted into evidence.[181] Steinberg somehow managed to persuade the jury that the prosecution failed to produce enough witnesses or evidence to support Watley's sworn testimony.[182] Had he been found guilty, Marshall could have faced a one year sentence in prison.[183]

Unfortunately for Marshall, his troubles did not end after his acquittal on the battery charges against Watley. In 2009, weeks after becoming engaged to his current wife, Michi Nogami-Marshall, he was arrested on disorderly conduct charges that were eventually dropped, after police officers witnessed the couple kicking and punching each other.[184] Eventually, on April 22, 2011, Nogami-Marshall was arrested for her involvement in a domestic dispute that culminated in Marshall being stabbed in the stomach with a kitchen knife.[185] Marshall initially told the police officers who arrived at his home, in response to a 9-1-1 call, that he had slipped and fell onto a broken vase.[186] After the officers observed that there were no traces of blood on the broken glass, they arrested her upon making a determination that she had been the aggressor.[187] After the arrest, she later admitted to stabbing him but claimed to have been acting in self-defense.[188] She was formally charged with aggravated battery with a deadly weapon, spent the night in jail, and was released on a $7,500 bond the next day.[189] In the end, the prosecutors decided to drop the charge against her in July 2011 and the couple is still married.[190]

A. *Ball in the Victim's Court: Victim Protection of Aggressors and Fear of the Media Showers*

As seen in the above subsection, legal biases, high quality legal representation and intense media scrutiny can act independently, or in conjunction with one another, to create the following possibilities:

1) Incidents relating to criminal acts of violence against women committed by high-profile athletes go unreported to, or charges go unfiled with, law enforcement officers;
2) Charges are eventually dropped by prosecutors at the victim's request;
3) Charges are eventually dropped by prosecutors due to a lack of adequate victim cooperation or victims recanting previous statements;
4) Ability of professional athletes to avoid a felony criminal conviction by bargaining a guilty plea to a lesser misdemeanor offense; and/or

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[181] Lindsay H. Jones, Marshall Cleared of Battery, Denver Post, Aug. 15, 2009, at C1.
[182] *Id.*
[183] *Id.*

[184] Andrew Carter, Brandon Marshall Stabbed by Wife, Released from Hospital, Sun Sentinel, Apr. 23, 2011, http://articles.sun-sentinel.com/2011-04-23/sports/fl-brandon-marshall-stabbed-0424-20110423_1_brandon-marshall-kitchen-knife-nfl-lockout.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] Michael Klopan, Brandon Marshall Stabbing: Charges Dropped Against Michi Nogami-Marshall, Huffington Post, July 29, 2011, http://www.huffingtonpost.com/2011/07/30/brandon-marshall-stabbing-michi-nogami-marshal_n_914021.html. Soon after the stabbing incident with his wife, Marshall was diagnosed with borderline personality disorder (BPD). Kim Carollo, NFL Star Brandon Marshall has Borderline Personality Disorder, ABC News, Aug. 1, 2011, http://abcnews.go.com/Health/ miami-dolphins-wide-receiver-brandon-marshall-reveals-borderline/story?id=14204660#.TusmutQS2Ag. While that incident was very serious, it was only one in a long line of off-field problems that have been encountered by Marshall. Sean Deveney, Brandon Marshall Becomes Unlikely Voice for Borderline Personality Disorder, Sporting News, Oct. 25, 2011, http://aol.sportingnews. com/nfl/story/2011-10-25/brandon-marshall-becomes-unlikely-voice-for-boderline-personality-disorder. According to the National Institute of Mental Health, sufferers of BPD often experience "intense bouts of anger, depression and anxiety that can be associated with aggression, alcohol or drug abuse and self-injury." Carollo, *supra*.
BPD is also said to usually have its roots in early childhood abuse, abandonment, and neglect, and that it manifests into poor coping techniques. Amanda Gardner, Miami Dolphins Star has Borderline Personality Disorder, CNN Health, Aug. 2, 2011, http://www.cnn.com/2011/HEALTH/08/02/miami.dolphin.borderline.personality/index.html. Marshall said that a big motivation for him to want to speak publicly about the condition is to help "set the record straight" regarding the stabbing incident. Carollo, *supra*. Marshall defended his wife and thanked her for standing by him during his struggles with BPD. *Id.* He stated, "I wouldn't be able to articulate and paint a vivid enough picture for you guys to show you what I've been suffering from which in turns affects my wife, who's the closest person to me." *Id.* Marshall has said he wants to become the face of BPD, that he wants to show as many people as possible that it is an affliction that affects countless people who go undiagnosed. *Id.* Hopefully Brandon Marshall's story has a happy ending.

5) Accused professional athletes are afforded a greater "presumption of innocence" by juries than would be afforded to the average citizen

In the previous subsection, some elements of these causal relationships were noticeable in the case analyses involving Barry Bonds, Brandon Marshall, and Ruben Patterson.[191] Whereas the outcomes of those cases seem to have been primarily influenced by the presence of biases in adjudication and highly-skilled legal defense counsels—as well as fears of the media preventing victims from reporting incidents or filing charges—the focus of this section is on cases where the most significant barriers to successful prosecution were directly related to the victim's substantial control over the outcome of a criminal prosecution, after charges have actually been filed. As illustrated by the outcomes of cases involving retired sports legends Daryl Strawberry[192], Scottie Pippen[193], Anfernee ("Penny") Hardaway[194], and Warren Moon[195], victims' actions or decision-making can sometimes be outcome-determinative.

However, as also seen in those cases, such victim influence has often been wielded in ways that actually serve as barriers to the successful criminal prosecution of professional athletes due to motivations such as: protection of aggressors, attempts at reconciliation, concern for the welfare of children, fear of intense media scrutiny or public embarrassment, or even psychological difficulties experienced when attempting to leave a cycle of abuse.[196] Unfortunately, these older cases represent only a mere subset of the many that involve vic-

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[191] With respect to the Barry Bonds and Ruben Patterson, both of their respective wives avoided reporting abuse suffered during long-term cycles of alleged domestic violence because they feared extensive media coverage. For the same reason, both wives also avoided cooperation with prosecutors in building cases against their husbands. Mrs. Patterson even requested the District Attorney to drop the case and publicly recanted previous statements after previously leading the prosecutor to believe that she would testify against her husband. Further, Ruben Patterson and his attorney were able to use the "*Alford plea*" to bargain his way out of a felony conviction for the alleged sexual assault of Jenny Stevens, a conviction that could have resulted in a jail sentence. The family court judge's decision to reduce Bonds' child-support payments and his subsequent request for Bonds' autograph also supports the perception of judicial bias.

With respect to Brandon Marshall's criminal trial, there appears to be good reason to believe that jury bias may have played a role in the adjudication of his innocence for the misdemeanor charges involving ex-girlfriend Watley. This seems very possible in light of the strong evidence that was presented against him. The many instances of law enforcement being called to investigate prior disputes between Marshall and Watley, as well as Marshall's subsequent history of alleged abuse with his current wife Mogami, only strengthens the perception of possible jury bias in his criminal adjudication. Finally, it is apparent that Brandon Marshall, possibly a victim of domestic violence, lied about how he was stabbed in order to protect Mogami from prosecution or to prevent both of them from having to deal with media scrutiny.

[192] Gordon Edes, Strawberry's Future in Doubt, Assault Charge Is Latest Trouble, Sun Sentinel, Sept. 6, 1993, at 5C. Strawberry was arrested after allegedly striking his girlfriend, Charisse Simons, in the eye. *Id.* The charges were dropped when she refused to cooperate with prosecution, reportedly due to fear of the inevitable media attention that would cause disruption to their lives. Strawberry Won't Face Charges, Chi. Trib., Sept. 21, 1993, at 5N. Before that incident, Strawberry had been arrested on charges of assault with a deadly weapon after allegedly hitting his wife, Lisa Strawberry, and threatening her with a handgun. Edes, *supra*. These charges were also dropped after she refused to cooperate with prosecution. *Id.* Lisa Strawberry reported that he had broken her nose on another occasion as well. *Id.*

[193] Nack & Munson, *supra* note 21. In 1995, Pippen was arrested for allegedly grabbing his fiancée, Yvette DeLeone, by the arm and shoving her against a car the day after his team, the Chicago Bulls, was eliminated from the playoffs. *Id.* Pippen was charged with domestic battery but the charges were dropped when DeLeone abandoned the case. *Id.* Prior to this incident, DeLeone had previously reported fractures in her hand from an incident in which Pippen allegedly threw her out the front door. *Id.* Pippen's former wife, Karen McCollum, had also reported to the police that Pippen hit and choked her. *Id.*

[194] Hardaway Charge to be Dropped, Associated Press, Feb. 5, 2001, http://www.cbsnews.com/stories/2001/01/10/sports/main263240.shtml. Hardaway had been accused by Latarsha McCray, the mother of his 8-year-old daughter, of intimidating her by carrying a gun during an argument outside Hardaway's home. *Id.* The charge was dropped when McCray declined to cooperate further in the case, despite having filed the complaint against Hardaway. *Id.* Regarding the dropped charge, the prosecuting attorney, Andrew Miller, stated, "At this time, our office is unable to proceed with this matter based on the current level of cooperation we are receiving from Ms. McCray and our inability to secure her attendance at trial." *Id.*

[195] Kate Murphy, Jury Rapidly Acquits Moon of Spousal Abuse Charges, N.Y. Times, Feb. 23, 1996, at B12. Moon was acquitted of domestic violence charges after his wife, Felicia Moon, urged the prosecutor to drop the charges and later altered her testimony on the stand. *Id.* Moon was acquitted despite the fact that he had publicly stated "this was a case of domestic violence." *Id.* One of the jurors even stated, "There's some sort of slapping in most marriages." *Id.*

[196] Whether the desire to protect professional athletes, save broken relationships, or consider the welfare of children are stronger or weaker for victims of professional athletes, relative to victims in the general population, is uncertain. However, there should be no reason to believe that the difficulties of leaving an abuser are not at least equivalent to those faced by victims in the general population. Brennan Williams, Tanya Young Williams, Jayson Williams' Estranged Wife, on 'Basketball Wives,' Huffington Post, Sept. 19, 2011, http://www.huffingtonpost.com/2011/09/19/tanya-young-williams-interview_n_969553.html (interview with Tanya Williams,

tims who create such barriers. More recent cases involving active professional athletes Julio Lugo, Brett Myers, and Kobe Bryant further illuminate the power of victim influence on criminal adjudications.[197]

1. Houston, We Have a Triple Crown Loser—Husband, Father, and Abuser

In 2003, at a trial held at the Harris County Criminal Court-at-Law, a jury acquitted former Houston Astros[198] shortstop Julio Lugo of misdemeanor assault charges after his wife, Mabely Lugo, testified that he did not actually intend to hurt her during a dispute that she claimed to have been at fault for causing.[199] In her testimony, she claimed that the incident occurred when she wanted to talk about marital problems, started yelling at him after he turned up the radio to ignore her voice, and that he accidentally hit her in the mouth while trying to push her arm away as she reached for the radio to turn down the volume.[200] However, the police report told a different story, stating that Lugo punched her in the mouth when she reached for the volume control while driving him to the Minute Maid Park, causing the back of her head to hit the driver's side window. [201] It was also reported to the police officers that she nearly lost control of the vehicle and that, once they had reached Minute Maid Park, Lugo got out of the car and tried to take away her house key.[202] During the reported struggle against him for the key, he allegedly grabbed her hair and slammed her head against the vehicle.[203]

Upon arrival, the police officers found her crying in the vehicle and observed a bump on her forehead, bruises on her face and blood on her lip.[204] After initially turning down medical attention, she was taken by

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former victim of retired NBA All-Star Jayson Williams and current advocate for battered women, about issues of abuse suffered at the hands of professional athletes,).
Regardless of aggressor or victim status, leaving an aggressor or a cycle of abuse is usually a tough process that affects all victims. *Id.* With regard to fear of public attention or embarrassment, unfortunately this appears to be a greater problem for victims of professional athletes, because proceeding with criminal prosecution against such athletes often triggers the watchful eye of the media. *Id.* If an individual should ever question the logic behind victims' decisions to not report abuse or rape, file charges or not cooperate with prosecutors, he or she needs to realize that there is nothing inherently logical about issues of violence against women. Additionally, in both the general population and professional sports contexts, it should be emphasized that the frequency of incidents of violence against women are probably greater than what we know because we cannot have knowledge of the incidents that never get reported or the charges that never get filed.

[197] In the following cases, it should be fairly easy for the reader to observe the presence of possible judicial and jury biases, as well as highly-skilled criminal defense attorneys. Still, the article finds it appropriate to separate discussion of these cases from the case analyses presented in the previous subsection. The reason for this separate discussion is that the following cases are uniquely revealing as to the power that victims can wield over the ultimate disposition of criminal cases against professional athletes charged with crimes of violence against women. These cases deserve their own subsection because the article wants the reader to pay special attention to the distinctive barriers that victim influence can pose to the successful prosecution of athletes. Furthermore, observations of judicial and jury biases in these cases, as well as the influence of skilled criminal defense teams, should only serve to strengthen the article's general contention that this unique legal environment necessitates action by the MLB, NBA, and NFL.

[198] Astro's Lugo Arrested for Assaulting Wife, Associated Press, May 1, 2003, http://sportsillustrated.cnn.com/baseball/news/2003/05/01/lugo_arrested_ap/. The Houston Astros released Lugo the day after his arrest in order to quickly distance themselves from him. *Id.* The Astros released a statement that said that the organization was "acutely aware of the issues surrounding domestic violence and we completely support the steps necessary to deal with it." *Id.* Pam Gardner, Astros president of business operations and member of the board of directors for the Houston Area Women's Center, also stated "I was proud that our organization dealt with it in the way it did. We made a statement how we deal not with just domestic violence but violence of any kind. It's unacceptable. We clearly stated that and I'm proud of that." *Id.*

[199] JEFFREY GILBERT, JURORS ACQUIT EX-ASTRO LUGO IN ASSAULT TRIAL, HOUSTON CHRONICLE, JULY 17, 2003, HTTP://WWW.CHRON.COM/CDA/ ARCHIVES/ARCHIVE.MPL/2003_3672546/JURORS-ACQUIT-EX-ASTRO-LUGO-IN-ASSAULT-TRIAL.HTML. When Lugo approached jurors to express gratitude for the verdict, some of them requested his autograph and his defense attorney, Chris Tritico, even offered to send the jurors autographed baseballs. Rachel Graves, Ex-Astro Julio Lugo Signs Autographs for Jurors, HOUSTON CHRONICLE, JULY 21, 2003, HTTP://WWW.CHRON.COM/NEWS/HOUSTON-TEXAS/ARTICLE/EX-ASTRO-JULIO-LUGO-SIGNS-AUTOGRAPHS-FOR-JURORS-2123642.PHP. Prosecutor Catherine Evans characterized the scene as "slightly surreal," but declined to express her opinion as to whether the jury might have been influenced by his celebrity status. *Id.* However, Tritico stated, "I do not think that they were swayed one bit by the fact that Julio Lugo is a professional athlete. It is not uncommon for people who are acquitted to thank the jury in some way." *ID.*

[200] Gilbert, *supra.*

[201] JOSE DE JESUS ORTIZ, ASTROS CUTTING TIES WITH LUGO WITH POLL, HOUSTON CHRONICLE, MAY 2, 2003, HTTP://WWW.CHRON.COM/SPORTS/ ASTROS/ARTICLE/ASTROS-CUTTING-TIES-WITH-LUGO-WITH-POLL-2131032.PHP.

[202] *Id.*

[203] *Id.*

[204] *Id.*

ambulance to a hospital to receive treatment for her injuries.[205] The report also stated that she told the officers that she wanted to file charges because that incident was not the first time that Lugo had been violent toward her.[206] Lugo did not testify or call any witnesses and a conviction on the charge would have been punishable up to one year in jail.[207] When asked outside the courtroom about the April incident, Mabely Lugo wouldn't comment about what was recorded in the police report.[208] Instead, she stated, "I don't want to go back, I want to go forward."[209] She also explained that, despite the couple's filing for divorce, they still loved each other and that there was a possibility of reconciliation.[210]

In light of the statements made by the Houston Astros organization when justifying the organization's decision to immediately release Julio Lugo following his arrest for domestic violence, it may feel somewhat disconcerting that the team decided to sign Brett Myers to a contract in 2010, after the Philadelphia Phillies informed him that they would not re-sign Myers.[211] While playing for the Philadelphia Phillies, current Houston Astros pitcher Brett Myers was arrested in 2006 on an assault charge for acts of heinous violence committed against his wife, Kim Myers.[212] The violence reportedly erupted from a dispute over which bar they wanted to attend.[213] Myers was seen by witnesses hitting his wife and dragging her by the hair near the hotel.[214]

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[205] *Id.*

[206] *Id.*

[207] *Id.* In closing arguments, Evans told jurors that the case was "classic domestic violence" and that Mabely Lugo maintained her allegations of assault at least ten different times prior to the trial. *Id.* She also stated, "How sad is it to hear a woman say over and over, 'I hit myself against the truck. . . . I provoked him . . . it was my fault?'" *Id.* Once outside the courtroom, she said that it was common for victims to recant their stories in "these types of cases," that she was nevertheless surprised because Mabely Lugo's story had not changed until she testified, and that she "felt he committed the crime and still think that." *Id.*

[208] *Id.*

[209] *Id.*

[210] Julio and Mabely Lugo had been married for more than four years before the trial, but had been talking about getting divorced since January of that year, the month their first child was born. *Id.* While refusing to comment on the couple's filing for divorce, Tritico did comment that they were dealing with a situation that was common to many couples and that having a child together meant that they would always have a special bond to each other. *Id.*

[211] See *Supra* note 98. This might even make the reader wonder whether the release of Julio Lugo was influenced by strong moral values of the Houston Astros organization, or was actually just the result of bad publicity. *Id.* After all, Brett Myers's case was resolved about three years prior to his free agent signing with the Astros and also occurred in Philadelphia, far away from the spotlight of Houston media attention. Mel Antonen, Houston Astros Sign Pitcher Brett Myers, USA Today, Aug. 1, 2010, http://content.usatoday.com/communities/dailypitch/post/2010/08/houston-astros-sign-pitcher-brett-myers/1.

However, the Astros made the decision to deal with Julio Lugo's situation by immediately cutting ties with him, before he even had a chance to defend his innocence. David Coleman, The Astros Elephant in the Room with Myers, The Crawfish Boxes, Jan. 9, 2010, http://www.crawfishboxes.com/2010/1/9/1242120/the-astro-elephant-in-the-room (stating "You can't have it both ways. A valuable player, Lugo was let go as the organization made a decision based on off-the-field behavior. They drew a line at what's acceptable behavior. If that's how they want to run things, I'm fine with it, but you lose any moral high ground when you sign another guy with an alleged incident in his past. Yes, the Lugo situation happened eight years ago and some of the management has changed, but I get the feeling the Lugo stuff came down from Drayton (owner of Houston Astros). He hasn't gone anywhere, yet.")

Maybe Lugo's case could have also finally given the Astros the excuse they needed to justifiably release him, who was having a "slumping season", and allow the young and talented Adam Everett to replace him as starting shortstop. See *supra* note 98. Richard Justice, popular Houston Chronicle sports writer, even begged the question, "Is McLane showing one standard for a Latino player and another for a white guy? That's a fair interpretation." Richard Justice, Yes, Brett Myers Could Be Trouble. I'm Still Ok with the Astros Signing Him, Houston Chronicle, Jan. 10, 2010, http://blog.chron.com/sportsjustice/2010/01/yes-brett-myers-could-be-trouble-im-still-ok-with-the-astros-signing-him/)

[212] After Wife's Request, Charge Dropped vs. Phils' Myers, Associated Press, Oct. 5, 2006, http://sports.espn.go.com/mlb/news/story?id=2614037.

[213] *Id.*

[214] Dan Shaughnessy, Phillies Should Have Stopped Myers's Start, Boston Globe, June 25, 2006, http://articles.boston.com/2006-06-25/sports/29248942_1_hits-women-brett-myers-domestic-violence/2. In a telephone interview with the Boston Globe, one of the witnesses, Courtney Knight, said, "He was dragging her by the hair and slapping her across the face. She was yelling, 'I'm not going to let you do this to me anymore.' She's a real small girl. It was awful. He had her on the ground, trying to get her to go, and she was resisting. She curled up and sat on the ground." *Id.* Sly Egidio, another witness who was with Knight, added, "I watched him just haul off and smack her in the face. This was violent. This was wrong." *Id.*

Boston police responded to a 9-1-1 call from the witnesses and found Kim Myers crying while sitting on a sidewalk. *Id.* According to the officers, the left side of her face appeared swollen and she told them that her husband punched her in the face twice. *Id.* Myers was subsequently arrested and later released from after his wife posted his $200 bail. *Id.* He pleaded "not guilty" at the following arraignment. *Id.*

Upon the request of his wife that Myers not be prosecuted for hitting her in the face during an argument near Fenway Park, the charges were dismissed less than four months after the incident occurred.[215] She told Judge Dougan, "There's no violence in our family. That night in Boston we had both been drinking. I was not hurt. I was not injured….he's a loving father, he's a loving husband. This is not something that happens on a daily basis, or ever. I became upset with him, and I pushed him away from me. That's when other people saw us disagreeing with each other."[216] Despite acknowledging that Myers did strike his wife, Judge Dougan dismissed the charge over the objection of prosecutors because she had agreed to sign an "affidavit of accord and satisfaction" stating that she did not want the charges to be pursued any further.[217]

2. Kobe Bryant's Sexual Assault Drama: Media Showers and the "He Said-She Said" Battle in Rape Cases

The Kobe Bryant sexual assault case began in the summer of 2003 when the sheriff's office in Eagle, Colorado arrested him in connection to a sexual assault complaint filed by Katelyn Faber.[218] Bryant had checked into a hotel in Eagle on June 30, 2003, prior to having surgery nearby on July 2.[219] Faber, who worked for the hotel at the time, accused Bryant of raping her in his hotel room on July 1, the night before his surgery.[220] After a third-degree sexual assault charge was filed against him by the Eagle County District Attorney's office on July 18, 2003, Bryant held a press conference where he admitted to an adulterous sexual encounter with his accuser but claimed that it was consensual.[221] A conviction on the charge could have resulted in a sentence anywhere from four years to life in prison.[222]

However, on September 1, 2004, after about a year of extraordinary legal and media drama for both Bryant and Faber, Eagle County District Judge Terry Ruckriegle dismissed the case after prosecutors had already spent more than $200,000 preparing for trial.[223] The decision to dismiss was the direct result of Faber deciding that she was unwilling to testify.[224] The dramatic turn of events occurred during the middle of jury selection and less than one week before opening statements were set to commence.[225] Within hours of the state's announcement that the case would be dropped, Bryant's attorney read a written apology statement to the public.[226] A separate civil suit was filed by Faber on August 10, 2004, before dismissal of the criminal case and was settled out of court about six months after the apology.[227]

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[215] *Id.*
[216] *Id.*
[217] *Id.* In justifying his decision to dismiss the case over the prosecutors' objections, Judge Dougan stated, "There appears to be no coercion or pressure that resulted in this being filed." *Id.* Oddly enough, he also acknowledged that determining the existence of coercion in domestic violence cases is a difficult task. *Id.* He also took the couple's participation in marriage counseling into account as additional support for the decision to dismiss the case. *Id.* Apparently, it was also reported that court officers treated Myers like a celebrity, because they shook his hand and patted him on the back. *Id.* One reportedly told him, "Good luck, it will be all right," while another said, "Nice seeing you again." *Id.*
[218] Sylvia Moreno, A Different Spotlight for Bryant's Accuser, The Washington Post, Aug. 30, 2004, http://www.nbcsports.msnbc.com/id/5866608/.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] Associated Press, Case Will Not Be Retried, But Civil Trial Pending, ESPN.Com News Services, Sept. 2, 2004, http://sports.espn.go.com/nba/news/story?id=1872740
[226] Anthony J. Sebok, Why Did Bryant's Accuser Become Uncooperative?, CNN.com News Services, Sept. 7, 2004, http://articles.cnn.com/2004-09-07/justice/sebok.bryant_1_accuser-sexual-history-prosecution/4?_s=PM:LAW.
[227] Associated Press, *supra* note 125. In court, one of the woman's lawyers, John Clune, said Bryant's apology factored into her decision to drop out of the case. *Id.* Bryant attorneys Pamela Mackey and Hal Haddon told ESPN's Jim Gray, "The accuser insisted on that statement as the price for his freedom. The statement doesn't change the facts: Kobe is innocent and now he is free." *Id.* Legal analyst Craig Silverman also expressed skepticism and doubt with the civil settlement, stating, "It appears to me that an exchange of money will take place between Kobe Bryant and his accuser which has been leveraged by this criminal prosecution to the extreme detriment to the taxpayers of Colorado. Kobe gets his day in the sun today and she will get her money in the days to come. The criminal case was used as leverage and it's offensive." Craig Silverman, Kobe Bryant's Criminal Case Dismissed, Denver News, Sept. 2, 2004, http://www.thedenverchannel.com/news/3699625/detail.html.

This article is not concerned with whether Bryant did or did not commit the sexual assault or the amount of the civil settlement, because, truthfully, nobody will ever know. The criminal case never reached the trial stage and the terms of the civil settlement prohibited the parties from revealing the settlement amount. Nevertheless, the case was incredibly revealing as to how influential an alleged victim can be in the criminal adjudication of a star athlete facing life altering criminal charges. It also revealed the uphill battle victims must face when the state prosecuting star athletes. There have been many criminal cases against many star athletes, but the only one that seems comparable—in terms of fame, media attention, criminal stakes, and public controversy—is the O.J. Simpson murder trial. Naturally, Bryant's case presented much more complex issues relating to victim influence over criminal prosecution than those presented in the Julio Lugo and Brett Myers cases. Again, we do not know if Bryant committed the crime or if the victim falsified her complaint; therefore, fair analysis must only rely on what *is* known.

So why did she stop cooperating?[228] What is known is that the case was only dismissed after Faber expressed unwillingness to testify because of frustration with the media circus and legal mistakes that apparently affected her quality and safety of her life.[229] Her sexual history, moral character and reputation were questioned in both the courtroom and through online media.[230] She had also been harassed with death threats and obscene messages,[231] stalked by private investigators and followed by reporters.[232] It has even been reported that these intrusions into her life forced Faber to drop out of the University of Northern Colorado, move to four different states over the course of six months, and prevented her from being able maintain a steady job.[233]

Most major news outlets acted ethically by choosing not to publish her name or photograph because the case involved a sex crime.[234] However, her name, picture, telephone number and e-mail address were widely circulated on the Internet immediately after Bryant was formally charged by the Eagle County District Attorney's office.[235] Additionally, Faber was also the subject, by name, of a Los Angeles radio talk show that questioned her motives in pursuing charges against Bryant, and even had national tabloids publishing her name and photo.[236]

Even during pretrial hearings, Bryant's defense attorneys also introduced information about the woman's personal life, alleged drug use, two suicide attempts, which they claimed were efforts to gain attention from a

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[228] Sebok, *supra* note 126.

[229] Aaron J. Lopez, Expert: Victims' Path Rockier than Celebrities', Rocky Mountain News, Mar. 15, 2007, http://therocky.com/news/2007/mar/15/expert-victims-path-rockier-than-celebrities/.

[230] *Id.*

[231] Sylvia Moreno, *supra* note 118. The U.S. attorney for Colorado and the FBI, in a written statement, said John William Roche pleaded guilty to making a threatening telephone call across state lines. *Id.* Prosecutors said Roche called from Iowa to Eagle County, Colorado and threatened to kill the woman who accused Bryant. *Id.* Three people spoke in the message, which was left on the family's answering machine. *Id.*

[232] *Id.*

[233] *Id.* In an effort to speed up the trial, her mother even wrote a letter to Judge Ruckriegle that said, "Her safety is at risk. . . . She can't live at home, she can't live with relatives, she can't go to school, or talk to her friends. She can't go anywhere, even to have a simple dinner with a friend. No one else involved in this case has had to make the life changes and compromises that my daughter has had to make and will need to continue to make until this case is over." *Id.*

[234] Christy Oglesby, Rape Victims' Name Withheld by Choice, not Law, CNN.com News Service, Oct. 16, 2003, http://articles.cnn.com/2003-10-16/justice/rape.confidential_1_assault-victims-shield-laws-identity/2?_s=PM:LAW. Many states, as a measure to encourage victims to come forward, have rape confidentiality statutes that prevent law enforcement and court personnel from revealing the identity of sex assault victims. *Id.* In Colorado, where Bryant is on trial, it's a misdemeanor punishable by up to a $100 fine and 90 days in jail. *Id.* Those confidentiality laws are often confused with rape shield laws. *Id.* Rape shield laws generally govern the admissibility of evidence and testimony of an alleged victim's sexual history during trial, based on the theory that evidence of past behavior is irrelevant to the current case. *Id.* They do not address revealing the identity of victims and the media, legal experts say, are free to print those names. *Id.* The U.S. Constitution guarantees the press that right, but media outlets choose not to exercise it. *Id.* Victoria L. Lutz, of the Pace Women's Justice Center, proposes that "The big question is ...'Do you want to see your daughter's name in 28-point type on the front of The New York Times as a rape victim?'" *Id.*

[235] Associated Press, *supra* note 125. One of Faber's attorneys, John Clune, remarked, "The difficulties that this case has imposed on this woman the past year are unimaginable." *Id.* He said she has been through a difficult time and was particularly disturbed by mistakes including the release of her name on a state court's Web site and her medical history to attorneys. *Id.* When Judge Ruckriegle dismissed the case, he said he took full responsibility for the mistakes, but blamed Colorado lawmakers for slashing the budgets of the judicial system. *Id.* Ruckriegle also said the case "will of course always leave a question in the mind of everyone because as several of the prospective jurors have stated, only two people know what happened *Id.*

[236] *Id.*

former boyfriend, and that she was given nearly $20,000 from a victims' compensation fund.[237] Both suicide attempts occurred when she was a college freshman, in the four-month period before she met Bryant, and this information, as well as her identity, was inadvertently circulated to the media by the Eagle County court staff.[238] Although Judge Ruckriegle ruled that evidence about her psychological history could not be presented at trial, he did allow the defense to probe into Faber's sexual history in a limited manner.[239] Prosecutors tried to protect the accuser's privacy under the Colorado's rape shield law, however it was ruled that the defense could present a limited set of evidence relating to the any acts of sex up to 72 hours before, or in the hours immediately following, the accuser's time with Bryant.[240]

After Faber decided not to testify, why did the Eagle County prosecutors drop the case? The state could have chosen to continue to pursue the charges without her voluntary cooperation, and could have even subpoenaed Faber to testify.[241] However, practically speaking, without a victim's voluntary cooperation, the state would have probably faced a very tough road to winning the case.[242] This is because jurors would probably begin to seriously doubt the credibility of her forced testimony, possibly interpreting her unwillingness as indicative of her originally making a false claim against Bryant.[243] Nevertheless, the prosecutors insisted they had enough evidence to win a conviction despite having had little success during the course of the pretrial rulings leading up to the trial date.[244]

II. Tackling Athlete Aggressors is in the "Best Interests" of the Leagues

> While MLB doesn't condone domestic violence and provides counseling for players in such situations, the sport can't justify punishing those players, unlike Rocker. It's a little different than someone insulting your fan base.[245]
>
> —Robert D. Manfred Jr., Executive Vice President of MLB

> For many professional athletes, you cannot believe the lack of discipline, good fatherly advice, counsel and guidance missed throughout their life. For many of them, there are no fathers in their life. They have a very different perception of what their individual responsibilities are because they've never had anyone to set an example for them. For many of these young men, their whole goal in life is to try to make it in professional sports so they can buy their mother a home so she won't have to continue working sixteen hours a day.[246]
>
> —Roger Headrick, former owner and CEO of the Minnesota Vikings

A. *Three Strikes and…Play Ball???*

The first commissioner in American professional sports was Judge Kennesaw Mountain Landis, who was appointed in 1920.[247] Landis was granted the authority to "be the final arbiter of disputes between leagues and clubs and disputes involving players and to impose punishment and pursue legal remedies for any conduct

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[237] *Id.*
[238] *Id.*
[239] Sebok, *supra* note 126.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] Associated Press, *supra* 125. District Attorney Mark Hurlbert said, "This decision is not based upon a lack of belief in the victim, she is an extremely credible and an extremely brave young woman. Ultimately, we respect her decision 100 percent." *Id.*
[245] John Gibeaut, When Pros Turn Cons: Athletes Who Commit Crimes Are Giving Sports a Black Eye. But While the NFL Claims It's Tackling the Problem, Other Leagues Appear Content to Sit on the Sidelines, 86 A.B.A.J. 38, 103 (2000).
[246] *Id.*
[247] Robert L. Lockwood, The Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA, 15 Sports Law, J. 137, 141 (2008). The position of commissioner was created in response to a scandal in which eight Chicago White Sox players were charged with intent to defraud the gambling public, also known as the "Black Sox Scandal." *Id.* The prevailing view at the time was that the integrity of baseball had been compromised by widespread gambling and that corrective action had to be taken. *Id.*

that he determined to be detrimental to the best interests of the game."[248] Under the Major League Agreement (MLB's former collective bargaining agreement (CBA)) that governed baseball at the time of his appointment, he had the power to "investigate, either upon complaint or his own initiative, any act, transaction or practice charged, alleged, or suspected to be detrimental to the best interests of the national game of baseball…and determine, after investigation, what preventative, remedial or punitive action that [was] appropriate."[249] This broad authority of the commissioner to determine whether certain conduct is detrimental to the best interests of the game has been consistently affirmed by the courts through *Milwaukee Am. Ass'n v. Landis*,[250] *Charles O. Finley & Co. v. Kuhn*,[251] *and Rose v. Giamatti*.[252]

While Bud Selig, the current MLB Commissioner, continues to maintain expansive authority to discipline players, the Basic Agreement (MLB's current CBA) contains a provision that has operated to undermine some of this authority.[253] This provision allows for a grievance procedure in which players can appeal disciplinary actions taken against them, by the league or their team, to an independent arbitrator.[254] Under Article XI(A)(1)(b), Selig reserves the power to remove a grievance from this system and choose to hear the complaint himself if he determines that the action taken against the player involves "the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball."[255] Nevertheless, he has vowed to the Major League Baseball Players' Association (MLBPA) not to remove any actions from the grievance system.[256] Although the CBA requires the arbitrator to use a just cause standard of review,[257] past arbitral awards indicate the use of a much less deferential standard that has resulted in arbitrators substituting their own judgment for that of the commissioner.[258]

Despite the fact that the courts have affirmed the broad power of the MLB Commissioner to act for the best interests of sport, as well as his ability to prevent undermining his power through arbitration,[259] it is safe

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[248] Matthew B. Parchman, Limits on Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy, 76 Va. L. Rev. 1409, 1415 (1990).

[249] James M. Pollack, Take My Arbitrator, Please: Commissioner 'Best Interests' Disciplinary Authority in Professional Sports, 67 Fordham L. Rev. 1645, 1646 (1999) (citing Major League Agreement Section 2(a)-(b), at 1 (1921)).

[250] Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 303 (N.D. Ill. 1931). In *Milwaukee Am. Ass'n v. Landis*, the court stated that the commissioner has "almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball," The case involved a challenge of Landis's decision to refuse the trade of a St. Louis Browns' player to a minor league club. Landis learned that the player being traded had been transferred numerous times between the Browns and minor league teams—all of which were secretly controlled by the Browns' owner, Phil Ball. Paul C. Weiler & Gary R. Roberts, Sports and the Law: Text, Cases, and Problems 14-15 (3rd Ed. 2004).

[251] Charles O. Finley & Co. v. Kuhn, 569 F.2 527, 537 (7th Cir. 1978). In 1978, the court once again deferred to the commissioner's judgment using the arbitrary and capricious standard of review in *Charles O. Finley & Co. v. Kuhn*. In this case, Charles Finley, owner of the Oakland Athletics, challenged the rejection of the sale of three players to the Boston Red Sox and the New York Yankees. Weiler & Roberts, *supra*, at 18. Kuhn, former MLB Commissioner, found the sale to be "inconsistent with the best interests of baseball" because it would potentially result in a loss of competitive balance in the league. *Id.*

[252] Rose v. Giamatti, 721 F. Supp. 906 (S.D. Ohio 1989). Finally, deference to the commissioner was yet again affirmed in *Rose v. Giamatti*. Pete Rose brought suit against former MLB Commissioner Bart Giamatti for reviewing the facts of his case in a prejudiced way and "not giving due regard for all the principles of natural justice and fair play." Weiler & Roberts, *supra* note 150, at 8. Rose eventually agreed to withdraw his suit and accept the commissioner's permanent ban from baseball in exchange for not having to admit or deny guilt for betting on baseball. *Id*. at 9. In that case, the court stated that the commissioner "is given virtually unlimited authority to formulate his own rules of procedure for conducting investigations."

[253] Bethany P. Withers, The Integrity of the Game: Professional Athletes and Domestic Violence, 1 Harv. J. Sports & Ent. L. 1, 158 (2010).

[254] 2007–2011 Basic Agreement between Major League Clubs and the Major League Baseball Players Association, Schedule A Section 9(a), at 32, 42 (2006), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB Basic Agreement].

[255] *Id.* at 32-33.

[256] *Id.* at 128.

[257] *Id.* at 43.

[258] Gibeaut, *supra* note 145, at 105. For example, in an arbitration that has not been released to the public, arbitrator George Nicolau overruled the suspension of a player who had been arrested on drug and sexual assault charges. *Id.* Nicolau stated his belief that "baseball fundamentally errs in justifying punishment by holding out players as role models." *Id.* at 106.

[259] Although the CBA requires the arbitrator to use a just cause standard of review, past arbitral awards indicate the use of a much less deferential standard that has resulted in arbitrators substituting their own judgment for that of the commissioner. For example, Gibeaut, *supra*. Rocker was able to get an arbitrator to reduce the suspension to two weeks and the fine to $500. Peter Schmuck, With Rocker Warming Up, Guillen is in Need of Relief, Balt. Sun, June 26, 2006, at 2D. The commissioner did not overrule this in accordance with his promise to not remove cases from arbitration. This is further troubling because it shows that even if a player ever

to say that the MLB has done the least in terms of punishing players who have been arrested for acts of violence against women.[260] Although many of these arrests result in dropped charges, preventing conviction, the lack of a criminal conviction has not stopped the commissioner from punishing players for other off-field transgressions.[261] In fact, the MLB has even punished players for legal, but morally repugnant, personal conduct.[262] This was the case when Commissioner Selig punished former Atlanta Braves pitcher, John Rocker, for making racist remarks to reporters off the field,[263] leading to suspension for two months and a fine of $20,000 for the incident.[264]

Although there are many examples demonstrating the commissioner's readiness to punish off-field conduct that offends the public, but the MLB has remained hesitant to punish athletes who have committed acts of violence against women.[265] Specifically, the employers (team ownership and its management) have rarely taken team disciplinary action in such instances, while no MLB Commissioner has ever taken disciplinary action on behalf of the league. In fact, the league has never once punished a player for commission of such acts. In explaining this hesitancy, Robert D. Manfred Jr., Executive Vice President of MLB, stated, "While MLB doesn't condone domestic violence and provides counseling for players in such situations, the sport can't justify punishing those players, unlike Rocker. It's a little different than someone insulting your fan base."[266]

Although there have been some teams that have punished their players for acts of violence against women, team punishment, like league punishment, can be undermined by arbitral review.[267] It should then come as no surprise that the majority of teams have failed to take a stand against domestic violence when the league itself has failed to do so.[268] This is because individual teams lack the profit-motive to punish players who have committed such acts because those same players can subsequently join other teams that do not have these types of disciplinary policies.[269]

B. *NBA: Commissioner Driven Fines and Suspensions*

Similar to the MLB Commissioner, the NBA Commissioner has traditionally had broad power to discipline players to protect the "best interests" of the sport and the American court system has consistently afforded great deference to the "best interests" powers.[270] Additionally, the NBA Uniform Player Contract (UPC) is incorporated in Article II of the CBA and binds players to Rule 35 of the NBA Constitution.[271] Under Rule 35, NBA Commissioner David Stern has the power to:

> To suspend for a definite or indefinite period, or to impose a fine not exceeding $50,000, or inflict both such suspension and fine upon any player who, in his opinion, i) shall have made or caused to be made any statement having, or that was designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member, or ii) shall have been guilty

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were to be suspended for an act of violence against a woman in the MLB, arbitration would probably lead to lessening of such punishment. *Id*

[260] Withers, *supra* note 153.

[261] *Id.*

[262] *Id.*

[263] Ira Berkow, After Schott Spoke Out, the Air Needed Clearing, N.Y. Times, Mar. 6, 2004, at D3.

[264] Gibeaut, *supra* note 145, at 41.

[265] Withers, *supra* note 153.

[266] Gibeaut, *supra* note 145, at 102.

[267] *Id.* For example, after the Arizona Diamondbacks suspended Alberto Callaspo and placed him on the inactive list after being arrested for domestic violence, the team was forced to take him off the inactive list after nine days as a result of a grievance filed by the MLBPA. *Id.* After the grievance was heard, Callaspo was also awarded his salary back for six of the nine days he was suspended. *Id.*

[268] Withers, *supra* note 153, at 163.

[269] *Id.*

[270] Lockwood, *supra* note 147, at 149; Riko Enters, Inc. v. Seattle Supersonics Corp., 357 F. Supp. 521 (S.D.N.Y. 1973). In *Rice Enters., Inc. v. Seattle Supersonics Corp*., the court determined that the best interest clause of Rule 35 will be broadly interpreted and commissioner actions will be given deference as long as they do not contradict the terms of the NBA Constitution.

[271] NBA Uniform Player Contract Section 5(d), available at http://www.nbpa.org/sites/default/files/ EXHIBIT%20A.pdf [hereinafter NBA UPC].

> of conduct that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association.[272]

Similar to the CBA of the MLB, the NBA's CBA has been modified to allow players to have grievances appealed to an independent arbitrator.[273] Therefore, application of this violent conduct provision has resulted in the same restrictive effect on the disciplinary power of the NBA Commissioner in that his sentencing can be undermined.[274] While this would be unproblematic in the MLB where the Commissioner can overrule arbitration if he ever chose to do so, the NBA Commissioner does not possess the same power. Other problems with this grievance procedure of the NBA CBA stem from conflicting provisions regarding the standard or review to be used by the arbitrator.[275] In Section 8 of the CBA, titled "Special Procedures with Respect to Player Discipline," the standard of review is "arbitrary and capricious."[276] Under Section 14, titled "Miscellaneous," the standard of review to be used is "just cause."[277] This conflict has caused confusion as to the appropriate amount of deference to be given to the commissioner in different situations.[278]

Although the NBA began taking a stronger stance during the late 1990s, some investigations into off-court conduct still resulted in no punishment from the league. For example, Allen Iverson received no punishment after being arrested on charges for criminal trespass, simple assault, terroristic threats, and gun offenses in a domestic dispute with his wife.[279] Similarly, Jason Kidd's[280] and Lee Nailon's[281] arrests for domestic violence did not result in punishment by their teams or the league. In recent years however, David Stern, unlike Commissioner Selig, has not been hesitant to exercise his best interest powers to discipline players for

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[272] NBA Constitution and By-Laws R. 35(d).

[273] Lockwood, *supra* note 147, at 154. The current NBA CBA that began in 2005 places certain limits on the right to arbitration. Players may not file a grievance over "a dispute involving i) a fine of $50,000 or less or a suspension of twelve games or less…imposed…for conduct on the playing court… or ii) action taken by the Commissioner… A) concerning the preservation of the integrity of, or the maintenance of public confidence in the game of basketball and B) resulting in a financial impact on the player of $50,000 or less." NBPA Collective Bargaining Agreement, art. XXXI, Section 8(a) (2005), available at http://www.nbpa.com/cba_articles.php [hereinafter NBA CBA].

[274] Roger A. Javier, You Cannot Choke Your Boss and Hold Your Job Unless You Play in the NBA: The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA, 7 Vill. Sports & Ent. L.J. 209, 210-11 (2000). This possibility of having commissioner disciplinary powers undermined was first exemplified in the handling of the case of former Golden State Warrior Latrell Sprewell. *Id*. In 1997, Sprewell threatened to kill his coach and strangled him for ten to fifteen seconds before his teammates were able to restrain him. *Id.* After leaving to the locker room, he returned to practice twenty minutes later and punched the coach. *Id*. at 211. The league treated the situation as one of off-court violence and suspended Sprewell for one year without pay, and the Golden State Warriors also terminated his contract under the authority of paragraph 20(b)(i) of the UPC. *Id.* This provision states, "The Club may terminate this contract…if the Player shall do any of the following: a) at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character and good sportsmanship.." *Id.* This provision remains in the current UPC under Section 16(a)(i). NBA UPC, *supra* note 171, at Section 16(a)(i). *Id*. at 219.

[275] Withers, *supra* note 153, at 155.

[276] NBA CBA, *supra* note 173, at art. XXXI Section 8(b).

[277] *Id.* at art. XXXI, Section 14(c).

[278] After receiving punishment, Sprewell filed a grievance and Arbitrator John Feerick reviewed Commissioner Stern's disciplinary action. *Id*. at 217. Using a just cause standard of review, under Section 14 ("Miscellaneous") of the CBA, he found that fairness required him to reduce the suspension because Sprewell had been punished by both his team and the league. Lockwood, *supra* note 147, at 155. Many commentators have attributed Feerick's leniency to the fact that he used a just cause standard of review, as opposed to the arbitrary and capricious standard required by Section 8 of the CBA, titled "Special Procedures with Respect to Player Discipline." *Id.* This highlights the ambiguity regarding the level of deference to be given to the commissioner, because the NBA has not provided any guidelines for which situations implicate Section 8, as opposed to Section 14. *Id.* Feerick came to this ruling despite having stated that the commissioner was entitled to "great deference" and that "it would be wrong for him to substitute his judgment for the commissioner's", and, yet, it was Feerick's judgment of "fairness" that led him to reduce the suspension. *Id.* As a result of the Sprewell case, the CBA was modified to state that the commissioner's disciplinary action "will preclude or supersede disciplinary action by any Team for the same act or conduct." NBA CBA, *supra* note 173, at art. VI, Section 10(a). However, the NBA CBA allows for double penalty when the player's conduct is so egregious as to warrant it. *Id.* at art. VI, Section 10(b). The NBA borrowed this language from the NFL's CBA after witnessing the role double jeopardy had in Feerick's determination of fairness. *Id.*

[279] Sixers Star Iverson Awaits Charges of Terror, Trespass, San Diego Union-Trib., July 12, 2002, at D1.

[280] Carrie A. Moser, Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women, 11 Sports Law J. 73. In 2001, Kidd was arrested for punching his wife and received no league or team punishment. *Id.* He returned to play for the Phoenix Suns after missing four games and was traded at the end of the season. *Id.*

[281] Former 76er Pleads Guilty, Phila. Inquirer, Sept. 21, 2006, at E6. In 2006, Nailon was arrested for domestic assault and pleaded guilty to harassment. *Id.* Like Kidd, he was not reprimanded by the league or his team. *Id.* He also returned to his team before being traded to another team. *Id.*

off-court conduct that is detrimental to the integrity of basketball and has specifically taken initiative to punish players for violence against women charges.[282] For example, when Ron Artest pleaded no contest to infliction of injury on his wife, the commissioner suspended him for seven games.[283] The NBA Players' Association filed a grievance on his behalf to have the suspension reduced to the standard three or four games that are usually given in domestic violence situations.[284] The suspension was upheld after Stern cited Artest's status as a repeat-offender as a factor in his determination of the length of the suspension.[285]

This is encouraging because it shows that the NBA is headed in the right direction in dealing with violence against women issues involving its players. The result of the Artest arbitration served to endorse the power of Stern to determine appropriate punishments based on a case-by-case inquiry into the surrounding circumstances involved. This investigatory power and discretion are especially important in such cases because the frequency of dropped charges demands that the commissioner be able to conduct his own investigation and consider repeat-offender status to determine if punishment is warranted in cases that do not result in conviction. However, there is still potential for Stern's authority to be undermined by arbitration in his future rulings. Further, the terms of Rule 35's illegal conduct provision only leaves room to punish players who have been convicted or who, like Artest, plead guilty or no contest to the criminal charges.

C. *NFL: A Balanced Approach Please…Hold the Arbitration!*

Under the NFL Constitution, the commissioner has the power to discipline players who have "violated the Constitution or by-laws of the NFL, or have been or is guilty of conduct detrimental to the welfare of the NFL or professional football."[286] Unlike the MLB and NBA, the NFL CBA states that any "action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence, in the game of professional football" may only be appealed to the commissioner.[287] Consequently, there is no possibility of an independent arbitrator undermining the commissioner's disciplinary actions for off-field conduct.

Also, as under the NBA Constitution, the commissioner's disciplinary actions will "preclude or supersede disciplinary action by any Club for the same act or conduct."[288] In those situations where both the team and league take disciplinary action against a player, this could serve to address arguments of unfairness that are based on rationale akin to that underlying the concept of "double jeopardy." The NFL player contract, incorporated into the CBA in Article XIV(1), also pledges the players to agree to the commissioner's right "to fine…to suspend…and/or to terminate this contract" if the player is "guilty of any…form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football."[289] Due to the fact that the NFL's grievance procedure does not provide for arbitration review of punishment considered detrimental to the league, the NFL commissioner wields the most power out of all three league commissioners. Additionally, there is no judicial precedent limiting the broad disciplinary powers of the commissioner.

Former Commissioner Paul Tagliabue and current Commissioner Roger Goodell have not hesitated to make use of this expansive disciplinary authority. In fact, the NFL has gone a step beyond the other leagues by instituting a league-wide personal conduct policy to further regulate off-field player conduct. Under former Commissioner Tagliabue, the NFL took its first significant action to regulate off-field player conduct with the adoption of the Violent Crime Policy in 1997.[290] The policy was adopted in response to the negative publicity generated by the O.J. Simpson murder trial and the increasingly visible crimes related to violence against

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[283] Mitch Lawrence, Artest Fights Suspension, Daily News (N.Y.), Oct. 24, 2007, at 72.

[284] *Id.*

[285] *Id.* The Players' Association and the league reached a settlement whereby Artest only lost four games' worth of salary, totaling $255,000, instead of losing all seven games' worth, which would have amounted to $450,000. Mitch Lawrence, Son Not Setting, Daily News (N.Y.), Nov. 18, 2007, at 91.

[286] Michael A. Mahone, Jr. Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy, 11 Vand. J. Ent. & Tech. L. 191 (2008). (citing Constitution and By-Laws of the National Football League, art. VIII, Section 8.13(A)).

[287] Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2006-2012, art. XI, Section 1(a) (2006), available at http://images.nflplayers.com.mediaResources/files/PDFs/General/NFLCOLLECTIVEBARGAININGAGREEMENT 2006 – 2012.pdf [hereinafter NFL CBA].

[288] *Id.* at art. XI, Section 5.

[289] *Id.* at app. C, Section 15.

[290] Ambrose, *supra* note 9, at 1086-87.

women committed by NFL players, as discussed earlier in this Note.[291] The unilaterally adopted policy enabled the commissioner to take disciplinary action against any player charged with a violent crime, felony or misdemeanor.[292] It also required the disciplined player to undergo counseling and clinical evaluations.[293] In the first two years of the policy's enforcement, league officials reported a drop in the number of player arrests for violent crimes from thirty-eight players in 1997 to twenty-six players in 1999.[294]

In 2007, current NFL Commissioner Goodell strengthened his power to discipline under the Personal Conduct Policy.[295] Goodell made it clear that violators of the policy would receive longer suspensions and larger fines and said that he would discipline teams for the violations of its players.[296] However, before implementing the modification in policy, he sought the advice of Gene Upshaw, former executive director of the NFL Players' Association.[297] He also sought advice from players and established a panel to oversee the change in policy.[298] As a result of league-wide involvement in the process, the policy has been supported from both league officials and players.[299] The new Personal Conduct Policy states:

> It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime.[300]

Goodell also stated:

> To some extent, what we're looking at is if there are a number of players that have repeat offenses, that will be something that our players and clubs will feel at some point we need to act before the judicial system acts.[301]

Additionally, domestic violence is specifically listed as a crime for which discipline may be taken.[302] Under the amended policy, the NFL still incorporates rehabilitation by requiring formal clinical evaluation for anyone "arrested, charged, or otherwise appearing to have engaged in prohibited conduct," and providing for counseling where determined to be necessary based on the results.[303] Finally, the Commissioner has the authority to conduct investigations and to determine whether certain player conduct requires discipline and he has "full authority to impose discipline as warranted."[304]In the first year that the changes took effect, the NFL reported that the number of off-field violent incidents dropped by 20%.[305]

The impact of the Player Conduct Policy is also made evident when comparing discipline of alleged abusers before the changes were made to discipline after the changes. Prior to the 1997 implementation of the

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[291] *Id.* at 1087.
[292] *Id.*
[293] *Id.*
[294] Mahone, *supra* note 186, at 185-86.
[295] Ambrose, *supra* note 9, at 1076.
[296] *Id.* at 1076-77.
[297]Goodell Strengthens NFL Personal Conduct Policy, USA Today, Apr. 11, 2007, http://www.usatoday.com/sports/ football/nfl/2007-04-10-new-conduct-policy_N.htm?csp=34.
[298] *Id.*
[299] *Id.*
[300] National Football League, 2008 Personal Conduct Policy 1, available at http://images.nflplayers.com/mediaResources/images/oldimages/fck/NFL%Personal%20Conduct%20Policy%202008.pdf [hereinafter NFL Conduct Policy]
[301] Judy Battista, Goodell Says He'll Punish NFL's Problem Players, N.Y. Times, Mar. 27, 2007, at D4.
[302] NFL Conduct Policy, *supra* note 200, at 2.
[303] *Id.*
[304] *Id.*
[305] Paul Kuharsky, NFL Says Player-Conduct Policy Working, Tennessean, Mar. 13, 2008. The San Diego Union-Tribune confirmed the accuracy of the 20% figure, finding that there were sixty-two arrests or citations in the first year under the amended policy compared to seventy-six arrests or citations in the preceding year. Brent Schrotenboer, Holding that Line; In the Year Since NFL's Player-Conduct Policy Took Effect, the League Has Taken A Tougher Stance with Players with Criminal Issues…Or, at Least, Most of Them, San Diego Union-Trib., Apr. 19, 2008, at D1.

Violent Crime Policy, the NFL had never disciplined a convicted domestic abuser[306] even though 56 current and former NFL players were reported for violent behavior toward women between January 1989 and November 1994.[307] Since 2000, however, we have seen a significant increase in the number of players being punished by the league. In 2000, Corey Dillon, Rod Smith, and Dana Stubblefield were fined, and Mario Bates, Mustafa Muhammad, and Denard Walker were suspended for one or two games—all for domestic violence incidents.[308] Since Michael Pittman's arrest and suspension for three games in 2004, eight more players have received league suspensions for domestic violence arrests.[309]

Similar to Stern's treatment of the Artest case, Goodell took Brandon Marshall's pattern of abusive behavior into account when he initially suspended Marshall for three games in August 2008, following his arrest for misdemeanor battery against his ex-girlfriend.[310] It is important to take into consideration patterns of abusive behavior as it can guide the commissioner's decision to discipline in the same way a conviction can—both decrease the likelihood that a player will be punished for conduct he did not commit.[311] The broad discretionary power of the commissioner allows him to carefully investigate the merits of each, individual case and to use patterns of abusive behavior and criminal conduct to suspend players who have been acquitted.[312]

As mentioned earlier, this is critically important in confronting issues of violence against women because valid charges against athletes are frequently dropped for various reasons. Unlike the MLB, the NFL's policy allows the league to act immediately and provide for consistent punishments. The success of the NFL in addressing these issues can also be attributed to the fact that commissioner decisions cannot be appealed to an independent arbitrator. Unlike Commissioners Selig and Stern, Goodell does not face the risk of having his authority undermined. The NFL's Personal Conduct Policy should also serve as a model for implementing changes to the MLB and NBA policies because its strict disciplinary measures are combined with rehabilitative intervention to effectively address both the punishment and rehabilitation aspects of cases involving violence against women.

III. Proposals for Strengthening Commissioner Authority to Discipline Players

As evidenced by the inconsistencies between team punishments for off-field conduct, such as in the article's earlier discussion of Julio Lugo and Brett Myers, domestic violence is best dealt with by league-wide player conduct policies and punishment. Leagues have more capacity to establish a system with adequate due process protections and are more likely to be consistent in enforcement.[313] Because it is against the economic interest of teams to discipline players who contribute to team success, league punishment is necessary because it reduces the temptation to be lenient with some players and not with others.[314] Therefore, like the NFL, the MLB and NBA should create league-wide player conduct policies that address issues of violence against women. Although the simple solution would be to encourage the MLB and NBA to adopt policies similar to the NFL's Personal Conduct Policy, there are potential problems with the policy that can be addressed. For example, these policies should be incorporated in the CBAs of the leagues, provide sentencing guidelines, and also provide for a "three strikes" policy.

A. *Incorporating the Player Conduct Policy into its Collective Bargaining Agreement*

One can argue that a significant concern with the Personal Conduct Policy is that it has not been incorporated into the NFL's CBA. Due to the fact that the leagues are governed by labor law, the commissioners cannot unilaterally make rules that involve wages, hours, and other terms and conditions of employment.[315] Any failure to negotiate with the Players' Association regarding these issues is a violation of the duty to collective-

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[306] Jefferson, *supra* note 1, at 362.
[307] Out of Bounds: Professional Sports Leagues and Domestic Violence, 109 Harv. L. Rev. 1050 (1996).
[308] NFL Players Arrested in 2000, San Diego Union-Trib., Jan. 22, 2001, at D4.
[309] Gerry Dulac, Domestic Violence Difficult to Gauge; Dropped Charges, Few NFL Penalties, Pittsburgh Post-Gazette, Mar. 12, 2008, at D1. Seven players received one-game suspensions between Pittman's suspension and when the article was written, in March 2008. *Id.* Since March 2008, Brandon Marshall has also received a suspension. Lindsay H. Jones, *supra* note 75.
[310] *Id.* The suspension was dropped to one game after appeal and he was ultimately acquitted on his misdemeanor battery charge. *Id.*
[311] Withers, *supra* note 153, at 168.
[312] *Id.*
[313] *Id.* at 127.
[314] *Id.*
[315] Brent D. Showalter, Technical Foul: David Stern's Excessive Use of Rule-Making Authority, 18 Marq. L. Rev. 205, 218. (2007).

ly bargain and is an unfair labor practice.[316] Should the NFL Commissioner's disciplinary action ever be appealed in a court of law, case law indicates that an employer's ability to enact a policy that would result in suspensions or fines is a term or condition of employment.[317] However, the commissioner can make a good argument that the Players' Association has waived its right to bargain collectively over the commissioner's ability to discipline under the Policy because it granted the commissioner authority to discipline players and enact conduct policies under Article XI of the CBA and under the NFL player contract.[318] Therefore, a challenge to the policy would have a good chance of being denied; however, incorporation into the CBA would help deter against the potential for the policy to be challenged in the first place.

As long as the Players' Associations bargain for other concessions in return for formal policy inclusion in the CBA, the policy would be protected from antitrust liability by the non-statutory labor exemption.[319] Allowing the policy to be negotiated also gives the players an opportunity to help create the policy, thus making them more likely to comply with it if passed in the MLB or NBA. Although the NFL gave its players an opportunity to help create the Personal Conduct Policy, incorporation into the NFL CBA would further allow players to help modify the policy if they have any concerns. This collaborative effort also helps ensure fairness in the policy, in turn increasing the potential for its enforcement efficacy.

B. *Use of Sentencing Guidelines*

Sentencing guidelines should also be incorporated into any policy created by the MLB and NBA. Neither the NFL Personal Conduct Policy nor the NBA's Rule 35 illegal conduct provision lists sentencing guidelines.[320] Although granting broad discretion to the commissioner is necessary to effective enforcement of the policy, it is important to limit this discretion with sentencing guidelines in order to provide for fairness and consistency in punishment. The leagues can also detail non-exclusive lists of what constitutes minor and serious offenses.[321] Of course, the sentencing guidelines should be negotiated collectively to ensure player support. However, even with the inclusion of sentencing guidelines for player convictions, there is an issue of how to punish repeated off-field offenses that do not result in conviction in the NBA and MLB.

C. *Three Strikes and You're out!*

This can be addressed by instituting a "three strikes" policy in which a player must be suspended for a minimum of one game after allegedly committing a third off-field offense.[322] Under such a policy, the leagues could also retain the power to punish a player before his third strike if there is a significant amount of evidence that he was involved in criminal conduct.[323] NFL players have already shown support for a three strikes policy[324] and this would be especially helpful since violence against women charges are frequently dropped or do not result in conviction.[325] The three strikes policy would also help ensure that a player could not continue such conduct without punishment, even when his prior incidents have been determined to be minor and therefore have not been punished.[326] The use of sentencing guidelines and the three strikes policy should also result in the MLB and NBA abolishing their arbitration clauses.[327] Under this system, the need for appeal to an arbitrator would no longer be necessary and the commissioners' authority to sentence is increased while their ability to punish inconsistently is limited.

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[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] Withers, *supra* note 153, at 179.
[320] Note that the NBA CBA provides a guideline for violent felony convictions, mandating a minimum ten-game suspension. NBA CBA, *supra* note 173, at art. VI Section 7.
[321] Withers, *supra* note 153 at 179.
[322] *Id.*
[323] *Id.*
[324] Joel Michael Ugolini, Even a Violent Game Has Its Limits: A Look at the NFL's Responsibility for the Behavior of Its Players, 39 U. Tol. L. Rev. 41, 54 (2007).
[325] Withers, *supra* note 153, at 177.
[326] *Id.* For example, Marshall, who had police report to his house seven times after reports of domestic violence, would have been punished more than once prior to his last off-field transgression, which resulted in his first one-game suspension. *Id.*
[327] *Id.*

IV. Conclusion

In order to better address the unique issues of violence against women that plague the mainstream sports culture in America, the leagues need to build on progress that has already been made in holding players more accountable. The flaws and frustrations inherent in the legal system's treatment of professional athletes are serious and a call for change is necessary. Focusing the crux of reform efforts, in the area of addressing violence against women issues in professional sports, toward the modification of league commissioner powers is much more likely to result in change in the near-future. This is not to say that the legal system should not change because it very clearly should in the context of adjudication professional athletes charged with crimes of violence against women. However, those efforts would seemingly require a lot of faith and good luck because we cannot just legislate a new criminal justice system. Although, we can view the area of labor law in professional sports as a new jurisdiction to which we can outsource the conflicts that inhere in the current legal system.

Restructuring the NFL Player Conduct Policy can lead to more effective deterrence in the near-future. By implementing the proposed changes and applying them to the creation of player conduct policies in the MLB and NBA, further decrease in the incidents of off-field domestic violence involving professional athletes may reasonably be expected. While the MLB's response to domestic violence has been non-existent, the NFL and NBA seem to be headed in the right direction. To achieve further success, the leagues must be held accountable and encouraged to hold themselves responsible for improvement in the off-field conduct of their players. We can only hope that Commissioner Selig changes course and avoids the mistakes that probably tainted both the MLB's, and his own personal, image during the infamous eras of collusion and steroid abuse. It is perfectly fine to celebrate professional athletes' feats on the field, however, we must be quicker to express distaste for reprehensible off-field actions such as domestic violence and sexual assault.

Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Jimmy A. Vaught (*J.A.V.)*, Rebecca Tillery (*R.T.*)

ANNULMENT

ANNULMENT GRANTED BECAUSE HUSBAND FRAUDULENTLY INDUCED WIFE TO MARRY HIM SO HE COULD OBTAIN A PERMANENT GREEN CARD

¶12-3-01. ***Montenegro v. Avila,*** -- S.W.3d --, 2012 WL 1231981 (Tex. App.—El Paso 2012, no pet. h.) (04/11/12).

Facts: Husband and Wife met through an internet-dating website. They communicated daily through emails and telephone calls. Wife learned from Husband that he was an industrial engineer from Miami and that he wanted a spouse, a family, and a home. Wife was a teacher in El Paso, and she also wanted a spouse, a family, and a home. Husband wanted to meet in person. Wife learned that Husband could not travel to Texas because he was from Bogota, Columbia and could not get a tourist visa. In addition, Wife learned that Husband was only studying to become an engineer. The couple met in Mexico, and Husband asked Wife to marry him. She said no. Husband then asked Wife for $200, which she gave him. Later, Husband threatened to end their relationship if Wife did not visit him in Columbia. Wife went to Columbia, and Husband proposed again. This time, Wife accepted. Husband had Wife apply for a fiancé visa on his behalf, so he could join her in the U.S. Husband did not bring much money with him, and Wife's parents paid for the couple's wedding. After the wedding, Husband immediately applied for a two-year conditional residency. For the next year, Wife worked, but Husband did not. Wife added Husband to her bank accounts because Husband told her they needed proof they were living together for his immigration purposes. Husband made monthly withdrawals from her account, claiming that he was using the money to pay off a debt to a friend in California. Husband opened several credit cards in his name and registered a car in his name alone. He claimed that this was because he did not understand how to complete the forms. Husband declined Wife's sexual advances and always used condoms to avoid pregnancy. Husband purchased a life insurance policy and did not list Wife as the beneficiary.

Husband attended a job training that taught the employees about the Violence Against Women Act (VAWA). That day, Husband went to a shelter to allege that Wife was abusing him. He did not file any police reports, and Wife did not learn of the allegations until trial. After receiving his permanent green card, Husband separated himself from Wife. He took out a $4000 cash advance on one of his credit cards. Wife overheard Husband say that he was "getting everything ready," but she did not know what he meant. Husband went back to the domestic violence center to discuss a divorce because of continued abuse. He "wanted to make sure that he [would] not get into any legal problems for leaving his wife." Husband gave advance notice to his employer that he would be leaving town. Wife overheard Husband tell his mother, "I'm leaving her today," but she did not know who he was talking about. That day, Husband called Wife at work to tell her that he loved her, but when Wife got home, Husband and his belongings were gone. Wife testified that she would not have married Husband if she had known that all he wanted was a green card and that he was planning to leave her.

Wife testified that Husband opened a bank account using the money he was supposedly sending to his friend in California. Husband claimed that he had borrowed money to open that account. Wife filed for an annulment, and Husband filed a counter-petition for divorce. An associate judge granted the divorce, and Wife filed for a de novo hearing. Trial court granted the annulment based on fraud. Husband appealed, arguing that the evidence was legally and factually insufficient to support the finding a fraud and that Wife did not cohabitate with him after learning of the alleged fraud.

Holding: Affirmed

Opinion: A court may grant an annulment if one spouse used fraud, duress, or force to induce the other to marry, and the innocent spouse did not voluntarily cohabitate with the inducing spouse after learning of the fraud. Fraudulent inducement occurs when a false representation is made and was known to be false, was intended to be acted upon, was relied upon, and caused injury. Here, Husband aggressively courted Wife. He misrepresented his place of residence and his career. He wanted to be married in the U.S. and he understood the immigration process. Husband did not want to be intimate with Wife. Wife also testified that Husband's behavior changed once he received his permanent green card. Husband's behavior established a preconceived plan to leave Wife once he received residence status. Trial court was within its discretion as fact finder to believe Wife's testimony and reject Husband's. Trial court could have reasonably found that Husband's actions before and during the marriage constituted fraud to induce Wife to marry him and stay married until he became a legal resident. Wife relied on those misrepresentations and suffered injury. Further, Wife did not learn of Husband's fraud until he left her and moved to another city. Wife did not cohabitate with Husband after learning of the fraud.

Editor's comment: *TFC 6.107 says a marriage can be annulled if "the other party used fraud, duress, or force to induce the petitioner to enter into the marriage." But here the court relied upon fraudulent conduct both pre-marriage and post-marriage. J.V.*

Editor's comment: *The key to this case is "discretion." The trial court determines the credibility of the witnesses and the weight given to a witness' testimony. As long as there is some credible evidence to support the trial court's decision, the trial court may weigh heavily or discard completely the testimony of a particular witness. This "likeability" factor can win or lose a case. Here, apparently the trial court placed much weight on the wife's testimony and little on the husband's testimony, thus using the trial court's discretion. M.M.O.*

DIVORCE

STANDING AND PROCEDURE

TEXAS LACKED PERSONAL JURISDICTION OVER CORPORATION BECAUSE CORPORATION DID NOT HAVE CONTINUOUS AND SYSTEMATIC CONTACTS WITH TEXAS

¶12-3-02. ***In re Knight Corp.,*** -- S.W.3d --, 2012 WL 1059389 (Tex. App.—Houston [14th] 2012, no pet. h.) (03/29/12).

Facts: Husband filed for divorce. Wife counterclaimed for divorce. Subsequently, Wife filed an amended petition joining Pennsylvania Corporation as a party. Husband was vice-president of Corporation and president of Corporation's Texas subsidiary. Wife alleged that both companies were alter egos of Husband and that all three acted fraudulently to hide community assets. Wife asserted that Texas had personal jurisdiction over Corporation because it was the parent company of a company doing business in Texas, its vice president lived in Texas, it maintained a bank account in Texas, and it engaged in business in Texas. Corporation filed a special appearance, contending that it had no purposeful contacts with Texas. Trial court denied Corporation's special appearance, finding Texas had personal jurisdiction over Corporation. Two weeks later, Corporation filed an appeal to this ruling. About three months after that, Corporation filed a petition for writ of mandamus complaining of the same order. COA consolidated the appeal and the original proceeding.

Holding: Appeal dismissed; Petition for Writ of Mandamus Conditionally Granted

Opinion: A grant or denial of a special appearance in a family law matter has no right to an interlocutory appeal. Thus, COA dismissed Corporation's appeal. However, because mandamus relief may only be granted if there is no adequate remedy by appeal, COA considered the petition for writ of mandamus.

A defendant waives its right to contest personal jurisdiction if it invokes judgment of the court on any question other than jurisdiction, acts in such a manner as to recognize that the action is properly pending, or seeks affirmative action from the court. Here, Husband, as an individual, filed a motion to quash. Corporation did not seek affirmative relief. Corporation did not enter a general appearance before the court. Further, Corporation's participation in discovery matters relating to personal jurisdiction did not waive its special appearance.

Texas may only exercise personal jurisdiction over a non-resident if federal due process requirements and the Texas long-arm statute are both satisfied. The long-arm statute authorizes personal jurisdiction over a non-resident defending doing business in Texas. Federal due process requirements are satisfied if the defendant has minimum contacts with Texas, and exercise of jurisdiction does not offend the traditional notions of fair play and substantial justice. A defendant may purposefully avoid Texas by structuring its transactions to neither profit from Texas laws nor subject itself to personal jurisdiction. Although Wife alleged that Corporation engaged in a civil conspiracy giving Texas jurisdiction, Tex. Sup. Court has declined to recognize jurisdiction over a nonresident based solely on the effects or consequences of an alleged conspiracy. Minimum contacts are analyzed in terms of specific jurisdiction and general jurisdiction. Because there was no connection between Corporation, the forum, and the litigation, Texas did not have specific jurisdiction over Corporation. To establish general jurisdiction, the plaintiff must show continuous and systematic contact with the forum state. While Corporation maintained a website accessible in Texas, the website was a passive, marketing tool and insufficient to support a finding of continuous and systematic contact. Although Corporation did sell a few items in Texas, those sales only accounted for 0.05% of Corporations annual business and did not support a finding of general jurisdiction. A bank account in Texas was listed as belonging to Corporation. However, there was sufficient evidence to establish that the account was opened under the name of the Corporation's Texas subsidiary, and the bank improperly designated the name on the account. Finally, there was sufficient evidence to show that Corporation did not exercise sufficient control over its Texas subsidiary to support Wife's claim that Corporation was the Texas subsidiary's alter ego. Because Corporation did not have continuous and systematic contacts with Texas, trial court should have granted its special appearance.

JURISDICTION WAS PROPER OVER NON-RESIDENT HUSBAND BECAUSE CONDOMINIUM HE PURCHASED AND FURNISHED FOR WIFE IN HOUSTON QUALIFIED AS THE COUPLE'S 'LAST MARITAL RESIDENCE'

¶12-3-03. ***Aduli v. Aduli,*** -- S.W.3d --, 2012 WL 1743349 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (05/17/12).

Facts: Husband, an Iranian citizen, and Wife, a French citizen, were married in Louisiana. Husband was in the United States on a work visa, and Wife was in the country on a visa as Husband's spouse. Five years after their marriage, they visited Houston and spoke of moving there to find work after Husband received his green card. Two years later, Husband bought and furnished a condo in Houston and moved Wife there. Wife claimed that Husband planned to join her there after he got his green card. However, Husband stated that Wife moved to Houston because they planned to separate, and that he purchased the condo because he wanted Wife to be comfortable during their separation. Over the next several months, Husband paid the utility bills and mortgage payments on the condo, and also gave Wife a monthly stipend for living expenses. Husband visited Wife at least once a month for a few days at a time. Wife filed for divorce, and Husband filed a special appearance on the basis that Texas was not the couple's last marital resident, and there was no other valid basis for asserting personal jurisdiction over Husband. The trial court denied Husband's special appearance.

Shortly thereafter, the couple agreed to a set of temporary orders and injunctions regarding spousal support, payment of debts, temporary use of property, and discovery. After various violations of these temporary orders, the trial court struck Husband's pleadings. Husband then filed a motion to dismiss, saying his application for a permanent work visa had been denied and both he and Wife had to leave the country. The trial court denied the motion to dismiss. Nine days before trial, Husband requested a continuance, saying that he had been forced to return to France and needed time to obtain a new visa.

The trial court denied Husband's motion for continuance and granted Wife a default judgment. Husband timely filed a motion to set aside the default judgment and for a new trial and attached an affidavit attesting that he had been forced to leave the United States because his application for a permanent visa had been denied; he also attached a copy of a boarding pass for a flight to Paris dated June 30 of an unspecified year. The trial court denied Husband's motion. Husband appealed.

Holding: Affirmed

Opinion: In a suit for dissolution of a marriage, Texas courts may acquire jurisdiction over a nonresident spouse if Texas was the parties' last marital residence or if there is any basis consistent with the state and federal constitutions for exercise of personal jurisdiction. While the TFC does not define 'last marital residence,' the Austin Court of Appeals has observed that

> [a] work separation, where spouses live apart to pursue professional opportunities, must be distinguished from a marital separation when spouses have decided to dissolve their marriage…As long as the parties choose to maintain a marriage, there will be a marital residence somewhere.

Here, Husband purchased the Houston condo in his own name, paid the bills and mortgage payments. Further, he gave Wife a monthly stipend while she lived there and visited her frequently. Wife stated that Husband visit her because "[he] is my husband" and they had not separated and had no intention of doing so when she moved to Houston. The COA concluded that these facts were sufficient to show that Houston was the couple's last marital residence.

Texas may only exercise personal jurisdiction over a nonresident defendant if the defendant has purposefully established minimum contacts with the forum state, and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. Here, Husband purchased, furnished, and made mortgage and utility payments on the Houston condo; visited several times a month; and sent Wife a monthly stipend. These actions were purposeful and regular contacts by Husband, not unilateral activity on the part of Wife or random and fortuitous contacts. These activities were of sufficient quality and quantity that Husband should not have been surprised to have been called into Texas court for divorce and property division proceedings.

Editor's Comment: *The real question here is not whether Texas had jurisdiction over this divorce because it was the location of the last marital residence. Rather, it is whether Wife could establish Texas as her domicile. If Wife cannot establish Texas as her domicile, Texas has no jurisdiction. Here, there appeared to be no dispute that neither Husband nor Wife had a green card or permanent visa and that Wife's H-4 visa only allowed her to be in the United States based upon Husband's H-1b work visa and that he had been denied his permanent visa and been unable to get a green card. For a trial court to be authorized to grant a divorce, the petitioner must establish that she has been a domiciliary of Texas for the preceding six months. See Skubal v. Skubal, 584 S.W.2d 45, 46 (Tex. Civ. App.—San Antonio 1979, writ dism.); Schreiner v. Schreiner, 502 S.W.2d 840, 843 (Tex. Civ. App.—San Antonio 1973, writ dism.). The elements of the legal concept of domicile are (1) an actual residence, and (2) the intent to make it the permanent home. Snyder v. Pitts, 241 S.W.2d 136, 139 (Tex. 1951). To establish domicile there must be more than mere physical presence in a particular place, there must be an intention to establish a permanent home. Skubal, 584 S.W. 2d at 46. Wife would have this Court believe that she has the intent to domicile in Texas when she has only temporary permission to be in this country at best. Domicile cannot be established by an alien who is in the country illegally. Hurst v. Nagle, 30 F.2d 346, 347 (CA 9th 1929). A person residing in the U.S. under a temporary visa cannot be considered a "permanent" resident." See Sukati v. Commonwealth Dept. of Public Welfare, 402 A.2d 325, 326 (Pa. Cmwith 1979). Certain classes of non-immigrant aliens can establish a domicile in the U.S. when their visas contemplate a long stay and the visa has no requirement for the alien to return to his home country or maintain a residence there. See Elkins v. Moreno, 435 U.S. 647 (1978). But here, Wife's visa does contemplate a temporary stay. If Husband loses his H-1B status, Wife loses her H-4 status. An H-1B status is for temporary workers and a worker's total stay cannot exceed 6 years. Wife may not work on an H-4 visa, her Husband must support here. Therefore, Wife cannot be a domiciliary of Texas because she does not have the*

ability to form the intent to make Texas her permanent home. Accordingly, the trial court had no jurisdiction to grant her a divorce in Texas. G.L.S.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

HUSBAND WAS ENTITLED TO JUDGMENT ON MSA; BREACH OF CONTRACT, WITHOUT CIRCUMSTANTIAL EVIDENCE OF FRAUD, DID NOT CONSTITUTE FRAUD FOR THE PURPOSES OF SETTING ASIDE MSA

¶12-3-04. ***Mueller v. Mueller,*** No. 01-11-00247-CV, 2012 WL 682285 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (mem. op.) (03/01/12).

Facts: Wife filed for divorce, and Husband filed a counter-petition. The parties later entered into an MSA that apportioned the property between the parties and established custody matters for their Child. After the agreement was signed, Husband repeatedly breached it. For example, he failed to delivery money to Wife the day after the agreement. Husband nevertheless filed a motion asking trial court to render a final divorce decree in conformity with the agreement. Wife filed a motion to set aside the agreement, alleging fraud and citing Husband's numerous breaches of the agreement. Trial court granted Wife's motion and signed the final decree of divorce.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: While a breach of contract alone is not evidence that a party did not intend to perform, breach combined with slight circumstantial evidence of fraud is some evidence of fraudulent intent. Here, wife failed to cite any portion of the record that would constitute "slight circumstantial evidence" to accompany evidence of husband's breaches.

Editor's comment: *MSA cases are hot, hot, hot! This case seems to indicate that a party breaching terms of an MSA (what else is new?), combined with "slight circumstantial evidence" of fraud would be enough to throw out the MSA. Scary. R.T.*

Editor's comment: *Say What? I agree with Rebecca that this is really scary since neither breach of contract or slight circumstantial evidence of fraud (whatever that means) are grounds to set aside a MSA. J.A.V.*

★★★TEXAS SUPREME COURT ★★★

MSA WAS AMBIGUOUS BECAUSE IT WAS UNCLEAR WHETHER THE PARTIES INTENDED MERELY TO TRANSFER HUSBAND'S INTEREST IN COMPANIES OR WHETHER THE PARTIES ALSO INTENDED FOR WIFE TO ASSUME HUSBAND'S STATUS AS PARTNER; THE DISAGREEMENT SHOULD HAVE BEEN RESOLVED THROUGH FURTHER MEDIATION, NOT BY TRIAL COURT

¶12-3-05. ***Milner v. Milner,*** 361 S.W.3d 615 (Tex. 2012) (03/09/12).

Facts: Wife filed for Divorce. Part of the community estate included Husband's interest in two companies that were formed during marriage. Husband was a partner of one of the companies and a member of the other. The latter company had a 1% interest in the former and served as a general partner of the former. The Spouses

signed an MSA, in which, among other things, Husband agreed "to transfer to [Wife] all of his beneficial interest and record title in and to" both companies subject to existing liabilities and to the Partnership Agreement. The Spouses also agreed to execute two attached exhibits to complete the transfer. One of the exhibits required signatures of all the existing partners to show their consent to Wife becoming a limited partner instead of Husband. One existing partner did not sign the exhibit, so Wife never became a limited partner. Later, Husband filed a draft of an Agreed Decree of Divorce. Wife objected arguing that it did not comply with the MSA because she had not assumed Husband's status as limited partner. Husband argued that the MSA only required him to transfer his interests in the companies, not his partnership status. A hearing was held to resolve the issue. Trial court stated that it would send the parties back to mediation, but it also decided to take the matter under advisement. Later, Wife withdrew her consent to the MSA, and Husband re-urged trial court to enter his draft decree. Trial court signed the decree, which did not include the exhibit requiring the existing partners' signatures. Wife moved for new trial. Trial court denied her motion, and she appealed. COA affirmed the divorce but reversed the property division, holding that there had been no meeting of the minds regarding the transferred interest in the companies. Husband petitioned for review, arguing COA erred in setting aside the MSA because it was a non-revocable agreement that the court was required to enforce.

Holding: COA Affirmed

Majority Opinion: (J. Medina, C.J. Jefferson, J. Hecht, J. Wainwright, J. Guzman, J. Lehrmann)

TFC 6.602(b)–(c) provides that if an MSA meets certain formalities, the parties are entitled to a judgment that adopts the agreement. If an agreement is ambiguous, there is a fact issue on the parties' intent. Whether an agreement is ambiguous is a question of law to be addressed by the court even if issues of ambiguity are not raised by the parties. The fact that trial court and COA interpreted this MSA differently does not establish ambiguity. In determining whether an agreement is ambiguous, the court must look to the language of the agreement. Here, Husband agreed "to transfer to [Wife] all of his beneficial interests and record title in" the two companies. Husband and Wife also agreed to execute the necessary documentation to complete the transfer. The phrase "beneficial interest and record title" was not defined in the MSA or partnership agreement. However, a "beneficial interest" has been defined as a "right or expectancy in something . . . as opposed to legal title in a thing." The Partnership Agreement permitted a transfer of a partnership interest only with the consent of all the general and limited partners. The MSA did not expressly require Husband to acquire his partners' consent. However, the fact that Husband agreed to transfer his interest and execute the necessary documentation at least implied that the Spouses may have intended to make Wife a partner. The MSA included a mediation provision in the event of a question of fact about the meaning of the MSA. Here, because the MSA was ambiguous as to whether the parties intended Wife to be a partner, the issue should have been arbitrated by the mediator. It was improper for trial court to resolve the dispute. It was also improper for COA to substitute its interpretation for trial court's. In addition, the MSA met the formal statutory requirements and should not have been set aside. However, the ambiguity should have been resolved through mediation before an agreed judgment was entered.

Dissenting Opinion: (J. Johnson, J. Green, J. Willett)

The MSA was unambiguous and trial court properly enforced it. In the MSA, Husband agreed to transfer his beneficial interest and record title in the entities "subject to all liabilities . . . and all provisions of the existing Partnership Agreement." The Partnership Agreement permitted a former spouse of a partner to become a partner only with the unanimous consent of the existing partners. Wife was fully aware of this limitation. Nothing in the MSA explicitly stated that Husband would secure consent from the existing partners. Although the MSA contained a number of explicit contingency provisions, nothing in the MSA expressly stated that any provision was contingent on the Wife becoming a partner. Husband had the power to transfer his interests in the entities, but he had no legal authority to ensure that the existing partners would consent to Wife being made partner. The only reasonable construction of the MSA was that Husband agreed to transfer his interest in the entities subject to the Partnership Agreement's provisions. Further, because the extensive MSA as a whole contained such detail, the omission of language expressing a contingency implied that no such contingency was agreed upon during the Spouses' extended negotiations.

Editor's comment: *The Supreme Court here seems to become confused between a mediation clause, which by definition is a non-binding proceeding where, if unsuccessful, results in a trial by the court to determine the merits, versus an arbitration clause, which results in a binding proceeding before an arbitrator with specific provisions for disagreement with the arbitrator's ruling. Seems to me the question here is whether the issue is an ambiguity or simply and issue that isn't resolved by the agreement. Either way, then the trial court may send the parties to mediate the ambiguous or remaining issues. But, if no agreement is reached in the non-binding proceeding, then the remaining remedy is a trial to the court. I don't see how the Supremes get arbitration out of this. This case does, however, underscore the importance of precision in drafting agreements. Sometimes mediations run late and by the time the parties get to an agreement, lawyers and mediators are tired and less precise than desired. As a practical standpoint, make sure that you don't compromise your abilities just to "get done." Your malpractice carrier won't appreciate an appellate court blaming an error in the client's case on the lawyer's failure of precise drafting. M.M.O.*

Editor's comment: *This is a good example why you should always have an arbitration provision in the MSA to resolve any disputes that arise with regard to the interpretation or performance of the MSA or any of its provisions including the necessity and form of closing documents. There are several critical concepts to include in the arbitration provision: (1) the mediator will serve as the sole arbitrator of disputes; (2) at the sole discretion of the arbitrator, the arbitration may be by written submissions without a hearing; and (3) the arbitration shall be binding. J.A.V.*

DIVORCE

DIVISION OF PROPERTY

HUSBAND FAILED TO ADEQUATELY TRACE ALLEGED SEPARATE PROPERTY, SO THE MAJORITY OF THE PARTIES' ASSETS WERE DEEMED TO BE COMMUNITY PROPERTY

¶12-3-06. ***Sink v. Sink,*** -- S.W.3d --, 2012 WL 840340 (Tex. App.—Dallas 2012, no pet. h.) (03/14/12).

Facts: Wife filed a petition for divorce. Husband answered and filed a counter-petition for divorce. Wife filed an amended petition asking for a disproportionate share of the estate. Trial court entered temporary orders permitting each party to withdraw $9000 per month from the community estate to cover living expenses. During trial, Husband produced extensive documentation summarizing a number of financial accounts. He called an expert to testify about his separate property, but Wife challenged the expert's expertise. Trial court did not allow the expert to testify. In the final decree, trial court divided the estate, finding most of the assets and liabilities of the parties were community property.

Holding: Affirmed

Opinion: All property possessed by either spouse at the dissolution of marriage is presumed to community property. In order to overcome the community property presumption, a spouse claiming to have separate property must trace and clearly identify the property claimed to be separate. Mere testimony that certain property is separate is insufficient to overcome the community property presumption. Here, although Husband claimed to have separate property, he failed to point to any specific evidence in support of his claims. He generally cited to trial exhibits that spanned multiple volumes of the reporter's record. Husband failed to direct the court to any specific pages supporting his claims. COA had no duty to independently review the record to determine if there was error. Thus, Husband waived his separate property claims because they were inadequately briefed.

In order to preserve for appeal an error concerning the exclusion of evidence, the party must offer the evidence and secure an adverse ruling. If no offer of proof is made, then to preserve the error, the party must introduce the evidence into the record by a formal bill of exception. Here, Husband did not make a timely of-

fer of proof and he did not file a formal bill of exception regarding the testimony of his expert witness. Thus, Husband failed to preserve a complaint regarding the exclusion of his expert's testimony for appeal.

Editor's comment: *The decision here turned almost 100% on waiver issues related to the appellate briefing. Take the time and make sure you have crossed all the "t's" and dotted all the "i's" ESPECIALLY when it comes to appellate work. And don't forget to make offers of proof when your trial testimony or evidence is excluded - if you don't, the appellate court won't touch it. R.T.*

Editor's comment: *The court gives this example of inadequate briefing: "Husband cites generally to respondent's exhibit five which is set forth in volumes six through fifteen of the reporter's record and consists of hundreds of pages of account statements and other documents." J.V.*

HUSBAND COULD NOT SET ASIDE MSA PROVISION GRANTING WIFE HALF OF HUSBAND'S RETIREMENT BENEFITS, BECAUSE PROVISION WAS NOT AMBIGUOUS AND HUSBAND COULD NOT SHOW ANY PROOF OF MUTUAL OR UNILATERAL MISTAKE

¶12-3-07. ***Toler v. Toler,*** -- S.W.3d --, 2012 WL 1758091 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (05/17/12).

Facts: Husband and Wife divorced after 11 years of marriage. They entered into an MSA, which contained a provision granting a portion of Husband's retirement benefits to Wife. The provision stated, "Parties agree to award wife 50% of the community property of [husband's] Rail Road Retirement benefits, with a stop date of September 27, 2010." Husband's monthly retirement benefits derived from two sources: Tier I, the railroad retirement benefit component; and Tier II, the divisible railroad retirement benefit components, described as supplemental annuity and dual benefits. A week after signing the MSA, Husband claimed the MSA did not reflect the couple's agreed division of Husband's retirement benefits earned during the marriage. Husband moved to have the MSA set aside and return to mediation on the issue. Trial court entered judgment on the MSA, and denied Husband's motion for a new trial. Husband appealed claiming the trial court erred because the MSA provision apportioning retirement benefits was ambiguous and a mutual or unilateral mistake renders the provision unenforceable as written.

Holding: Affirmed

Opinion: TFC does not authorize a court to modify an MSA, to resolve ambiguities or otherwise, before incorporating it into a decree. An MSA is more binding than a basic written contract because, except when a party has procured the settlement through fraud or coercion, nothing either party does will modify or void the agreement once all the parties have signed it. Because of the unique attributes of an MSA, the COA applied contract principles to interpret its meaning, and examined whether the MSA was ambiguous, or whether there had been a mutual or unilateral mistake.

Here, the decree's terms were not ambiguous simply because Husband disagreed about the proper interpretation. The provision of the MSA granting 50% of Husband's retirement benefits to Wife was not reasonably susceptible to more than one meaning. To align with Husband's desired construction would require additional language that would substantively alter the provision's plain meaning.

Further, aside from Husband's assertion that the MSA did not reflect the parties' intent, the record did not show any indication that there was a mutual mistake regarding the provision in the MSA. Husband had produced a sworn statement recounting events at mediation, but under the parol evidence rule, the COA could not consider extrinsic evidence that varied or contradicted the express or implied terms of the written agreement absent a showing of fraud, accident, or mutual mistake.

Editor's comment: *This case has an interesting footnote distinguishing a portion of its analysis from the recent Texas Supreme Court decision of Milner v. Milner, discussed hereinabove. R.T.*

Editor's comment: *This is one reason that the terms of a MSA should be as clear as possible although it appears that the Husband changed his mind or realized that he made a bad deal after the fact. J.A.V.*

PROPERTY ACQUIRED DURING MARRIAGE SHOULD HAVE BEEN CLASSIFIED AS COMMUNITY PROPERTY, WHERE DEED STATED THAT HUSBAND PROVIDED CASH AND OTHER VALUABLE CONSIDERATION FOR THE PROPERTY, AND HUSBAND DID NOT PROVIDE CLEAR AND CONVINCING EVIDENCE TO OVERCOME THE COMMUNITY PROPERTY PRESUMPTION

¶12-3-08. ***Tatum v. Tatum,*** No. 14-11-00622-CV, 2012 WL 1795112 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (mem. op.) (05/17/12).

Facts: Husband and Wife divorced. In Wife's inventory filed with the trial court, she identified a property as community property. However, Husband listed the same property on his inventory as separate property. Wife testified that she and Husband purchased the house and performed extensive work on the home to improve it. Wife further testified that the family spent summers there during the course of her marriage to Husband. Husband claimed the property was given to him by his father as a gift. Husband acknowledged that the family had spent time and effort repairing the house, but said they had invested little money in the improvements. Husband produced a certified copy of the deed showing that his father had deeded the property to him and that Husband claimed the property as separate property because his father had given it to him and he did not pay for the property. The trial court awarded Husband the property as separate property. Wife appealed.

Holding: Reversed and Remanded

Opinion: Property possessed by either spouse during or on dissolution of marriage is presumed to be community property. To overcome this presumption, a spouse claiming assets as separate property must establish their separate character by clear and convincing evidence. Separate property is property acquired during marriage by gift, devise, or descent. A gift is a transfer of property made voluntarily and gratuitously, without consideration.

In this case, the deed for the property states that Husband provided consideration of $10 cash and "other good and valuable consideration" for the property. The deed did not indicate that it was conveyed to Husband as his separate property or that consideration for the property was paid from Husband's separate estate. There was no clear and convincing evidence in the record to overcome the presumption that the property, acquired during the couple's marriage, was community property.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

DIVORCE DECREE WAS AMBIGUOUS BECAUSE PROVISION REGARDING TERMINATION OF CONTRACTUAL ALIMONY UPON WIFE'S RETURN TO WORK DID NOT DEFINE "FULL-TIME BASIS"; SUMMARY JUDGMENT WAS IMPROPER

12-3-09. ***In re C.P.Y.***, -- S.W.3d --, 2012 WL 1038397 (Tex. App.—Dallas 2012, no pet. h.) (03/29/12).

Facts: Husband and Wife divorced. Pursuant to the divorce decree, Husband agreed to pay alimony to Wife in the amount of $2,000 per month until, among other specified events, Wife "return[ed] to work on a full time basis." A few years later, Husband filed a petition declaring that his contractual alimony obligation terminated because Wife had returned to work on a full-time basis. Trial court granted summary judgment to Husband and declared that Husband's contractual alimony obligations had actually ceased two years prior.

Two years before this suit, Wife began work as a contract attorney. As such, she was paid only for the hours that she worked, and her hours depended on the needs of the attorneys who hired her. Wife argued that "full time basis" meant working forty or more hours per week consistently. The summary judgment evidence showed that she had only exceeded a forty-hour work week on three occasions. Husband argued that his obligations ended when Wife returned to work, regardless of the number of hours she worked. Alternatively, he argued that in his experience as an attorney that an attorney "must work for more hours than the hours he/she is actually able to bill." Therefore, Wife's bills should have been interpreted to mean that she necessarily worked more hours than she billed and that this established her full time status. Wife challenged the summary judgment rendered in favor of Husband. At issue on appeal was whether Wife had actually returned to work on a "full time basis."

Holding: Reversed and remanded.

Opinion: Applying a de novo standard of review to trial court's interpretation of the alimony provisions in the divorce decree, COA began with an analysis of the contract language. Contract construction requires a court to determine the true intentions of the parties as expressed in the writing itself. If the language can be given a certain and definite meaning, the contract is not ambiguous, and summary judgment may be appropriate. If the contract is susceptible to more than one reasonable interpretation, however, the contract is ambiguous, and a fact issue exists as to the parties' intent. Summary judgment is thus improper as to an ambiguous contract. Additionally, a court must consider the entire writing in an effort to harmonize and give effect to the provisions of a contract so that none will be rendered meaningless.

The divorce decree itself was silent as to what the parties intended. Additionally, there appeared to be no common meaning of the term "full-time." Dictionary definitions do not expressly state the number of hours a person must work to be considered a "full-time" employee. For example, a full-time state employee is a person "required to work…not less than 40 hours a week." The Texas Insurance Code defines an "eligible employee" as an employee who works on a "full-time basis and who usually works at least 30 hours a week" and does not include an employee who "works on a part-time, temporary, seasonal, or substitute basis." The divorce decree contained no other mention of employment on a "full-time basis." A definition of employment was given, but it did nothing to harmonize provisions in the decree to determine the parties' intent as to the disputed language.

COA concluded that the language in the divorce decree did not clarify a definite meaning of "full-time basis" and that it could not determine the true intentions of the parties from the expression in the writing itself. COA further concluded that the language was susceptible to more than one reasonable interpretation, thus a fact issue existed as to the parties' intent. Thus, trial court erred in granting summary judgment in favor of Husband.

Editor's comment: *This is one of those cases where you wonder if the Appellant wouldn't have been better off simply proceeding to final trial on the issue, instead of adjudicating the issue through summary judgment, so as to take advantage of the easier abuse of discretion standard instead of the tougher de novo standard. Either way, when drafting your final decree, DEFINE EVERYTHING. It's always better to fight the fight THEN instead of years later when things go haywire. R.T.*

Editor's comment: *Much of the court's reasoning relies on statutes defining full-time employment, not working "full time" as a contract attorney. Nevertheless, under this opinion, a "returning to work" provision should spell out the number of hours worked and whether the person is an independent contractor or is employed. If employed, should whether the person has benefits be addressed? Would working two or more different jobs, totaling over 40 hours per week, count as "full time?" J.V.*

Editor's comment: *Again…. Drafting! Pay attention to the little details in drafting agreements and decrees. M.M.O.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

TAGGART FORMULA WAS IMPROPERLY APPLIED IN DRO BECAUSE TRIAL COURT MULTIPLIED THE COMMUNITY INTEREST BY 50% RATHER THAN THE 44% AWARDED TO WIFE IN THE FINAL DIVORCE DECREE

¶12-3-10. ***Freeman v. Freeman,*** -- S.W.3d --, 2012 WL 1137103 (Tex. App.—El Paso 2012, no pet. h.) (04/04/12).

Facts: Husband entered active military duty. He married Wife just over 6 months later. After about 20 years of marriage, the couple divorced. Husband retired about 7 years after the divorce was rendered. In the final divorce decree, Wife was awarded a portion of Husband's military retirement benefits. The decree provided that Wife was entitled to "title and interest in and to 44% percent [sic] of the . . . disposable retired pay . . . ." The Department of Financial and Accounting Services (DFAS) notified Wife of Husband's retirement and stated that it would pay Wife 44% of his fully accumulated disposable retired pay. Husband blocked payment, and Wife filed a motion to clarify and enforce the divorce decree. Trial court signed a DRO awarding wife half of the community interest in Husband's retirement benefits. Husband appealed, arguing trial court improperly modified the divorce decree.

Holding: Reversed and Remanded

Opinion: Military retirement benefits earned during marriage are community property. For many years, courts have used the *Taggart* formula to determine the non-military spouse's share of the benefits. More recently, the Texas Sup. Court held in *Berry* that the community interest must be valued as of the date of divorce. Regardless of these formulas, if a final divorce decree is unambiguous, it must be enforced as written. Here, there was no dispute as to the number of months of military service during the marriage or the total months of Husband's service (247/336 or 73.52%). Further, there was no dispute that Husband's disposable retired pay was $3293 per month. Thus, the community interest was 73.52% of $3293, or $2421.01, which was almost $1000 less than the disposable pay. The final divorce decree stated that Wife was entitled to "title and interest in and to 44% percent [sic] of the . . . disposable retired pay . . . ." Thus, as calculated by the decree, Wife was entitled to 44% of the community interest. DFAS erred in its calculations because it merely multiplied 44% times the disposable pay, rather than by the community interest. The DRO also awarded Wife more than she was entitled to under the final decree because the DRO awarded Wife 50% of the community interest as opposed to 44%. The DRO impermissibly modified the divorce decree. Trial court's use of the *Taggart* formula was correct, but it used the wrong percentage.

Editor's comment: *El Paso's Chief Justice McClure explains the law clearly and walks the reader through the steps necessary to calculate retirement benefits. Recommended reading. J.V.*

WIFE WAS NOT REQUIRED TO REACH ANY PARTICULAR AGE BEFORE BEING ENTITLED TO HUSBAND'S TIER II BENEFITS UNDER THE RAILROAD RETIREMENT ACT

¶12-3-11. ***Bien v. Bien,*** -- S.W.3d --, 2012 WL 1136859 (Tex. App.—Eastland 2012, no pet. h.) (04/05/12).

Facts: Husband and wife divorced after 22 years of marriage. Shortly after the divorce, Husband began receiving a disability check as a railroad employee. Wife realized years later that a portion of the benefits Husband had been receiving since the divorce constituted Tier II benefits under the Railroad Retirement Act and that under the divorce decree she would be entitled to a portion of the received benefits. Wife contacted the

Railroad Retirement Board, and it began paying Wife a portion of Husband's monthly benefits. Wife sued to recover her share of the Tier II benefits that Husband had received since the divorce. Trial court found that Wife was entitled to a money judgment against Husband of about $40,000 for her share of the Tier II benefits. Husband was also ordered to pay Wife's attorney's fees. On appeal, Husband challenged the legal and factual sufficiency of the evidence that Wife was entitled to any benefits before the age of 62. Second, Husband asserted that there was no evidence that he received Tier II benefits. Finally, Husband challenged the sufficiency of the evidence supporting the amount of judgment awarded to Wife.

Holding: Modified and affirmed.

Opinion: In his first issue, Husband asserted that Wife was not entitled to any benefits before the age of 62 and cited Railroad Retirement Act 231a(c)(4). However, that section only applied to Tier I benefits, and the division of Tier II benefits in a divorce proceeding is governed by section 231m. Neither the divorce decree nor section 231m required Wife to reach any particular age before receiving her proportionate share of Tier II benefits.

Husband's second issue was without merit. A letter from the Railroad Retirement Board specified he had been receiving both his Tier I and Tier II benefits prior to the date of the letter. Additionally, Wife testified to documents that referenced Husband's Tier II benefits that he had already received.

In his final issue, Husband challenged the sufficiency of the evidence supporting the amount of the judgment awarded to Wife. Husband asserted that the divorce decree directed the Railroad Retirement Board to pay Wife her share rather than requiring Husband to pay Wife directly. COA rejected that argument because the decree specifically provided that Husband was entitled to his Tier II benefits except for that portion specifically awarded to Wife. Husband further asserted that the amount of the judgment was incorrect based upon the evidence offered at trial, and COA agreed. Trial court awarded Wife 50% of Husband's Tier II benefits received from the date of the divorce through the date of trial court's order. The retirement board, however, actually began paying Wife benefits about 8 months before the trial court issued its judgment. These payments reduced the amount that had been paid entirely to Husband by about $5,000. Additionally, the amount owed to Wife was not 50% of Husband's benefits, but 43.28% because he began working for the railroad before they were married. Accordingly, Wife was only entitled to 43.28% of the gross amount of Tier II benefits paid *entirely* to Husband.

WIFE FAILED TO NOTIFY HUSBAND THAT SHE REMARRIED, SO SHE HAD TO REPAY HUSBAND FOR MONTHLY PAYMENTS THAT WERE SUPPOSED TO STOP UPON REMARRIAGE EVEN THOUGH THE AGREED DIVORCE DECREE DID NOT INCLUDE A PROVISION ADDRESSING OVERPAYMENTS

¶12-3-12. ***Garcia v. Alvarez,*** -- S.W.3d --, 2012 WL 1232009 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (04/12/12).

Facts: Husband and Wife entered into an Agreed Final Decree of Divorce, and trial court approved the agreement. In the decree, Husband agreed to pay Wife $1000 a month until their youngest child turned 18, Husband or Wife died, or Wife remarried. Husband made the payments as required. Later, Wife remarried but failed to notify Husband of her new marriage. Husband made 3 payments before he discovered that Wife was remarried. Husband demanded the return of the $3000, but Wife refused. Husband filed a motion for enforcement. Trial court granted the motion, ordered Wife to pay Husband $3000, and awarded Husband attorney's fees. Wife appealed, arguing that trial court lacked authority to require her to return the money because the divorce decree had no provision dealing with the issue of overpayment. Wife also contended that it was improper for trial court to award Husband a money judgment.

Holding: Affirmed

Opinion: TFC 9.006(a) provides that a court that renders a divorce decree retains continuing subject matter jurisdiction to assist in the implementation of or to clarify its prior order. However, TFC 9.007(a) limits that power, stating that the subsequent order may not amend, modify, alter, or change the division of property made or approved in the decree of divorce. Here, the divorce decree incorporated the parties' agreed division of the property. Thus, the final decree is treated as a contract and governed by the law of contracts. Regardless, chapter 9 of TFC still applies. The parties agreed that Husband would pay Wife $1000 a month until the occurrence of one of four specified events, including the remarriage of Wife. Nothing in the decree limited the parties' remedial rights in regard to overpayments. Wife remarried and did not notify Husband. Husband made three more payments after Wife remarried, and Wife retained the payments. Ordering the return of the payments did not amend, modify, alter, or change the decree. Trial court was merely enforcing the division of the property made in the decree as authorized by TFC.

To preserve error, a party must make a timely and specific request, objection, or motion to the trial court. Here, Wife did not object, complain, or argue that a money judgment was an improper remedy. Thus, Wife failed to preserve that issue for appeal.

Editor's comment: *When does a trial court's PROPER post-divorce "implementation" or "clarification" of a decree step over the invisible line into IMPROPER "amendment" or "modification"? No one knows, but this case gives us one more fact-specific example of PROPER implementation to add to the list. R.T.*

Editor's comment: *Suppose ex-Wife had moved to California and married a woman. Could a Texas court have granted ex-Husband any relief? J.V.*

TURNOVER ORDER GRANTED AUTHORITY TO RECEIVER THAT WAS NOT SUPPORTED BY TEXAS LAW: TRIAL COURT ATTEMPTED TO GRANT RECEIVER WITH NON-DELEGABLE DUTIES; THE ORDER WAS IMPERMISSIBLY BROAD; AND A RECEIVER'S FEE CANNOT BE SET UNTIL AFTER THE WORK CAN BE VALUED

¶12-3-13. ***Congleton v. Shoemaker,*** 2012 WL 1249406 (Tex. App.—Beaumont 2012, orig. proceeding) (mem. op.) (04/12/12).

Facts: Husband and Wife divorced, and Husband was ordered to assume certain financial obligations. After a judgment in favor of Wife for amounts owed by Husband, a receiver was appointed. Trial court signed a turnover order defining the receiver's powers and requiring Husband to deliver certain property. Husband filed an appeal and a petition for writ of mandamus. Husband argued that the order granted the receiver authority that was not supported by Texas law. Husband also contended that trial court erred in granting the receiver "[b]lanket immunity" and pre-setting the receiver's fee.

Holding: Affirmed in Part, Reversed and Remanded in Part, Petition for Writ of Mandamus Conditionally Granted

Opinion: A receiver may be appointed as an officer of the court to take possession of nonexempt property, sell it, and use the proceeds to pay the judgment creditor. A receiver's powers are limited to what is conferred by a trial court. However, a trial court may not confer the exercise of non-delegable judicial discretion. A receiver has no constitutional authority to adjudicate parties' rights. Here, three provisions improperly granted power to the receiver gave the receiver authority to make decisions without consulting trial court. One provision improperly granted receiver the authority to schedule hearings and to rule on evidence presented at those hearing. This provision improperly equated the receiver's orders with trial court's orders. Two other provisions were overly broad. One permitted the receiver to administer oaths and take testimony from witnesses, and another stated that an order from the receiver was binding as if it were a court order. Trial court abused its discretion in attempting to delegate these powers.

Under Tex. Civ. Prac. & Rem. Code 31.002, an order must specifically identify non-exempt property that is susceptible to turnover relief. Further, the order must specifically tailor relief to that property. Broadly iden-

tifying categories of assets does not satisfy this statute. Three of the provisions in trial court's order did not sufficiently identify non-exempt property and did not tailor relief to non-exempt property. One provision required Husband to turnover "all assets." Another provision improperly purported to order a branch of the military to perform certain functions. Finally, a third provision encompassed private information that is not subject to disclosure by requiring access to Husband's "real property, leased premises, storage facilities, mail and safety deposit boxes." These provisions did not comply with section 31.002 and reached far beyond the authority necessary to effectuate the purpose of the turnover statute.

A receiver is entitled to derived judicial immunity, but only when the court officer acts within his scope of authority. Here, trial court included a provision exempting the receiver from liability for actions taken in accordance with the order. However, the mere existence of a court order does not confer immunity for all functions as receiver. Trial court abused its discretion by failing to limit immunity to discretionary actions.

A receiver's fee should be measured by the value of services rendered. While a partial advance may be made before a final accounting, the reasonableness of the fee must be measured in light of the value of the work, after it has been completed. Here, there was no evidence establishing what percentage or amount constituted a fair, reasonable or necessary fee. Thus, trial court abused its discretion in pre-setting the receiver's fee at 25%.

DIVORCE
POST-APPEAL

HUSBAND COULD NOT BE REQUIRED TO PAY FOR WIFE'S EXPERT WITHOUT EVIDENCE AS TO THE REASONABLENESS OF THE FEE OR TO EACH PARTY'S ABILITY TO PAY THE FEE

¶12-3-14. ***In re Slanker,*** -- S.W.3d --, 2012 WL 1232944 (Tex. App.—Texarkana 2012, orig. proceeding) (04/13/12).

Facts: Husband and Wife divorced. Husband appealed and the case was remanded to trial court as to the property division only. After the remand, trial court entered an order requiring Husband to "pay $5,000.00 in certified funds . . . within 10 days . . . for [Wife] to retain . . . an expert to value the business." Husband filed a petition for writ of mandamus, contending that there was no evidence to support the order.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: This proceeding was an adversarial proceeding. Generally, in adversarial proceedings, expert witnesses work for the party that hires them. Here, because it would have been in Wife's interest for the expert to place a high value on business, it is likely that her witness would do just that. If the expert did not value the company in a manner that Husband believed to be fair, he would need to hire his own business valuation expert. An expert witness fee is an incidental trial expense and is not ordinarily recoverable.

Tex. R. Civ. P. 131 provides that "[t]he successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." Tex. Civ. Prac. & Rem. Code 31.007(b) provides that a court may include costs in an award, including fees of the clerk and the court, fees of the court reporter, fees for masters, interpreters, and appointed ad litem, and "such other costs and fees as may be permitted by these rules and state statutes." Because expert witness fees are incidental expenses, they are generally not recoverable as costs. Here, Rule 131 does not apply because the litigation in this case is ongoing, and this is a family law case.

There is no statutory authority governing the award of expert fees in a post-divorce property division action. COA looked instead to certain instances in which expert witness fees were awarded in divorce proceedings. TFC 6.708 permits a court to award costs in a divorce proceeding. Further, TFC permits an award of

expert witness fees in a property division that also involves a divorce or SAPCR. TFC 9.013 allows a court to award costs in a property division enforcement proceeding as it would in any civil proceeding.

Here, because this was a marital property division dispute, trial court could have ordered fees to be paid from the community estate that was under the sole control of Husband. However, trial court did not do this. TFC 9.013 gives the court the power to award expert fees, but only after evidence has been presented as to the reasonableness of the fee or the ability of each party to pay such fees. Because there was no evidence on the record regarding the fees, trial court's award was improper. Further, because trial court's order was a temporary order, Wife had no adequate remedy by appeal, and mandamus would be an appropriate means of challenging the order.

Editor's comment: *Another case addressing interim attorney's fees. Interestingly, this case results after appeal of the divorce and property division and remand for further orders on the property division. Because the COA in the first appeal did not reverse or remand the finding for divorce, the COA in the second appeal interprets this to be a property division case (not a divorce). The standard for an award of interim fees is reasonableness and ability to pay by each party. No evidence, no award. M.M.O.*

SAPCR

STANDING AND PROCEDURE

STEP-FATHER HAD STANDING TO FILE ORIGINAL SAPCR BECAUSE HE HAD ACTUAL CONTROL AND LEGAL CONTROL OVER THE CHILDREN FOR AT LEAST 6 MONTHS NOT MORE THAN 90 DAYS BEFORE THE FILING OF THE PETITION

¶12-3-15. ***In re A.C.F.H.,*** -- S.W.3d --, 2012 WL 726940 (Tex. App.—San Antonio 2012, no pet. h.) (03/07/12).

Facts: As part of a "Child Safety Evaluation Plan," Mother agreed to allow Step-Father to take possession of her Children. Before the stated end-date for the plan, Step-Father filed a SAPCR seeking sole conservatorship. Trial court entered temporary orders appointing Step-Father as SMC, and it appointed Mother as temporary possessory conservator. Trial court granted Step-Father a number of detailed rights and duties and granted Mother only limited visitation and limited authority while she was in possession of the Children. The case was later dismissed for want of prosecution, but Step-Father filed a motion to reinstate the case. Trial court reinstated the case, but it was again dismissed for want of prosecution. The next day, Step-Father filed another SAPCR seeking sole conservatorship. Trial court signed a Nunc Pro Tunc Order that incorporated an MSA entered into by Mother and Step-Father. The order appointed the parties as JMCs of the Children. Mother appealed the order, arguing for the first time on appeal that trial court lacked jurisdiction to enter the order because Step-Father lacked standing to file the SAPCR.

Holding: Affirmed

Opinion: Standing cannot be conferred by consent or waiver and may be raised for the first time on appeal. When standing is raised for the first time on appeal, there is no opportunity to cure a pleading defect. Thus, a COA must construe the petition in favor of the party whose standing has been challenged. In a SAPCR, standing is governed by the TFC. TFC 102.003(a)(9) grants standing to an individual, "other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition . . . ." Here, Step-Father did not plead that his actual care, control, and possession did not end more than 90 days prior to the date of the filing of the petition. However, the record supported his explanation that he did not make this allegation because his actual care, control, and possession had not ended and was still on-going. Prior temporary orders, which appeared to be still in effect, granted Step-Father a list of rights and duties, including the right to physical possession, to consent to the

Children's medical needs, to represent the Children in legal actions, to designate the primary residence of the Children. Mother, on the other hand, was only given limited visitation and limited authority over the Children during her periods of possession. Step-Father's duties appeared to remain unchanged from the time that the temporary orders were issued to the time that he filed his most recent SAPCR.

COA noted disagreement among its sister courts regarding the definition of "actual control." COA found a recent opinion from Austin the most persuasive: "'actual . . . control . . . of the child,' as used in section 102.003(a)(9), means the actual power or authority to guide or manage or the actual directing or restricting of the child as opposed to legal or constructive power or authority to guide or manage the child." 348 SW.3d 523. Because the purpose of TFC 102.003(a)(9) is to grant standing to those who have a relationship with a child that has been developed and maintained over time, "actual control" should not hinge on whether a care-giver possesses legal authority over the child. Here, because Step-Father had both actual control and legal control over the Children during the relevant time period, he had standing to bring his petition.

Editor's comment: *This case continues the interesting discussion about what "actual care, control, and possession of the child" means in Section 102.003(a)(9). Under any of the appellate courts' differing analyses the step-father here clearly had standing, but this case does give you a helpful synopsis of where the debate currently stands, and which appellate courts have weighed in. R.T.*

MOTHER'S PETITION FOR BILL OF REVIEW WAS NOT FILED IN BAD FAITH; TRIAL COURT WAS LED TO BELIEVE THAT NOTIFICATION OF TERMINATION PROCEEDING WAS MADE ON MOTHER'S NEW ADDRESS, BUT SERVICE WAS ACTUALLY DELIVERED TO COUNTY JAIL

¶12-3-16. ***Harrison v. Harrison,*** -- S.W.3d --, 2012 WL 823045 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (03/13/12).

Facts: Mother and Father divorced. Mother was named managing conservator, and Father had visitation rights. Father picked up the Child from the babysitter's for scheduled visitation but did not return the Child to Mother. Father and the Child lived with Father's parents ("Grandparents"), and the Child was enrolled in day care. Grandparents filed a SAPCR, seeking termination of Mother's parental rights to the Child. Mother filed a motion for enforcement of child custody determination. After hearing testimony, trial court granted Mother's motion for enforcement and denied Grandparents' motion for temporary orders. The Child was returned to Mother pending trial. Mother's attorney filed a motion to withdraw and provided trial court with Mother's last known address. Attorney stated that Mother was aware of an upcoming deposition. Trial court granted the motion to withdraw. Mother failed to appear at the deposition. Father filed a petition seeking sole managing conservatorship. Trial court held a hearing on Father's motion, and Mother failed to appear. Trial court granted Father's motion for temporary orders and issued a writ of attachment for the Child. Trial court did not enter a default but ordered that the Child be brought before the court within 72 hours to provide Mother with an opportunity to present evidence. The county sheriff executed the writ, picked up the Child at Mother's new address, and delivered the Child to Father at the county jail, as arranged. Father and the Child appeared before trial court, but Mother did not. Trial court set a pre-trial hearing on the petition seeking termination of Mother's parental rights. Father's counsel suggested service on both Mother's last known address and the address where the writ of attachment was served. Trial court agreed. Notice of the pre-trial hearing was sent to Mother's last known address and the jail where the Child was delivered to Father. Mother did not appear at the hearing, and after hearing testimony, trial court entered an order terminating Mother's parental rights to the Child.

Nearly 4 years later, Mother filed a petition for bill of review alleging failure to serve her with notice. Grandparents filed an answer and a motion for sanctions, arguing that the petition was groundless and was filed in bad faith and for the purpose of harassment. After an evidentiary hearing, trial court granted the motion for sanctions and struck Mother's petition for bill of review as the sanction. Mother appealed, arguing trial court erred in finding her petition was groundless and in imposing Rule 13 sanctions without evidence of bad faith.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 13 permits a court to impose sanctions for groundless pleadings that are brought in bad faith or for the purpose of harassment. Whether a pleading is groundless is judged by an objective standard. Pleadings are presumed to be filed in good faith, and the burden is on the party moving for sanctions to overcome this presumption. Bad faith requires a conscious doing of a wrong. The court must make its determination based on the facts and circumstances at the time the pleading was filed. Here, all notices were sent by certified mail to Mother's last known address. The county clerk testified that trial court had not received any returned mail from that address. Mother testified that she did not notify the court of her new address. It is the responsibility of the person to be notified to keep the court apprised of his current address. However, in this case, trial court ordered, and opposing counsel agreed, that notice of the pre-trial hearing would be served on both Mother's last known address and the address where the writ of attachment was served on Mother four years prior. Nonetheless, rather than using Mother's address, service was made on the Austin County jail, where the Child was delivered to Father. In the sanctions hearing, trial court was led to believe that Mother's claim that she was not served at her new address was false, when in fact, service was not made to her, but to the county jail. Based on this error and on the circumstances of a termination of parental rights, Mother's failure to notify the court of her current address was an insufficient basis to dismiss her claim for being groundless and filed in bad faith.

FATHER WAS NOT ENTITLED TO A CONTINUANCE BECAUSE HE FIRED HIS ATTORNEY ONE MONTH BEFORE TRIAL

¶12-3-17. ***In re J.P.,*** -- S.W.3d --, 2012 WL 1263493 (Tex. App.—Dallas 2012, no pet. h.) (04/16/12).

Facts: Father and Mother were married with two Children. Father filed for divorce, and Mother filed a counter-petition for divorce. A hearing was set, but it had to be reset due to trial court's heavy docket. Father had been represented by counsel for ten months, but one month before the reset trial date, Father fired his attorney. The attorney filed a motion to withdraw and notified Father of the final trial date, and trial court granted the withdrawal. One month later, on the day before trial, Father filed a motion for continuance. Trial court denied the motion, and the case proceeded to trial. The only issues in controversy were conservatorship, possession, and access to the Children. Trial court appointed Mother as sole managing conservator with the right to designate the Children's primary residence. Father was granted possessory conservatorship with supervised visitation until the Children reached the age of six. Father filed a motion for new trial, arguing that trial court abused its discretion in denying his motions for continuance, trial court erroneously admitted evidence at trial, and Father had newly discovered evidence that was sufficiently strong to justify a new trial. The trial court denied the motion and Father appealed.

Holding: Affirmed

Opinion: Absence of counsel alone is not good cause for a continuance. The movant must show that the failure to be represented was not due to his own fault or negligence. Here, Father was represented for ten months, but he fired his attorney one month before trial. Father was notified of the trial date. Based on the evidence, COA could not conclude that Father's failure to secure representation was not the result of his own fault or negligence.

Although appellate briefs should be construed liberally, a brief must cite to legal authorities and to the record. Pro se litigants must be held to the same standards as attorneys. To do otherwise would give an unfair advantage to pro se litigants over those represented by counsel. In his arguments regarding erroneous admission of evidence, Father failed to provide COA with any legal analysis or citations to any authority to support his arguments. In his contentions regarding newly discovered evidence, Father failed to provide any citations to the record to show that his alleged new evidence was sufficiently strong to necessitate a new trial. Neither of these issues was adequately briefed.

Editor's comment: *Obviously there is some discrepancy in the cases involving the denial of continuance because an attorney was fired or withdrew. However, in this case, I didn't see anything to indicate the Father was not represented due to his own fault or negligence. J.A.V.*

FOSTER PARENTS' PETITION TO INTERVENE IN SAPCR SHOULD HAVE BEEN CONSIDERED UNDER TFC 102.004, NOT TFC 102.003

¶12-3-18. ***In re Salverson,*** No. 01-12-00343-CV, 2012 WL 1454549 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (mem. op.) (04/23/12).

Facts: The Department filed a petition seeking conservatorship of the Children and termination of the Parents' parental rights. The Department was appointed SMC of both Children. Foster Parents filed a petition to intervene under TFC 102.004(b), seeking conservatorship of the Children. Foster Parents pled that the Children had been in their care for about five months, that intervention was necessary to protect their interests, and that intervention would not complicate the issues of the case. The Children's Parents moved to strike Foster Parents' petition to intervene. After a hearing, trial court granted Parents' motion based on TFC 102.003(12). Foster Parents moved to reconsider. After a second hearing, trial court denied the motion. Foster Parents filed a petition for writ of mandamus, arguing that trial court should have considered their petition to intervene under TFC 102.004 and that trial court erred in striking the petition.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: TFC 102.003 governs which parties have standing to file an original SAPCR. Contrarily, TFC 102.004 governs standing to intervene in pending a SAPCR. TFC 102.004 has more relaxed requirements than TFC 102.003 because "the overriding concern for the best interest of the child when a termination suit is already pending is greater than the concern for the privacy of the parties." For a party to intervene in a SAPCR under TFC 102.004, the intervener must show substantial contact with the child and proof that appointing a parent as SMC or both parents as JMCs would significantly impair the child's physical health or emotional development. Thus, a foster parent who may not have standing to file an original SAPCR under 102.003 may have standing to intervene in a SAPCR under TFC 102.004. Trial court clearly abused its discretion in failing to apply the appropriate law when considering Foster Parents' petition to intervene.

In this case, mandamus was appropriate to protect Foster Parents' substantive rights. Absent a writ of mandamus, Foster Parents would have to rely on the Department to preserve their interests as "foster-to-adopt" parents. There was no guarantee that the Department's and Foster Parents' interests would remain the same throughout a trial. Finally, granting a writ of mandamus prevented waste because these proceedings would be subject to "certain reversal" based on trial court's failure to correctly consider Foster Parents' petition under TFC 102.004.

TRIAL COURT CANNOT DECLINE JURISDICTION IN A CASE FILED UNDER UIFSA BECAUSE OF MOTHER'S BAD CONDUCT (TFC 152.208). TFC 152.208 APPLIES ONLY TO UCCJEA CASES, NOT UIFSA CASES

¶12-3-19. ***In re M.I.M.,*** -- S.W.3d --, 2012 WL 1863404 (Tex. App.—Dallas 2012, no pet. h.) (05/23/12).

Facts: Father and Mother had one Child in 2001. Father signed an acknowledgment of paternity that same year. In 2002, the OAG filed suit in the 296th District Court in Collin County to establish child support for the Child. Father and mother then signed temporary orders named both as temporary JMCs. After six weeks of sharing custody, Mother took the Child and fled to Guatemala. The OAG ultimately nonsuited the case, and no final custody order was entered. In 2004, the 296th District Court dismissed the case for wanted of prosecution. In 2009, the OAG filed a petition in the 219th District Court in Collin County, under the UIFSA to

establish child support for the Child. Father filed a plea to the jurisdiction arguing that Texas should decline jurisdiction because of Mother's bad conduct under TFC 152.208. Father's motion was granted. The OAG appealed.

Holding: Reversed and Remanded

Opinion: Texas has two uniform laws that govern foreign and interstate child support and custody, each of which evaluates jurisdiction independently—UCCJEA, which is codified in TFC chapter 152 and governs child custody, and UIFSA, which is codified in TFC chapter 159 and governs child support. A court's jurisdiction to hear a child support issue does not confer jurisdiction upon that court to determine issues of custody or visitation. The duration of personal jurisdiction, when acquired in a proceeding under [TFC 159.202] for a support order, continues as long as the tribunal has continuing, exclusive jurisdiction to enforce its order. A voluntary or involuntary dismissal of a SAPCR does not create continuing, exclusive jurisdiction in a court.

Here, the OAG properly filed a petition under UIFSA in Collin County, where personal jurisdiction was proper over Father. Further, the failure to pursue a final order in the 2002 proceeding negates the existence of continuing, exclusive jurisdiction in the 296th District Court in Collin County

Finally, TFC 152.208, which applies to UCCJEA cases, provides that a court may decline to exercise jurisdiction due to the unjustifiable conduct of a person seeking the court's jurisdiction. TFC 159.312, which applies to UIFSA cases, contains no such 'reason of conduct' language. Therefore, it was improper for the trial court to decline to invoke jurisdiction pursuant to TFC 152.208.

Editor's comment: *Father also pleaded that the case should be abated 'until the person now claiming to be [M.I.M.] can be properly identified by DNA or other testing as to establish that she is the same person as the [M.I.M] that was illegally abducted from this jurisdiction over eight years ago." The court held that "it was improper for the trial court to conclude as a matter of law it did not have subject matter jurisdiction due to the residency or current existence of M.I.M." J.V.*

SAPCR
TEMPORARY ORDERS

MOTHER FAILED TO ESTABLISH THAT AN AWARD OF INTERIM ATTORNEY'S FEES IN SAPCR WAS NECESSARY BECAUSE SHE FAILED TO SHOW THAT THE AWARD WOULD HAVE HAD ANY EFFECT ON THE SAFETY AND WELFARE OF THE CHILDREN

¶12-3-20. ***In re Rogers,*** -- S.W.3d --, 2012 WL 1581374 (Tex. App.—Austin 2012, orig. proceeding) (05/04/12).

Facts: Mother and Father divorced, and the final divorce decree appointed the Parents JMCs of their 3 Children. A few years later Mother filed a SAPCR and was awarded a TRO against Father and limited Father's access to the Children to supervised visitation. Father filed a counter-petition seeking SMC with supervised visitation for Mother. Father demanded a jury trial. After numerous discovery requests and motions from Father, Mother filed a motion seeking $30,000 interim attorney's fees. Mother contended that the fees were necessary to protect the safety and welfare of the Children. After a hearing, Trial court ordered Father to pay $20,000 to Mother's attorney. Father filed a petition for a writ of mandamus, arguing that trial court abused its discretion in awarding interim attorney's fees because there was no evidence to establish that the fees were necessary for the safety and welfare of the Children.

Holding: Petition for Writ of Mandamus Conditional Granted

Opinion: Mandamus is an appropriate method of relief when a trial court has clearly abused its discretion and there is no adequate remedy by appeal. TFC 105.001(a)(5) allows a temporary order of attorney's fees in a SAPCR only if the award is necessary for the safety and welfare of a child. The party seeking attorney's fees bears the burden of showing that such an order is necessary for the safety and welfare of the child. Here, Mother's attorney stated that a jury trial would be expensive and that the case was "unusually acrimonious and contentious." Mother's attorney also testified that the Children were "under assault" because Father did not visit them as often as allowed, and Father refused to get a psychological evaluation. However, on cross, Mother's attorney admitted there was no current threat to the safety and welfare of the Children because they were under the protection of the court. Moreover, Mother testified that she was saving money to rent a house, that she had received some free legal advice from her boyfriend and his brother, and that she had made arrangement to "get [her attorney] some money." Thus, there was no room for an inference that Mother would be unable to move forward with the litigation without the temporary order. There was no evidence presented that an award of interim attorney's fees would have had any effect on the safety and welfare of the Children. Mother failed to satisfy her burden. Trial court's interim order that Father pay Mother's attorney's fees was a clear abuse of discretion.

Editor's comment: *Lesson #1 on attorney's fees awards. When it's a SAPCR, the attorney MUST testify how the fees requested are necessary for the safety and welfare of the child. Testifying about the costs of litigation doesn't generally get you there when it's a SAPCR. For other helpful examples, see Saxton v. Daggett, 864 S.W.2d 729, 736 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); In re Sartain, No. 01-07-00920-CV, 2008 WL 920664, *2 (Tex. App.—Houston [1st Dist.] April 3, 2008, orig. proceeding) (memo. op.); and In re T.M.F., No. 09-10-00019-CV, 2010 WL 974577 (Tex. App.—Beaumont, Jan. 25, 2010, orig. proceeding) (memo. op.). R.T.*

Editor's comment: *To add to the above, see Marcus v. Smith, 313 S.W.3d 408, 418 (Tex. App.—Houston [1st Dist.] 2009, no pet.), which holds that just establishing that your client is the parent with the primary responsibility for the child and for the care and upkeep of and the debt on the children's principal residence is sufficient to establish that attorney fees are necessary for the safety and welfare of the child. See also, In re Garza, 153 S.W.3d 97, 101 (Tex. App.—San Antonio 2004, orig. proceeding). G.L.S.*

Editor's comment: *What the court does not acknowledge is that interim attorney's fees to prepare for trial are for the safety and welfare of the children because their safety and welfare will be affected by whatever happens at trial. Under this decision, interim attorney's fees never can be awarded unless right at the moment of the temporary orders hearing the safety and welfare of the children are in jeopardy. J.V.*

Editor's comment: *There are several cases this time that address interim attorney fees awards in various contexts. Many trial judges are under the mistaken impression that they have free reign to award interim attorney's fees at will, with little or no evidence. This case and the others in this newsletter all stand for the proposition that a trial judge's authority to award interim fees is limited by statute and by the evidence presented. Here, attorney's fees were requested in a SAPCR under 105.001, based on the need for interim fees to protect the safety and welfare of the child. The COA points out that there was no evidence addressing anything to do with the safety and welfare of the child or how such would be harmed if no attorney's fees were awarded. No evidence, no fees. Is that a difficult concept? Based on the number of cases reported in this newsletter, maybe so. M.M.O.*

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT COULD NOT RENDER ORDERS INCORPORATING A NON-MEDIATED RULE 11 AGREEMENT CONCERNING CONSERVATORSHIP, POSSESSION, AND CHILD SUPPORT BECAUSE MOTHER REVOKED HER CONSENT TO THE AGREEMENT BEFORE THE ORDERS WERE ENTERED

¶12-3-21. ***In re M.A.H.,*** -- S.W.3d --, 2012 WL 1036388 (Tex. App.—Dallas 2012, no pet. h.) (03/29/12).

Facts: Mother and Father had three minor Children. Father filed for divorce. Without attorneys or a mediator, the Parents negotiated a rule 11 agreement concerning the division of property, spousal maintenance, possession and conservatorship, and child support. Father's attorney prepared a written agreement, which was signed by Parents and the attorney. Although the agreement purported to be non-revocable, Mother later filed a pro se answer in the trial court, claiming that she had signed the agreement under duress. She claimed that Father had threatened to take the Children and to have Mother arrested for credit card debt she had allegedly acquired in his name without his knowledge. Mother retained counsel and filed a motion to set aside the rule 11 agreement. Father filed a "Counterclaim and Motion to Enforce Rule 11 Agreement and to Sign Decree of Divorce." A hearing was set on Father's motion. At the hearing, Mother testified that she did not have an attorney during the negotiations because she had no money, and Father would not provide her with money to hire an attorney. Mother only had a high school education, and she testified that she did not know the meaning of the word "revocation" in the sentence, "This agreement is not subject to revocation." She stated that she only signed the agreement to get Father "off [her] back," and she did not know what she was signing. Mother testified that if she had fully understood the agreement she would not have agreed. Trial court signed the final judgment, which incorporated the rule 11 agreement. Trial court denied Mother's motion for new trial. Mother appealed and filed an affidavit of indigency. Trial court sustained the clerk's and court reporter's challenge to indigency partly because Mother had $2500 in a savings account. In her appeal, Mother argued that trial court erred in rendering judgment after she withdrew her consent to the rule 11 agreement and that her withdrawal of consent made the agreement invalid. Father argued that Mother was estopped from appealing because she had accepted the benefits of the judgment.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The acceptance of benefits doctrine prevents a party from treating a judgment as both right and wrong. A party cannot accept the benefits of a judgment and appeal the judgment, unless the acceptance is due to an economic necessity. Here, Mother testified that she had no money of her own, that she was forced to move out of the house, and she had no choice but to use the assets granted to her by the divorce to support herself. Father did not present any contrary evidence. Mother was not estopped from bringing her appeal.

TFC 6.604(b) provides that a rule 11 agreement concerning a dissolution of marriage is binding if it "(1) provides, in a prominently displayed statement that is in boldfaced type or in capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed." Here, the agreement stated that "**THIS AGREEMENT IS NOT SUBJECT TO REVOCATION.**" Further, the agreement was signed by Mother, Father, and Father's attorney. Thus, the agreement was binding on the parties with regards to the dissolution of marriage, division of the marital estate, and spousal maintenance. TFC 6.604(d) provides that the agreement is also binding on the court if it finds that the agreement is just and right. Here, trial court found the agreement was just and right, so it was also binding on trial court.

TFC 153.007 and 154.124 provide that an agreement between the parties regarding possession, conservatorship, and child support is binding on the court if the court finds that the agreement is in the best interest of the child. Unlike the provision concerning the dissolution of marriage, these sections do not include language

regarding irrevocability. Thus, because Mother revoked her agreement to the rule 11 agreement before trial court rendered its orders, trial court could not enter orders on child support, conservatorship, and possession in accordance with the rule 11 agreement.

Father asserted that Mother's signing of the rule 11 agreement constituted judicial admissions that the division of property was just and right and the in the Children's best interests and that the terms concerning child support, possession, and conservatorship were in the Children's best interests. Even if this were true, it would not have relieved Father of burden of pleading breach of the rule 11 agreement and obtaining a judgment on that cause of action. Supposing that Father's counterclaim and motion to enforce were construed as a breach of contract counterclaim, nothing in the record supported a contention that there was notice or hearing on that cause of action. There was no documentation purporting to set a breach of contract cause of action for trial. There was no ruling on a breach of contract claim. Thus, trial court enforced the revoked 11 agreement and did not find Mother breached the rule 11 agreement.

TFC 7.001 requires a court to make a just and right division of the marital estate "having due regard for the rights of each party and any children of the marriage." Because trial court erred in enforcing the rule 11 agreement as it pertained to child support, conservatorship, and possession, on remand, trial court may no longer find that the division of the marital estate was just and right when considering the rights of the Parents and their Children. Thus, the division of the marital estate was also remanded to trial court. COA noted that trial court could take into consideration the assets already distributed to Mother in the prior proceedings.

Editor's comment: *It seems to me like the appellate court went out of its way in order to let the mother out of this deal. Perhaps a different result if the mother had an attorney during the signing of the Rule 11 agreement? R.T.*

Editor's comment: *Mother avoided estoppel by acceptance of benefits with evidence that she lost her job post-divorce, had no money at the time of divorce, was required to move out of the marital residence with only her clothes and some small items, had no valuable possessions aside from those received in the divorce (two cars and a boat), and sold the cars and boat to buy a mobile home in which to live, purchasing the mobile home outright rather than financing it because she had no job. J.V.*

Editor's comment: *Interesting thing about this case is how the COA did the remand. The parties negotiated an informal settlement agreement as to the property division and a rule 11 agreement as to the kiddo issues. (NOTE: the binding-ness of an informal settlement agreement only applies to property divisions and not to kiddo-issues!). Wife reneged as to the kiddo-issues. Husband sought entry of judgment and raised contractual issues at the hearing, and the trial court entered the judgment. Wife made no objection to trying contractual issues at that time. COA found that Husband should have filed a counterclaim for breach of contract by Wife and sought as damages specific performance of the contract, with notice and a trial. So, the COA reversed the judgment on kiddo-issues and remanded. They completely ignored the fact that the trial court did consider the breach of contract at the hearing and Wife did not object. Note, however, the COA also reversed the property division under the guise that the trial court's determination of a just and right division requires consideration of the kiddo-issues, so if the kiddo-issues are reversed, then the property division must also be reversed. I think the COA is wrong to reverse the property division since the informal settlement agreement is binding between the parties. M.M.O.*

SAPCR
CONSERVATORSHIP

TRIAL COURT'S ORDER REQUIRING CHILD TO BE IMMUNIZED AGAINST MOTHER'S WISHES HONORED FATHER'S WISHES, WAS SUPPORTED BY A PHYSICIAN'S RECOMMENDATION, AND WAS IN THE CHILD'S BEST INTEREST

¶12-3-22. ***In re A.J.E.,*** -- S.W.3d --, 2012 WL 1644946 (Tex. App.—Eastland 2012, no pet. h.) (05/10/12).

Facts: Mother and Father were appointed as JMCs of the Child. Mother filed a SAPCR, asking for the sole responsibility to make decisions regarding immunization of the Child. Mother testified that the Child had an allergic reaction to her first set of immunizations. Mother also testified that through her research of the safety of immunizations, she determined that the Child should not receive future immunizations. In addition, she stated that her family had a history of bad reactions to immunizations. After a hearing, trial court required Parents to consult with a physician to determine the risks involved with immunizing the Child, and the physician provided a letter stating that he "strongly suggest[ed] that [the Child] be immunized according to CDC and AAP recommendations." Trial court entered a final order requiring the child to be immunized. Mother appealed, arguing that trial court's order violated her constitutional and statutory rights by infringing on her right to direct the medical care and treatment of her Child.

Holding: Affirmed

Opinion: Mother's argument ignored the fact that the Child's other parent wanted the child to be immunized. Further, this case did not involve a situation where the government attempted to override the will of both parents or the sole surviving parent of a child. Rather, it involved a determination of which of the conflicting preferences of the Child's Parents should be honored.

Tex. H&S Code 161.004(a) provides that "[e]very child in the state shall be immunized against vaccine preventable diseases caused by infectious agents" in accordance with the requirements of the Texas Board of Health. However, there are exceptions for reasons of conscience, including religious beliefs, or if the immunization is medically contraindicated based on the opinion of a licensed physician. Here, there was evidence that the immunization is in the child's best interest, as evidenced by the physician's letter, which established that the immunization was not medically contraindicated. Further, there was evidence supporting trial court's determination that Father's preference for the Child to be immunized was in the Child's best interest.

SAPCR
ENFORCEMENT

FATHER WAS REQUIRED TO PROVIDE CONSENT FOR CHILD'S OVERSEAS TRAVEL WITH MOTHER BECAUSE MOTHER SUBSTANTIALLY COMPLIED WITH THE PARENTS' AGREEMENT BY PROVIDING FATHER WITH ADEQUATE DETAILS OF THE TRIP; FAILURE TO ATTACH TO ORDER THE CONSENT FORM REFERENCED IN AGREEMENT DID NOT RENDER THE ORDER UNENFORCEABLE

¶12-3-23. ***In re G.D.H.,*** -- S.W.3d --, 2012 WL 751952 (Tex. App.—Amarillo 2012, no pet. h.) (03/08/12).

Facts: Mother traveled overseas from time to time, and she wanted to take the Child with her. The TC entered an agreed order, which provided that if the parent in possession wanted to travel overseas with the Child, that parent would provide the other parent with specific information regarding the trip including requisite forms from various entities, dates, destinations, means of transportation, and contact information. Once provided with the requisite information, the non-traveling parent would execute and return a consent form to the traveling parent within 10 days of receipt of notice. The agreement included a provision that if a parent failed to comply with the agreement, that parent would have to pay any costs incurred in enforcing the agreement.

Subsequently, Mother sought to take the Child overseas. She provided Father with details of the trip and presented him with a consent form. Father refused to sign because he claimed that Mother failed to provide him with all the requisite information. Mother petitioned trial court to order Father to sign the consent. After a hearing, trial court found that Mother had substantially complied with the agreement and ordered Father to execute the form and to pay attorney's fees, court costs, and expenses. Father appealed, arguing that Mother was required to provide a consent form that was of the type required by the U.S. Dept. of State or other organization. Father also argued that the order incorporating the prior order was unenforceable because it was supposed to include an attached consent form, but it did not. Finally, Father contended that his duty to sign the consent form had not been triggered because Mother failed to comply with each detail of the notification clause in the agreement.

Holding: Affirmed

Opinion: Agreed order governed by the law of contracts. Thus, to construct the meaning of the document, the court had to garner the Parents' intent from the writing as a whole. One portion of the order referred to written consent forms required by the country or destination. Another portion referred to a written consent form and any other form required by the U.S. Dept. of State or other authority. Construing these portions together led COA to conclude that the Parents contemplated the potential need for multiple consent forms: one consent form from the non-traveling spouse, any forms required by the foreign country, and any form required by the U.S or other authority to prove the other parent's consent. Thus, Father's claim that Mother necessarily needed to provide a form by some government entity or third party was mistaken.

A court may add to a contract already in existence or supply a missing term or provision in order to effect the purposes of the parties to the contract. Here, the order referenced a written consent form that was supposed to be "attached hereto," but there was no such form attached. It was clear that the purpose of the agreement was to facilitate the Child's overseas travel and that the attached form was intended to be an executed written consent to the Child's travel. Here, trial court ordered Father to sign a form that identified him as the Child's father, expressed his consent to the proposed travel, and identified the Child's destination. This form required by trial court did nothing more than fulfill the intended purpose of the agreed order.

Under the doctrine of substantial compliance, which has been applied in family law, exactitude of performance may not be required where deviations do not seriously impair the underlying purpose of the contractual provision. Here, Mother provided Father with the date of the Child's departure, the purpose and destination of the trip, the identity of the people the Child's was traveling with, the organization they would be work-

ing with, the time period they would be working overseas, people who would have the Child in their custody, contact information, and a copy of the Child's plane ticket and itinerary. In addition, Mother agreed to give more contact information when it became available, and she agreed to meet with Father in person if he had questions. While it was true that Mother did not provide the contact information for each interim destination or the specific time and date for the Child's return, she did provide the bulk of the requisite information, and she remained available to Father for further questions. Trial court did not abuse its discretion in finding Mother substantially complied with the order or in ordering Father to sign the consent form.

SAPCR
CHILD SUPPORT

TFC 154.303 REQUIRES A SPECIFIC ASSIGNMENT TO OAG TO GRANT STANDING TO OAG TO SUE FOR CONTINUING SUPPORT OBLIGATIONS FOR AN ADULT DISABLED CHILD

¶12-3-24. ***In re A.N.M.,*** No. 09-11-00070-CV, 2012 WL 1380213 (Tex. App.—Beaumont 2012, no pet. h.) (mem. op.) (04/10/12).

Facts: Mother and Father divorced when their child was ten. Their Child suffered from mental retardation. In the divorce decree, Father was ordered to pay child support. Later, OAG filed a notice that it was a necessary party and that Mother had assigned her support rights to OAG because the Child was receiving Title IV-D benefits. OAG requested that support payments be directed to the state disbursement unit. After the Child had turned 18, OAG filed a suit for modification because a psychologist determined that the Child would require substantial care and supervision, and the Child was incapable of self support. An associate judge signed the modification order. Father filed a motion to dismiss, claiming that the OAG lacked standing to file the suit to enforce child support obligations after the Child had turned 18. Trial court determined that the suit for modification did not include a specific assignment from Mother to OAG and vacated the associate judge's order. OAG appealed, arguing that trial court had misinterpreted section 154.303.

Holding: Affirmed

Opinion: TFC chapter 154 allows "court-ordered support for adult disabled children." TFC 154.303 lists the only three entities that may file a suit under chapter 154: a parent, guardian, or a person with physical custody of the child; the child, if certain requirements are met; or the Title-IV D agency, if an assignment of rights has been made. Here, the OAG did not claim that an express assignment had been made granting it standing under TFC 154.303. The OAG's general powers as the state's Title IV-D agency does not grant it standing under the specific requirements set forth in TFC 154.303. "[T]he fact that the OAG had standing to file its original petition to enforce . . . child support obligations does not mean that it maintained standing to file a subsequent petition to require continuing support payments for adult disabled children."

LOAN MADE TO FATHER BY HIS MOTHER SHOULD HAVE BEEN INCLUDED IN CALCULATIONS FOR MODIFYING CHILD-SUPPORT ORDER WHERE THERE WAS NO EVIDENCE THAT FATHER WAS OBLIGATED TO REPAY THE LOAN

¶12-3-25. ***In re A.M.P.,*** -- S.W.3d --, 2012 WL 1851595 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (05/22/12).

Facts: Mother filed a petition to modify a prior final order in a SAPCR, seeking to raise the monthly amount of child support for the Child. Father filed a counter-petition seeking to reduce the amount of child support. Mother agreed to temporary orders that would reduce Father's child-support obligations, believing Father was

unemployed. Trial court signed a temporary order reducing Father's child-support obligations by more than half. Later, Mother learned that Father had made a bank deposit of approximately $8,000 and was employed by his mother's business. Mother asserts that she only agreed to the temporary orders because Father presented that he was unemployed, and therefore Father had fraudulently induced Mother into entering the agreement. Mother sought to rescind the agreement and increase Father's child-support amount. Evidence showed that Father had collected unemployment benefits and also served as the general manager for his mother's business. Father claimed he had not received a paycheck that year because the business was unsuccessful and could not pay his salary. Father also said that his mother had advanced him more than $80,000 for personal expenses in the prior three years. Further, Father's name was on the deeds to several pieces of real property, along with his mother's name, but he testified that he had no equitable interest in most of the properties, and that his name was on the deeds in case something were to happen to his terminally ill mother. Father also testified that he was behind in his mortgage payments on his home and had accumulated tens of thousands of dollars in credit card debt. Trial court modified Father's monthly child-support obligation and issued a final order reducing his monthly payment by more than half. Mother appealed, claiming the trial court erred in dismissing her fraudulent-inducement claim and in determining Father's net resources by excluding the amount advanced by his mother from Father's resources.

Holding: Affirmed In Part, Reversed and Remanded In Part

Opinion: Mother argued that a finding of unemployment was against the great weight of the evidence. However, Mother did not challenge the implied findings as to each element of fraud. Because she did not challenge the independent bases for the trial court's judgment, the judgment is affirmed as to the dismissal of the fraudulent-inducement claim.

Mother claims that the money advanced to Father by his mother should be included in his resources for calculating child-support obligations because the advance qualified as a gift. The trial court must make certain fact findings if the amount of child support it orders varies from the amount computed by applying the percentage guidelines under TFC 154.125 or 154.129. In this case, the amount of child-support established by the guidelines was twenty percent of Father's monthly net resources, which included income and other compensation for personal services as well as gifts Father received.

Father claimed that the advance was a loan on his inheritance, to be repaid after his mother died by deducting it from what he was to receive from her estate. Father claimed this arrangement was set forth in his mother's will. However, the record did not contain any will or written agreement between Father and his mother regarding the sum. For this sum to be a loan, Father must have had an absolute duty to repay the money, but there was no written evidence of any obligation to repay his mother. There was insufficient evidence to conclude that the advance was a loan, and therefore the amount of the advance should have been included in the trial court's calculations of Father's child-support obligation.

FATHER WAS REQUIRED TO PAY RETROACTIVE CHILD SUPPORT BECAUSE HE KNEW HE WAS THE FATHER OF THE CHILD AND HAD PREVIOUSLY MADE REGULAR MONTHLY PAYMENTS TO MOTHER IN SUPPORT OF THE CHILD

¶12-3-26. ***In re A.B.,*** -- S.W.3d --, 2012 WL 1852062 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (05/22/12).

Facts: Mother became pregnant with the Child during a brief relationship with Father in Russia, Mother's native country. Father paid travel expenses for Mother to relocate to Colorado, where the Child was born. Mother wrote to Father, saying that while she assumed full responsibility for the Child, she requested temporary assistance until she achieved financial stability. For at least four years, Father made regular payments to mother, averaging approximately $460 per month. After Father quit making payments, Mother retained an attorney, who sent a letter to Father expressing Mother's intent to establish a support obligation and her desire to amicably resolve the issue. Allegedly, Father called Mother and threatened physical harm on her and threatened to take the child away and have Mother deported. Mother testified that she did not pursue further

action out of fear of these threats until two years later, when the child's expenses increased. Father denied making threats and instead testified that he quit making payments because an attorney advised him to establish an agreement before making any further payments. The record showed a responsive letter to Mother's attorney, requesting information regarding Mother's income and the Child's expenses. Father testified he received no further response until served with the current suit. During this period, however, Father sent the Child cards and gifts, and enrolled her in a pre-paid college tuition plan, to which he contributed monthly. The OAG filed suit against Father under UIFSA seeking to establish a child-support obligation for the Child, who still resided in Colorado at the time. The trial court signed a temporary order requiring Father to pay child support of $1,100 per month and medical support. Mother filed a petition seeking to establish Father's paternity and requesting current and retroactive child support and medical support. The trial court signed a final order requiring Father to pay retroactive child support of $129,000, covering the period from the cessation of Father's payments until the time of trial, and ordering Father to pay $1,100 per month in child support, as well as $125 per month for medical support. Father filed a motion for new trial which was denied.

Holding: Affirmed as Modified

Majority Opinion (J. Seymore): Under the TFC, a trial court may order retroactive child support if the parent (1) has not previously been ordered to pay support for the child, and (2) was not a party to a suit in which support was ordered. In ordering retroactive support, the court looks to TFC 154.131 for guidelines, which include consideration of several factors: whether the mother of the child had attempted to notify the obligor of his paternity; whether the obligor had knowledge of his paternity; whether the order of retroactive support would impose an undue financial hardship on the obligor; and whether the obligor had provided support before the filing of the action.

Here, Father did not dispute that he fathered the Child and knew about the Child from birth. Further, his four years of payments after the birth support the child support order because Father quit making payments despite his proven ability to provide support. Moreover, although Father testified that the temporary support obligation triggered elimination of his younger children's extracurricular activities, he provided no specific evidence that he was unable to provide for his children's needs because of the support obligation. Additionally, even though Father had paid into a college tuition plan, retroactive support could still be proper to account for the Child's needs during the period during which Father paid no support.

Father contended that the trial court was required to limit retroactive support to the amount that would have been due for four years prior to the date when the petition seeking support was filed. Under TFC 154.131, courts presume that orders limiting retroactive child support to the four-year period prior to the filing of a petition seeking support are reasonable and in the best interest of the child. This presumption can be rebutted, however, by showing evidence that the obligor knew or should have known he was the father of the child for whom support is sought, and that he sought to avoid establishment of a support obligation to the child. However, here, the OAG and Mother did rebut the presumption, as it was undisputed that Father knew he was the father of the Child, and Mother presented evidence Father sought to avoid establishment of a child-support obligation. Mother testified that Father threatened repercussions if Mother pursued a formal child-support order, which supported the determination that Father sought to avoid the establishment of a support obligation.

Regarding the amount of retroactive child-support ordered, Father did not object when the trial court announced its decision, and therefore any arguments regarding an improper calculation of the amount ordered cannot be raised on appeal. Further, the trial court was not required under TFC 154.131, as Father contended, to credit his payments into the college tuition plan against the retroactive award. Father providing actual support before the filing of the action was a factor relative to determination of retroactive child support, but there is no statutory requirement that the trial court *must* credit his support against any actual award.

Concurring Opinion (J. Frost): Father alleges that since he asked the Mother to abort the Child's life, he should not be required to pay retroactive support for the Child. However, a father's plea for the Mother to abort the pregnancy has no legal relevance to the issue of support for that child. Once a child is born, a parent owes a legal duty of support. Further, Father's assertion that his request should be considered in a child-support order is repugnant to Texas' public policies of protecting children and fostering strong family rela-

tionships. A child's discovery that, prior to the child's birth, the father requested that the mother abort the child's life could be confusing, distressing, and devastating to the child. There is a legitimate and compelling public policy justification, beyond the lack of legal relevance, that parties should not offer and courts should not consider such evidence in a retroactive child-support analysis.

SAPCR
CHILD SUPPORT ENFORCEMENT

ALABAMA JUDGMENT WAS ELIGIBLE FOR REGISTRATION AND ENFORCEMENT IN TEXAS BECAUSE THE ISSUE OF PERSONAL JURISDICTION WAS FULLY AND FAIRLY LITIGATED AND FINALLY DECIDED IN ALABAMA, AND FATHER FAILED TO PURSUE AN APPEAL OF THE ALABAMA JUDGMENT

¶12-3-27. ***In re T.B.,*** No. 07-10-00377-CV, 2012 WL 751950 (Tex. App.—Amarillo 2012, no pet. h.) (mem. op.) (03/08/12).

Facts: The State of Alabama filed a paternity and child support action against Father. Father lived in Texas, and he asserted that Alabama lacked personal jurisdiction over him. The Alabama trial court found that it had jurisdiction over Father and signed a final judgment determining Father to be the father of the Child. The Alabama trial court ordered Father to pay current and retroactive child support. Later, the Texas OAG filed a notice of registration of the Alabama order. Father contested the validity and enforcement of the order. Father argued that the child was conceived in Georgia, not Alabama, so Alabama had no valid claim of personal jurisdiction over him. The Texas trial court held that the Alabama order was not eligible for registration and dismissed OAG's notice. OAG appealed.

Holding: Reversed and Remanded

Opinion: States are generally required to give other states' judgments full faith and credit when the judgment has been fully and fairly litigated and finally decided. When a court is asked to give effect to a judgment from a sister state, the second court may inquire into the foreign court's jurisdiction, but the scope of that inquiry is "limited to whether questions of jurisdiction were fully and fairly litigated and finally decided by the court which rendered the judgment." Here, Father filed with the Alabama trial court a motion to dismiss for lack of personal jurisdiction before he filed his answer. Father's motion to dismiss was denied. Subsequently, Father filed an answer, in which he stated that, along with a general denial of the allegations, his answer was "without waiver of his previously stated grounds for dismissal." Father again asserted that the Alabama trial court lacked personal jurisdiction over him. The Alabama trial court found that it had personal jurisdiction over Father because he had waived the issue of jurisdiction by filing a general denial. Father requested a rehearing, and a rehearing was set and continued. After that, Father filed for bankruptcy, and his attorney withdrew. The hearing was reset again. About a week before the new hearing date, Father sent a letter to the court asking for a continuance because he claimed that he had no means to travel to Alabama. Trial court denied the request, noting that Father had previously failed to submit to DNA testing and failed to cooperate "with all discovery requests." Father did not appear. The Alabama trial court signed a final order, and Father did not appeal. Father failed to pursue the remedies provided to him under Alabama law. The Alabama trial court fully and fairly litigated the issue of personal jurisdiction, and the issue was finally decided. Thus, the judgment was entitled to full faith and credit in the Texas courts. Trial court erred in dismissing the AG's notice of registration.

SAPCR
MODIFICATION

MOTHER'S MOVE FROM TEXAS TO ILLINOIS CONSTITUTED A MATERIAL AND SUBSTANTIAL CHANGE, AND A MODIFICATION AWARDING FATHER THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE WAS IN THE CHILD'S BEST INTEREST; TRIAL COURT WAS NOT OBLIGATED TO GIVE MOTHER AN OPPORTUNITY TO REESTABLISH RESIDENCY WITHIN GEOGRAPHIC RESTRICTION

¶12-3-28. ***In re I.J.M.,*** No. 13-11-00459-CV, 2012 WL 1142890 (Tex. App.—Corpus Christi 2012, no pet. h.) (mem. op.) (04/05/12).

Facts: Mother and Father met while they were both doctoral candidates. Soon after the Child was born, they separated, and Mother filed for divorce. They signed an MSA, in which they agreed that Mother would have the exclusive right to establish the Child's primary residence with a geographical restriction. The final divorce decree incorporated the MSA. Less than one year later, Mother moved to modify the geographical restriction, so she could move to Illinois for work. Father moved to modify the decree to allow him the exclusive right to designate the primary residence of the Child in the event the trial court allowed Mother to move. An associate judge entered a temporary order lifting the geographic restriction, and trial court signed a temporary order consistent with the associate judge's order. Mother relocated based on this temporary order. After a trial, trial court denied Mother's motion and granted Father's. Mother appealed. She contended that the evidence failed to establish that there was a material and substantial change or that the modification was in the Child's best interest. Mother complained that trial court failed to elaborate on its finding that there had been a material and substantial change. In addition, Mother argued that trial court should have permitted her an opportunity to reestablish the Child's residence within the geographical restriction because she moved only after receiving permission from the court.

Holding: Affirmed

Opinion: COA held Mother's move constituted a material and substantial change such as to support Father's motion to modify and there was sufficient evidence to support the change in custody. Mother testified that after receiving her doctorate, she was only offered one job, and it just happened to be in Illinois, near her mother. Mother admitted that she only applied for one position in Texas. She stated that positions in Texas did not pay as well as positions in Illinois. Father was qualified for the same type of job as Mother, and he had found a job in Texas. Father did not earn as much as Mother did in Illinois, but Father introduced evidence that his expenses were less than Mother's. Mother testified that if the Child moved with her to Illinois, the Child would be in daycare more often than she was at home. Father testified that if the Child lived with him, she would only be in daycare three days a week. Mother testified that she wanted the Child to learn about the heritage on her side of the family. Mother also conceded that her home in Illinois had no backyard and that the weather would be "cold and treacherous." Father had a large backyard, and there were parks near his home. In addition, Father had located age-appropriate art and music classes and a recommended preschool that the Child could attend. If the Child lived in Illinois, the Child would be near her Mother's mother and grandfather. In Texas, the Child already has a good relationship with Father's extended family. Both Parents testified negatively about the other Parent's behavior when they met to exchange the Child for visitations. A move from Texas to Illinois would be a material and substantial change in circumstances, and the evidence presented at trial supported trial court's decision to award Father the exclusive right to determine the Child's primary residence. Further, Mother cited no authority supporting her contention that trial court should have permitted her to reestablish the child's residence within the geographic restriction before changing the conservatorship of the child.

Editor's comment: *I think the appellate court ultimately got this one correct, but it seems very incongruent to hold that the mother's actual relocation from Illinois to Texas (which she did pursuant to the associate judge's temporary orders, and after the father filed his petition to modify) was the material and substantial change in circumstances that supported the father's petition to modify. The way the opinion reads, it sounds like a judicially-created material and substantial change in circumstances. R.T.*

Editor's comment: *Good reminder that in every modification, the person wanting to modify must prove the circumstances as they existed at the time of the prior order, the circumstances during the prior order's effect, and the material change in those circumstances to prevail. M.M.O.*

Editor's comment: *In my opinion, the move to Illinois was a material and substantial change in circumstances even if the move was "authorized" by the Court on temporary orders. However, I am sympathetic to Mother's position and this indicates a reason that moves should rarely be authorized on temporary orders. J.A.V.*

TRIAL COURT ABUSED ITS DISCRETION IN MODIFYING CONSERVATORSHIP AGREEMENT, BY CREATING A GEOGRAPHICAL RESTRICTION ON THE CHILD'S RESIDENCY, BECAUSE THERE WAS NO EVIDENCE THAT THE CIRCUMSTANCES OF EITHER PARTY HAD MATERIALLY OR SUBSTANTIALLY CHANGED

¶12-3-29. ***In re H.N.T.,*** -- S.W.3d --, 2012 WL 1644434 (Tex. App.—Dallas 2012, no pet. h.) (05/10/12) (motion for rehearing filed on 06/11/12)

Facts: Final divorce decree appointed Mother and Father JMCs, with Mother as the primary with no geographic restrictions. At the time of the divorce, Mother was living in Houston, and then later moved to Grayson County. Some years later, Mother told Father she wanted to move back to Houston for work, at which point Father initiated a SAPCR to impose a geographic restriction preventing Mother from moving the Child. Father requested that the residency of the Child be established in Grayson County or that his child support obligations be decreased because of increased travel costs. In the alternative, Father asked that he be appointed as the conservator responsible for designating the Child's primary residence. Trial court entered temporary orders restricting the Child's residence to Grayson County. A few months later, after Mother moved to Houston to start her new job, Parents entered a Rule 11 Agreement giving Father possession of the Child until a further court order. After a final hearing, trial court granted Father the exclusive right to designate the primary residence of the Child within Grayson County so long as Mother resided outside of Grayson County. Trial court stated that if Mother returned to Grayson County or a contiguous county, she would be primary conservator. Mother appealed.

Holding: Reversed and Rendered

Opinion: The moving party bears the burden of showing that there has been a material and substantial change in circumstances since the entry of the last order establishing conservatorship. Here, trial court found that "[a]t the time of the prior order both parties resided in Grayson County." However, the evidence was undisputed that at the time that trial court entered the final amended divorce decree, Mother resided in Houston. Accordingly, there was no evidence to support trial court's finding that both parties resided in Grayson County at the time of the prior order. Because the original divorce decree did not contain a geographic restriction, and Mother lived in Houston at the time it was entered, Mother's desire to move the Child back to Houston did not establish a material or substantial change in circumstances.

Editor's comment*: Unfortunately, here the court merely concentrated on the fact that at beginning and end of this matter the mother lived in Houston (for a year before returning to Grayson County) without taking into consideration in its material and substantial change in circumstances analysis that the child was seven months old at the time of divorce and at time of modification was twelve and that during the period when the*

mother moved back to Grayson (a period of 10 years), child and father spent a lot of time together, and father was very involved in her life. The court really missed the boat here. G.L.S.

Editor's comment: *The result is hard to justify in my opinion. It certainly seems the move from Houston to Grayson County, and residing in Grayson County for a number of years before attempting to move back to Houston would constitute at least some evidence of a material and substantial change of circumstances. J.A.V.*

MODIFICATION OF CONSERVATORSHIP ORDER WAS IN CHILD'S BEST INTEREST, WHERE FATHER'S FAMILY HAD LONGSTANDING AND ONGOING RELATIONSHIP WITH CHILD, AND MOTHER'S NEW HOME IN NEW CITY COULD NOT PROVIDE THE SAME STABILITY AND SUPPORT AS THE FATHER'S HOME

¶12-3-30. ***In re Tyson,*** No. 12-10-00243-CV, 2012 WL 1623414 (Tex. App.—Tyler 2012, no pet. h.) (mem. op.) (05/09/12).

Facts: Father and Mother had one Child before they divorced. They were named JMCs of their Child. Mother was granted exclusive right to designate the Child's primary residence restricted to Texas. Father filed for a modification requesting that he be in charge of designating the primary residence of the Child and that the Child's residence be restricted to Rusk County after Mother said she was moving to Waco. Trial court entered temporary orders that the primary residence of the Child be in Rusk County. After a final hearing, trial court granted Father the exclusive right to designate the Child's primary residence as Rusk County.

Holding: Affirmed

Opinion: Since the decree gave Mother the right to establish the Child's residence in Texas, she had a right under the decree to relocate to Waco. Mother's relocation, without more, could not be sufficient evidence to establish a material and substantial change in circumstances. Therefore, Father had to rely on other evidence of a material and substantial change that warranted modifying the geographic provision to prevent the Child from moving with Mother to Waco.

Father produced evidence that Father's extended family, particularly his mother and grandmother, were extremely involved in the Child's life even before Mother moved. Father's extended family offered a secure, positive environment for the Child, and removing the Child from that extended family would have been an experiment requiring changes in the Child's life. The Child's paternal grandmother and great-grandmother had picked up the Child from school every day for years, taken him to church, doctor's visits, and Boy Scouts. Further, the Child stayed with the paternal grandmother during the summer. Contrarily, while Mother had siblings who lived close to her new home in Waco, a neighbor testified that she did not know Mother's work or school schedule and had never seen Mother's new home in Waco. This evidence supported a finding that Father's allegations regarding a material and substantial change were true, and that the modification was in the child's best interest.

SAPCR
TERMINATION OF PARENTAL RIGHTS

TERMINATION WAS NOT SUPPORTED BY TFC 161.001(1)(O) BECAUSE THERE WAS NO EVIDENCE THAT THE CHILD WAS REMOVED FROM MOTHER'S CARE AS A RESULT OF ABUSE OR NEGLECT OF THAT CHILD

¶12-3-31. ***In re E.C.R.,*** -- S.W.3d --, 2012 WL 897777 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (03/15/12).

Facts: Police were called to investigate allegations of abuse when a witness reported seeing Mother dragging the Child's older sister by her ponytail down the street. When police arrived, they saw that the Child's sister had a bruised lip, a cut on her forehead, dried blood on her nose, and fresh bruising on her right ear and left eye. The Child was not present during that incident. Mother was arrested and charged with injury to the Child's sister. Mother pled guilty and received four years' deferred adjudication community supervision. The Department took custody of the Child "due to the risk of [the Child] being physically abused by Mother." At the termination proceedings, the caseworker stated that Mother had completed some of the services required by the court's service plan, but she had failed to complete the psychiatric evaluation and psychological treatment. In addition, Mother had not found employment, and she had lost custody to another son. The caseworker also noted that the Child was "very behind" on his immunizations, and Mother was not taking care of the Child's medical needs. The caseworker testified that Mother had tried to kill herself while in prison. The child advocate testified that Mother had not lived in a home or had a job for six months. Although Mother claimed that she was unable to find a job due to complications with her last pregnancy, she failed to produce any documentation of her inability to work. Trial court found that termination was in the Child's best interest. Additionally, trial court found that termination was supported under TFC 161.001(1)(O). Trial court did not find termination based on the other grounds under TFC 161.001(1) urged by the Department. Trial court named the Department as sole managing conservator. Mother appealed, arguing that the evidence was legally and factually insufficient to support termination of her parental rights under 161.001(1)(O) because the Child was not removed as a result of Mother's abuse or neglect of the Child.

Holding: Reversed and Rendered in Part; Affirmed in Part

Opinion: A court may terminate a parent's parental rights if clear and convincing evidence shows that termination is in the best interest of the child and that the parent has engaged in one of the enumerated acts under TFC 161.001(1). TFC 161.001(1)(O) permits termination if the court finds that the parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child." To terminate a parent's parental rights under TFC 161.001(O), the court must find that the child who is the subject of the suit was removed as a result of abuse or neglect of that same child. Evidence of abuse or neglect of a sibling does not support termination under 161.001(O). Although a caseworker testified that the Child was "very behind" in his immunizations, it was clear from the record that the Department became involved as a result of the abuse of the Child's sibling. There were no allegations that abuse or neglect of the Child led to the Child's removal. Further, evidence that Mother was living on the streets and "moving from house to house" after the Child's removal, without more, could not be considered evidence of abuse or neglect of the Child. Thus, the evidence was legally insufficient to support a termination under TFC 161.001(1)(O).

PREVIOUS ORDER TO PAY CHILD SUPPORT WAS NOT PRIMA FACIE EVIDENCE OF MOTHER'S ABILITY TO PAY SUPPORT FOR PURPOSES OF TERMINATION UNDER TFC 161.001(1)(F)

¶12-3-32. ***In re D.M.D.,*** -- S.W.3d --, 2012 WL 1009731 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (03/27/12).

Facts: The Department removed Mother's four Children from her home, alleging abuse and neglect. Subsequently, trial court ordered Mother to complete certain services and pay $282.00 per month in child support to the Department. About 4 years later, the Department moved to terminate Mother's parental rights, alleging termination was proper under TFC 161.001(1)(F), (I), and (O) and was in the best interest of the Children. Trial court ordered Mother to submit to drug testing and disclose information about her current treatment and therapy. In a later hearing, trial court ordered mediation. A few months later, trial court appointed a new attorney to represent Mother. At the final hearing, Mother testified, and trial court signed a final judgment terminating Mother's parental rights to all four Children. Mother appealed, arguing the evidence was legally and factually insufficient to support trial court's findings that she violated subsections (F), (I), and (O) and that termination was in the best interest of the children.

Holding: Affirmed

Opinion: A trial court may terminate parental rights only upon proof by clear and convincing evidence that the parent has committed an act set forth in TFC 161.001(1) *and* termination is in the best interest of the child. COA determined that Mother had "failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition" pursuant to TFC 161.001(1)(F). Whether a previous child support order is prima facie evidence of a parent's ability to pay support for purposes of TFC 161.001(1)(F) is currently the subject of a circuit split. Here, the 14th COA joined the majority of courts on this issue and held that a child support order is not prima facie evidence of a parent's ability to pay support for the child.

In its analysis of whether termination was in the Children's best interest, COA weighed factors including the desires of the Children, Mother's parenting abilities, her acts or omissions demonstrating that the parent-child relationship was improper, and any excuses she has offered for her acts and omissions. There is a strong presumption that it is in the child's best interest to allow the natural parents to retain custody, but this can be rebutted by evidence presented to the contrary. One of the Children desired to visit Mother, two were ambivalent, and one did not want to visit Mother. Because Mother had not completed required parenting classes, had discontinued taking her psychiatric medications, failed to complete her substance-abuse evaluation, and was generally noncompliant with her FSP, the court found clear and convincing evidence that termination of Mother's parental rights was in the best interest of the Children. Finding that Mother had committed an act set forth in TFC 161.001(1)(F) and that termination was in the best interest of the children, COA affirmed trial court's final judgment terminating the parent-child relationship.

FATHER FAILED TO ESTABLISH PATERNITY OF MOTHER'S OLDEST CHILD; FATHER'S PARENTAL RIGHTS TO THE OTHER CHILDREN TERMINATED BECAUSE OF PAST VIOLENCE, DRUG USE, AND CRIMINAL ACTIVITY; GRANDMOTHER WAS NOT NAMED CONSERVATOR DUE TO MEDICAL CONDITIONS AND FAILURE TO FOLLOW THE DEPARTMENT'S ORDERS

¶12-3-33. ***In re C.J.,*** -- S.W.3d --, 2012 WL 1548921 (Tex. App.—Dallas 2012, no pet. h.) (04/30/12).

Facts: Mother and Father met and began a relationship. Mother had one Child, who Mother claimed was born before Mother and Father met. Mother and Father never married but claimed to be married by common law. During their relationship, they had three Children together. Before the Youngest Child was born, the Department received a referral concerning possible domestic violence and neglect of the Children. Mother agreed to

temporarily place the Children with Father's mother ("Grandmother"). A few days after Grandmother took possession of the Children, the Department could not locate her. About five months later, Father returned the Children to the Department. The Children were placed in foster care, and Mother and Father were ordered to complete certain services before the Children would be returned. The services were completed, and the Children were returned. After the Youngest Child was born, Mother alleged that Father hit her while she was holding the infant. The Department moved Mother and the Children to a domestic violence shelter. While in the shelter, the Youngest Child sustained bilateral skull fractures. Mother claimed that the Youngest Child fell on some concrete steps. After an investigation, the Department concluded that the injuries were a result of an accident. Mother left the shelter and returned home. Father agreed not to return home until completing a batterers' intervention program; however, he returned without completing the program. A few months after the Youngest Child's accident, Father discovered the Youngest Child was cold and not breathing. EMTs could not revive the Youngest Child, and she was pronounced dead. A medical examiner was unable to determine the cause of death but could not rule out a "SIDS-type" death. The medical examiner also testified that the previous skull fractures were inconsistent with a fall down steps and that they had to have been caused by significant force. After the Youngest Child's death, the Department obtained temporary conservatorship of the other Children and moved to terminate both Parents' parental rights. Mother voluntarily relinquished her rights, and the trial proceeded against Father. After a jury trial, trial court found that the Oldest Child's father was unknown and that the unknown father had failed to respond by pleading an admission of paternity or a counterclaim for paternity. Trial court terminated Father's parental rights to the other Children and named the Department as sole permanent managing conservator of all three Children. Father appealed arguing that the evidence was insufficient to support the findings that the Oldest Child's father was unknown and that termination was in the Children's best interest. Father also argued that the evidence was insufficient to support the finding that the Department should have been appointed sole managing conservator instead of Grandmother.

Holding: Affirmed

Opinion: Father challenged the constitutionality of former TFC 263.405(i). However, because he was determined not to be the Oldest Child's father, COA did not address this issue.

A father-child relationship can be established by an unrebutted presumption under TFC 160.204. TFC 160.204(a)(1) states that a man is presumed to a father if he was married to the mother, and the child was born during the marriage. Although Father claimed that the Oldest Child was born while Mother and Father were common law married, there was conflicting evidence on this point. Mother testified that she gave birth to the Oldest Child three months before meeting Father, and Mother signed an affidavit naming another man as the biological father. Father presented no scientific evidence showing that he was the Oldest Child's father. Further, he stated that he was "probably not" the biological father. Trial court's decision that the paternity of the Oldest Child was unknown was not unreasonable or arbitrary.

TFC 263.307 presumes that it is in a child's best interest to be promptly placed in a permanent, safe environment. There is also a presumption that it is in a child's best interest to preserve the parent-child relationship. TFC 263.307 provides a list of factors to consider in a determination of whether parents are willing and able to provide a safe environment for their child. These factors include whether there is a history of physical abuse or substance abuse, whether the family demonstrates adequate parenting skills, whether they are willing and able to complete counseling services, and whether there is an adequate social support system. When determining whether termination is in the best interests of a child, a court should consider, among other factors, the physical and emotional needs of the child, plans for the child by those seeking custody, and the stability of the home or proposed placements. Here, there was history of abusive conduct in Mother and Father's home. There was also evidence that Father's father had abused Grandmother. Police officers who had arrested Father testified that Father was "very abusive, uncooperative, verbally abusive," and "vulgar." Father admitted that he had "been arrested a bunch of times," and that there were three charges pending against him. In addition, some other members of Father's family, who would have access to the Children, also had criminal records. Father admitted to using marijuana, and there was evidence that Father had also used other illegal substances, including cocaine. There was testimony that Mother and Father had hid the Children from the Department for five months. When the Children were returned, they were diry, had lice, and needed dental care. One of the Children had fleas in his diaper, and another Child had ink her ear from trying to remove a bug with a pen.

The Department's investigation of the care of the Children during those five months suggested that while Father went to work, the five-year-old Child would be left to babysit the other Children. Mother and Father also failed to comply with court ordered services. Father refused an opportunity to participate in a church-based recovery program, and he convinced Mother to stop participating. A caseworker testified that the Children were badly behaved when Mother and Father were permitted to visit the Children. However, the Children's behaviors and attitudes improved when the visits stopped. Based on the totality of the evidence, a jury could reasonably find that termination of Father's parental rights was in the Children's best interests.

The Department, through APS, became involved with Grandmother after being found unconscious. An investigation revealed that Grandmother did not have a home, was diabetic, and had a history of an aneurysm and a stroke. Grandmother took medication for restless legs syndrome, seizures, diabetes, high blood pressure, circulation, and depression. There was also some evidence that Grandmother had been diagnosed with colorectal or gastrointestinal cancer. Mother and Father told the Department that Grandmother was addicted to pain pills. A nurse testified that Grandmother could not take care of the Children if she was in as much pain as Grandmother claimed to be in. Further, some of the medication that Grandmother was taking would make it difficult for her to be alert enough to take care of the Children. Grandmother testified that she received $1500 a month in disability payments, and she did not have a permanent home. She claimed that she could live in her brother's house for free, but she did not live there because she didn't want to turn on the electricity and water if she didn't have the Children. Grandmother had also had trouble keeping a phone, but her daughter had recently supplied her with a phone through a family plan. There was evidence that Grandmother had been abused by her husband and that she was still married to him. She implied that she believed that her husband had burned down their home when she filed for divorce, so she was afraid to leave him. Finally, Grandmother failed to comply with the Department's rules concerning temporary conservatorship. Grandmother signed a safety evaluation plan stating that they would stay with her for 30 days, and Father would have only supervised visits. However, a few days after Grandmother took the Children, the Department could not locate them. She claimed that she could not read the plan and that after the 30 days, she stayed with Mother, Father, and the Children at various motels. Based on this evidence, a jury could have reasonably found that it was not in the Children's best interest to appoint Grandmother as sole permanent managing conservator.

TFC 161.211 PRECLUDES ANY ATTACK OF A TERMINATION ORDER MORE THAN SIX MONTHS AFTER THE ORDER IS SIGNED; FATHER FAILED TO SHOW HOW APPLICATION OF THE STATUTE TO HIM WAS UNCONSTITUTIONAL BECAUSE HE HAD AN OPPORTUNITY TO FILE HIS CHALLENGE BEFORE THE TIME LIMIT EXPIRED

¶12-3-34. ***In re C.T.C.,*** -- S.W.3d --, 2012 WL 1511769 (Tex. App.—Dallas 2012, no pet. h.) (04/30/12).

Facts: Mother and Father met in college. Mother told Father that she was pregnant with his Child. Father proposed, and Mother accepted. She moved in with her parents, with the apparent intention to wait until Father was done with school before marrying. Child was born, and Father signed an acknowledgment of paternity. Later, Mother visited Father and told him that her parents were considering seeking reimbursement for medical expenses for the birth of the Child. Mother suggested that Father "sign over" his rights to the Child to prevent her parents from seeking any recovery. Mother stated that in this way, they "could save money to begin their life together as a family." Father executed an affidavit of waiver of interest in the Child. Mother filed a SAPCR. Father executed a waiver of service of citation as to the termination proceeding. Trial court signed an agreed termination order. A few months later, Mother "broke off the engagement." Soon after, Father stated that he realized that Mother was not going to allow him to have a relationship with the Child. Father contacted an attorney that month. About five months later, Father filed an original petition for bill of review challenging the termination order based on extrinsic fraud. Mother filed an answer and a plea to jurisdiction. Mother argued that TFC 161.211(a) required any attack on a termination order to be filed within six months of the signing of the order. Mother also filed a motion to dismiss for Father's failure to comply with TFC 161.211(a). Father argued that TFC 161.211 provides for an affirmative defense rather than a jurisdictional prerequisite. He argued that he did not sign the affidavit or waiver voluntarily, but only as a result of Mother's fraudulent conduct. Further, Father argued that the six-month limit was unconstitutional as applied to him be-

cause it unfairly took his constitutional right of a parent and did not afford him due process. Mother countered that there was no constitutional violation because Father had notice and an opportunity to be heard.

Holding: Affirmed

Opinion: TFC 161.211 plainly places a six-month limit on any collateral or direct attack on a termination of parental rights. This limit is not a plea in avoidance but is a bar to a challenge to a termination order more than six months after a termination order is signed. TFC 161.211(c) states that a challenge must be "limited issues relating to fraud, duress, or coercion." Section c makes no reference to a time limit and thus, is merely referring to the substance of a challenge without creating any exception to the six-month limitation.

At trial, Father argued that the statute was unconstitutional as applied to him. However, he failed to show how he was harmed by the application of the statute in this case. Father was aware of alleged fraud more than five weeks before the six-month period expired. Father contacted an attorney at least three weeks before the six-month period expired. However, despite the deadline, Father did not file a challenge until more than four months after the six-month period expired. Father failed to show how the time limit adversely affected his right to attack the agreed termination order.

Editor's comment: *Keep an eye on this one a petition for review will be coming. The Texas Supreme Court is already considering whether TFC 161.211 is jurisdictional in nature and the Solicitor General has agreed with Petitioner that it is not. In re E.R., 11-0282 pet. pending.*

BILL OF REVIEW PROCEEDING WAS NOT AN ACCELERATED APPEAL BECAUSE IT WAS A SEPARATE SUIT FROM ACTION TO TERMINATE PARENTAL RIGHTS; HOWEVER, BILL OF REVIEW WAS FILED MORE THAN SIX MONTHS AFTER THE TERMINATION ORDER WAS SIGNED, AND THEREFORE IT WAS BARRED BY STATUTE

¶12-3-35. ***In re A.A.S.,*** -- S.W.3d --, 2012 WL 1644475 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (05/10/12).

Facts: Father and Mother had a Child in Florida and lived together intermittently for approximately two-and-a-half years. Mother then left with Child and did not inform Father of her new address. The Department filed a petition to terminate Mother's parental rights and filed an affidavit regarding due diligence, describing its attempts to locate Father by checking with Mother, known friends, neighbors, and relatives. Two years later, a citation identifying Father by name was published in the local newspaper. Mother then voluntarily relinquished her parental rights, in which she identified Father by name, provided his birth date, and stated that he resided in Harris County, Texas. Father learned of the termination decree almost a year after it was signed and filed a petition for an equitable bill of review. Trial court dismissed his petition because it was filed more than six months after the termination decree. Father offered proof of the evidence that he would have presented concerning the substantive merits of his claim, including that he had never been to Texas before, had lived in Florida since before the Child was born, and had maintained the same telephone number so that Mother could reach him. Father further offered evidence that he was listed on the Child's birth certificate as the father, he claimed the Child as a dependant for two years following the Child's birth, he had always held the Child out as his son, he had actively tried to locate the Child, and when he learned of the termination, he tried unsuccessfully to have the Child placed with relatives. Father appealed.

Holding: Affirmed

Majority Opinion: (J. Christopher, J. Brown)

Former TFC 109.002(a) states that "[a]n appeal in a suit in which termination of the parent-child relationship is in issue . . . shall be accelerated by the appellate courts." Thus, while a typical appeal may be filed in 105 days if extensions are granted, an accelerated appeal can be filed in no more than 35 days after the signing of the final judgment. TFC 109.002(a) also states that "[a]n appeal from a final order rendered *in a*

suit, when allowed under this section or under other provisions of law, *shall be as in civil cases generally*." A bill-of-review proceeding is a separate action from a suit to terminate parental rights, and thus, an appeal of a petition for review is not accelerated. Here, because Father's petition for a bill of review was brought as a separate lawsuit, COA was not presented with an appeal of an order terminating parental rights, or an appeal from the same suit, but rather an appeal of the order dismissing Father's petition for bill of review. Thus, the only matter at issue was whether Father was properly served. Father timely moved for a new trial and therefore had 90 days from date of judgment dismissing his bill of review to file notice of appeal, which he did. Therefore, COA had jurisdiction to consider the merits of Father's appeal.

TFC 161.211(b) provides that the validity of an order terminating the parental rights of a person who was served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed. This lawsuit was a collateral or direct attack on the order terminating Father's parental rights, and therefore the lawsuit was barred by statute.

Citation by publication is valid when a party to a suit swears by affidavit that the defendant cannot be located after due diligence and after attempting to obtain personal service of nonresident notice. In such cases, the trial court must inquire into the sufficiency of the diligence exercised in attempting to ascertain the whereabouts of the defendant before granting any judgment on such service. Father could not prove fraud in connection with the citation by publication because there was no evidence that trial court's authorization for service by publication was based on Mother's affidavit, in which she stated she did not know where Father was located. The Department offered sufficient evidence that despite its own diligence Father's whereabouts could not be determined, and Father offered no evidence to the contrary. Because there was no evidence that service by publication was procured by fraud, trial court did not abuse its discretion is dismissing Father's suit as untimely.

Dissenting Opinion: (J. Frost)

COA lacked jurisdiction over appeal, because the appeal was not timely filed. This appeal was an accelerated appeal under the plain meaning of TFC 109.002(a). This section clearly states that an appeal in a suit in which termination of the parent-child relationship is *in issue* will be given precedence. Nothing in the statute suggests that the Legislature intended to exclude from accelerated treatment bills of review stemming from termination proceedings. Father's appeal was from a suit in which termination of the parent-child relationship was in issue, and therefore, under TFC 109.002(a), his appeal was an accelerated appeal. Because he perfected his appeal more than 75 days after trial court signed its order, Father's appeal was untimely.

The Legislature deliberately used broad statutory language to include all cases involving termination for swift disposition. The Legislature recognized that delays in the system at the trial and appellate level can put a child's life in limbo regardless of the nature of the particular legal proceeding in which the termination issue arises. By using the atypical "in issue" language, the Legislature chose to lower the threshold for accelerated-appeal treatment to include all types of proceedings that relate to the termination of parental rights. An additional example of the Legislature's intent to expedite proceedings in which termination is in issue is the shortening of the bill-of-review window from four years to six months.

Contrary to the plain language of the statute, the majority created a high threshold for accelerated treatment by construing the statute to apply only to direct appeals from final orders in termination proceedings. Under the majority's view, one seeking to set aside a decree terminating the parent-child relationship via a bill of review would not be placed on the fast-track, at least not if the one seeking to set aside the termination decree was unsuccessful in the trial court. A determination of what is in issue in a case is typically derived from what relief the parties actually requested, not from what relief the trial court granted or denied. The majority did not consider the parties' pleadings or requests for relief, but rather considered whether the bill-of-review challenge was successful. When a party must establish that the termination of the parent-child relationship was improper, the termination of the parent-child relationship is in issue. Father placed the termination of his parent-child relationship with A.A.S. in issue by requesting trial court to set aside and vacate the termination decree and declare him the father of the Child.

Moreover, even the majority addressed the termination of the parent-child relationship in its disposition of the case. In the first part of the opinion, the majority concluded it had jurisdiction of the appeal because termination was not in issue, but in the second part, the majority analyzed and disposed Father's challenge to the termination.

INCARCERATED FATHER HAD RIGHT TO PARTICIPATE IN BENCH TRIAL TERMINATING HIS PARENTAL RIGHTS

¶12-3-36. ***Larson v. Giesenchlag,*** -- S.W.3d --, 2012 WL 1660624 (Tex. App.—Austin 2012, no pet. h.) (05/11/12).

Facts: Father and Mother had a child. Mother died while Father was serving a two-year prison sentence. At the time of Mother's death, the Child was two years old. Maternal Grandfather sought to terminate Father's parental rights and be appointed sole managing conservator of the Child. Maternal Grandmother, who was no longer married to Maternal Grandfather, intervened seeking grandparent access to or possession of the Child. At the bench trial, neither Father nor Grandmother were represented by counsel, and no attorney ad litem had been appointed to represent the Child. Maternal Grandmother requested a continuance because she had been unsuccessfully seeking to have an attorney ad litem appointed for the Child and because she wanted Father to have pro bono legal advice "to stand up for his right." After noting that Father was not entitled to counsel in a non-criminal proceeding, trial court denied her motion for a continuance, and Maternal Grandmother left the courtroom. Maternal Grandfather introduced evidence of Father's criminal history, including a conviction for assault family violence. Trial court asked Maternal Grandfather's counsel whether Father had requested to make an appearance at the hearing, and counsel responded that Father had requested to postpone the hearing but had not requested in any way, shape or form to appear at the hearing. Trial court terminated Father's parental rights and denied Maternal Grandmother's motion for access and visitation.

Holding: Reversed and Remanded

Opinion: Here, Father had filed at least five documents trial court protesting Maternal Grandfather's petition. Father asked in several of the documents that trial court take actions that would potentially allow for the presentation of Father's case. Father asked that the proceedings be postponed until he was able to actively pursue and participate in the proceedings with counsel. It was clear from the context of Father's request for a continuance until his release, his request for appointment of counsel, as well as his numerous attempts to present his case from prison through objections and affidavits, that he sought to participate in the termination proceeding in some manner. Moreover, trial court did not consider any of Father's affidavit testimony or written responses and did not offer Father any other effective means by which to participate. While not required to allow Father to participate in person, trial court was obligated to allow Father to participate in *some* manner. By denying Father the opportunity to participate, trial court violated Father's fundamental right to parent his child without his input.

MISCELLANEOUS

★★★ UNITED STATES SUPREME COURT ★★★

TWINS CONCEIVED VIA IN VITRO FERTILIZATION AND BORN 18 MONTHS AFTER FATHER'S DEATH NOT ELIGIBLE FOR SURVIVOR BENEFITS UNDER THE SOCIAL SECURITY ACT; STATE INTESTACY LAW PROHIBITS TWINS FROM INHERITING, WHICH BARS THEM FROM SSA SURVIVOR BENEFITS

¶12-3-37. ***Astrue v. Capato,*** ___ U.S. ___, ___ S. Ct. ___, 2012 WL 1810219 (2012) (05/21/12).

Facts: Husband and Wife married in 1999. Shortly after their marriage, Husband was diagnosed with cancer and was told that chemotherapy might render him sterile. Because the couple wanted children, Husband depo-

sited his semen in a sperm bank before beginning chemotherapy. The couple conceived a Child naturally, but wanted the Child to have a sibling. Husband died in 2002 in Florida, where he and Wife resided. Husband's Will, executed in Florida, named as his beneficiaries his Child with Wife and two children from a previous marriage. The Will contained no provision for children conceived after Husband's death. Wife then began in vitro fertilization using Husband's frozen sperm and gave birth to twins 18 months after Husband's death. Wife claimed survivor insurance benefits on behalf of the twins. The Social Security Administration denied her claim.

The U.S. District Court for the District of New Jersey affirmed, finding that the twins would qualify for benefits only if they could inherit from the deceased wage earner under state intestacy law. Under Florida law, where Husband was domiciled, a child born posthumously may inherit through intestate succession only if conceived during the decedent's lifetime. The Third Circuit reversed, saying that the "undisputed biological children of a deceased wage earner and his widow qualify for survivors benefits without regard to state intestacy law." Courts of Appeals have divided on the statutory interpretation question this case presented. The Court granted certiorari to resolve the differences.

Holding: Reversed and Remanded

Opinion of the Court: (J. Ginsburg) Congress amended the Social Security Act in 1939 to provide a monthly benefit for designated surviving family members of a deceased insured wage earner. The Act provides that "every child (as defined in section 416(e) of this title) of a deceased insured individual shall be entitled to a child's insurance benefit. Section 416(e) defines child as "(1) the child or legally adopted child of an individual, (2) a stepchild [in some circumstances], and (3)…[grandchildren or stepgrandchildren in some circumstances." That section provides no further elaboration on the definition of "child," but Section 416(h)(2)(A), captioned "Determination of family status," provides that "[i]n determining whether an applicant is the child or parent of [an] insured individual for the purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]."

Wife argued that Section 416(e) alone provided the necessary definition to determine whether her twins qualified under the Act. However, the Court noted that the opening instructions to Section 416(h) include the phrase "for the purposes of this subchapter." That phrase refers to Subchapter II of the Act, which spans Sections 401-434. Therefore, Sections 416(e) and 416(h) are to be read together. Further, referencing state law in Section 416(h) is hardly anomalous. In several places, the Act refers to state law for, among other things, determining whether applicants and insured individuals were validly married; whether an applicant is the wife, widow, child, or parent of an insured individual; and setting duration-of-relationship limitations. The purpose of the Act was to provide dependent members of a wage earner's family with protection against the hardship occasioned by the loss of the insured's earnings. Congress chose to use state intestacy laws in determining eligibility to inherit as a substitute for burdensome case-by-case determinations as to whether the child was actually dependent upon the father's earnings. Wife proposed that the definition of "child" under the SSA should be the "biological child of married parents." However, the Court noted four potential problems with that definition. First, there is no indication that Congress understood the word "child" to refer only to the children of married parents. Second, there is also no indication that Congress intended "biological" parentage to be prerequisite to "child" status. In 1939 there was no such thing as a scientifically proven biological relationship between a child and father, hence why the term "biological" appears nowhere in the Act. Third, marriage does not necessarily mean that the child is the biological child of the couple, nor does the lack of marriage mean the child's parentage is uncertain. Finally, Wife's definition may not even cover her posthumously conceived twins. Under Florida law, marriage ends upon the death of a spouse. Therefore, her twins, who were conceived after the death of Husband, would not qualify as marital children.

Congress' chosen regime of referring to state intestacy laws for purposes of determining survivor benefits easily passes rational-basis review. The regime is, as the Ninth Circuit expressed, "reasonably related to the government's twin interests in [reserving] benefits [for] those children who have lost a parent's support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis." Further, Congress delegated authority to the Social Security Administration to make rules carrying the force of law. The Commissioner's regulations are neither arbitrary nor capricious in substance or manifestly contrary to the statute.

WIFE WAS DENIED A CONTINUANCE AFTER HER ATTORNEY'S MOTION TO WITHDRAW WAS GRANTED 6 DAYS BEFORE TRIAL; COA COULD NOT DETERMINE THAT THE ATTORNEY'S WITHDRAWL WAS NOT DUE TO WIFE'S OWN FAULT OR NEGLIGENCE

¶12-3-38. ***Thompson v. Thompson*****,** -- S.W.3d --, 2012 WL 720866 (Tex. App.—El Paso 2012, no pet. h.) (03/07/12).

Facts: Husband filed a petition for divorce, and Wife filed an answer and a motion for temporary orders. About 3 weeks later, Wife filed an amended answer and a counter-petition for divorce. Trial court set a final hearing. Two days before that hearing, Wife requested, and was granted, a continuance because her counsel had a setting in federal court. After that, the hearing was reset again, though the reason was not apparent from the record. Later, 2 days before the reset hearing, Wife asked that the hearing only address the temporary orders because Husband had failed to respond to discovery requests. The next day, Wife filed a motion to compel discovery. Trial court granted the motion to compel and continued the hearing again. Husband filed a certificate of written discovery, and a new date for the final hearing was set. About a month before the final hearing, Wife's attorney filed a motion to withdraw as counsel, alleging a breakdown in the attorney-client relationship. Two weeks before the hearing, Wife filed another motion for continuance. The record did not contain a written order granting the motion, but about 2 weeks after the scheduled hearing was to occur, trial court ordered mediation to take place prior to the trial date set to occur in just over 2 weeks. Wife failed to appear at the mediation, and her attorney filed another motion for a continuance. Husband objected to the continuance and filed a motion for sanctions. Soon after that, and only 6 days before trial, trial court granted Wife's attorney's motion to withdraw. Wife requested time to find another attorney. Trial court interpreted this as an oral request for continuance and denied her request. Wife appealed, arguing that trial court abused its discretion by granting her attorney's motion to withdraw and denying her oral motion for continuance.

Holding: Affirmed

Opinion: Tex. R. Civ. P. 10 permits an attorney to withdraw "only upon a written motion for good cause shown." If another attorney is not being substituted, the motion must state that a copy of the motion has been delivered to the client and that the client has been notified in writing of the right to object. The motion must also indicate whether the client consents or objects, and it must include the client's last known address and a list of all pending setting and deadlines. Here, Wife's attorney's motion did not comply with Rule 10 because it did no more than demonstrate good cause for the withdrawal. However, this error would be harmless if the party were given time to secure new counsel and time for the new counsel to become familiar with the case and prepare for trial. Here, although the motion was granted 6 days before trial, the motion was filed more than 50 days before trial. Thus, the question turned on whether the withdrawal was a result of Wife's own fault or negligence. Wife's attorney alleged a breakdown in the attorney-client relationship. Wife failed to appear for mediation, failed to comply with discovery, and failed to provide a sworn inventory, a monthly expense and income, a proposed division of the property, or a proposed parenting plan. In addition, this attorney was Wife's second attorney. A third attorney filed her motion for new trial, and a fourth prosecuted her appeal. COA could not determine that trial court's denial of Mother's motion for continuance was error.

NO WRIT OF HABEAS CORPUS OR WRIT OF MANDAMUS COULD ISSUE BECAUSE RELATOR HAD ALREADY BEEN RELEASED FROM JAIL, AND SHE DID NOT PROVIDE COA WITH THE GROUNDS FOR HER RELEASE; COA COULD NOT ISSUE AN ADVISORY OPINION BASED ON RELATOR'S FEAR THAT TRIAL COURT WOULD REINSTATE ITS CONTEMPT ORDER

¶12-3-39. ***In re Kuster,*** -- S.W.3d --, 2012 WL 787362 (Tex. App.—Amarillo 2012, orig. proceeding) (03/12/12).

Facts: Relator and her domestic Partner were raising two Children during their partnership. The Couple separated, and trial court determined custody of the Children. Relator was named JMC with the right to establish the Children's primary residence, and Partner was named a non-parent JMC with standard visitation. Partner filed a motion to enforce the possession order, alleging that Relator had been interfering with Partner's visitation. After a hearing on the motion, trial court found Relator in contempt and ordered her to serve 180 days in the county jail, as well as an additional period not to exceed 6 months until she paid Partner's court costs in the amount of $64.50. While incarcerated, Relator filed an application for writ of habeas corpus with trial court. Trial court held a hearing and denied Relator's motion. However, the next day, trial court ordered Relator's release. Relator then filed a petition for writ of mandamus, arguing that trial court's contempt order unconstitutionally deprived her of her rights to direct the custody and care of her children and that it unconstitutionally incarcerated her for payment of a debt. In one sentence, Relator alternatively pled for habeas corpus relief.

Holding: Petition for Writ of Mandamus Denied; Petition for Writ of Habeas Corpus Denied

Majority Opinion: (J. Hancock, C.J. Quinn, J. Campbell)

Mandamus is appropriate when there has been a clear abuse of discretion and there is no adequate remedy by appeal. A writ of mandamus is a judicial writ that requires the individual or entity to whom it is addressed to perform some specific legal duty. Here, Relator had already been released from the county jail the day after she petitioned trial court for a writ of habeas corpus. Her release from jail and return to her Children was the relief she sought by mandamus. Relator asserted that she was under a continued threat that trial court would reinstate the contempt order. However, COA could not issue an advisory opinion to address a hypothetical threat.

A writ of habeas corpus will issue if a trial court's contempt order is void because it was beyond the court's power to issue or if the court did not afford the relator due process of law. The purpose of a writ of habeas corpus is to ascertain whether the relator's liberties have been unlawfully restrained. Courts have interpreted "restraint of liberty" to mean more than just actual imprisonment. However, when a jail sentence is probated without any type of tangible restraint of liberty, there has been no restraint for the purposes of habeas corpus. Here, Relator's fear that trial court would reinstate the contempt order was not a sufficient restraint to grant habeas corpus relief. Further, Relator did not provide COA with any documentation describing the terms of her release from jail. COA could not base an opinion merely on Relator's unsubstantiated fears of trial court reinstating the contempt order. Thus, even if Relator's liberties were sufficiently restrained, she failed to demonstrate such restraint.

PROPERTY COULD NOT BE USED TO SATISFY HUSBAND'S DEBT OWED TO JUDGMENT CREDITOR BECAUSE THE PROPERTY WAS AWARDED TO WIFE IN DIVORCE BEFORE THE CREDITOR FILED SUIT AGAINST HUSBAND

¶12-3-40. ***Rancho Mi Hacienda v. Bryant,*** -- S.W.3d --, 2012 WL 952853 (Tex. App.—Texarkana 2012, no pet. h.) (03/22/12).

Facts: During marriage, a deed conveyed a 126-acre tract to Wife, without mentioning Husband. Less than a year later, the couple divorced, and trial court awarded the tract to Wife. During the marriage, Husband and

Buyer discussed Buyer's purchase of the tract. Husband sent Buyer a letter memorializing an alleged verbal contract for the conveyance. However, Wife did not sign anything related to the transaction. Before the divorce, Buyer, relying on the belief that the sale was final, took possession of the tract, moved 73 horses onto the land, paid Husband a purchase price, gave Husband and Wife's daughter a horse, and made improvements to the land. After the tract was awarded to Wife in the divorce, Buyer sued Husband and Wife, raising tort and contract claims. Buyer obtained service of citation on Husband, who was incarcerated in federal prison at that time. Buyer did not receive an answer from Husband. Buyer took a nonsuit against Wife and took a default judgment against Husband. In the default judgment, trial court awarded in favor of Buyer specific performance, actual and punitive damages, and fees and costs. Subsequently, Wife sought a declaratory judgment that the tract was her sole property and that Buyer could not acquire an interest in the property by virtue of a judgment against Husband. Trial court held that Husband had no interest in the property, and Buyer could not levy on the real estate to satisfy its judgment against Husband. Buyer appealed, arguing that it should have been able to reach the property awarded to Wife in the divorce because the property was presumptively community property that was subject to the tortious liabilities of either spouse.

Holding: Affirmed

Opinion: Real property deeded to a spouse during marriage is presumptively community property. All community property is subject to the tortious claims incurred by either spouse. However, in this case, Buyer did not file suit against Husband until after the final divorce decree awarded the property in question to Wife. Because the divorce was granted before the judgment in Buyer's suit, the community's right to joint management and control over the property no longer existed. Further, Buyer took a nonsuit against Wife, who was the owner of the property. Because Wife was not a party to Buyer's suit, she had no opportunity to raise any defenses she might have had. Thus, the property was not liable to satisfy the post-divorce judgment taken solely against Husband.

BECAUSE WIFE HAD A HOMESTEAD INTEREST IN PROPERTY AND THERE WAS NO CLAIM THAT HUSBAND HAD ABANDONED THE PROPERTY, THE HOMESTEAD EXEMPTION EXTENDED TO BOTH SPOUSES; CONSTABLE'S SALE OF PROPERTY WAS VOID

¶12-3-41. ***Saloman v. Lesay,*** -- S.W.3d --, 2012 WL 1136543 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (03/30/12).

Facts: Husband and Ex-Wife divorced, and Husband was ordered to pay spousal maintenance and child support. Soon after, Husband married New Wife, and they bought a house. Husband and New Wife (collectively "Spouses") were both listed on the deed as grantees. However, neither of them occupied the home full time. Husband travelled frequently, and New Wife helped to take care of her mother in France. A trial court found Husband to be in arrears in his spousal maintenance and child support payments. The court held him in contempt and issued a capias for his arrest because he failed to appear at an enforcement hearing. Ex-Wife filed a notice of a child support lien on all non-exempt property located in Texas belonging to Husband. Ex-Wife's investigation revealed that the house purchased by Spouses was not designated as their homestead. Ex-Wife obtained a writ of execution on the child support lien, and a deputy constable sent a letter to Spouses asking for a discussion of satisfaction of the judgment. Spouses then filed an application for a homestead exemption. A sale of the house was scheduled. Spouses sent a letter to Ex-Wife informing her that the house had been homesteaded and asking her to halt the sale. Spouses acquired a TRO to enjoin Ex-Wife from selling the home. Ex-Wife counterclaimed for a declaratory judgment that the house was not a homestead. Trial court extended the TRO on condition that Spouses pay a $50,000 bond. They did not pay, and the house was sold to Buyer. Buyer sent a letter to Spouses demanding that they vacate the premises. Spouses then amended their pleadings to join Buyer as a defendant.

Around the time that trial court had extended the TRO, trial court ordered the Spouses to appear for depositions. Husband repeatedly did not comply. After 3 failures to appear, trial court imposed a $1,000 fine and warned that Husband's pleadings were subject to being struck. Husband again failed to comply. Ex-Wife

moved for sanctions. When trial court asked why he failed to comply, Husband stated that he was afraid that if he appeared, Ex-Wife would have him arrested. Trial court struck Husband's pleadings and imposed a $2,000 fine.

After a jury trial, trial court issued its final judgment that the property was New Wife's homestead. Trial court also determined that Ex-Wife did not file a fraudulent lien on the property. Trial court declared that the child support lien was valid as to Husband but not as to Ex-Wife. Thus, New Wife had an undivided, one-half, homestead interest in the property, and Buyer had acquired an undivided, one-half, non-homestead interest in the property as tenant in common with New Wife. Spouses appealed, arguing that there was insufficient evidence to support the verdict that Ex-Wife had not filed a fraudulent lien and that the jury instruction on the fraudulent lien claim was flawed. Spouses also argued that trial court's judgment violated the constitutional homestead exemption and was unsupported by the pleadings. Finally, Spouses contended that trial court abused its discretion in striking Husband's pleadings.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Spouses did not have the property filed as a homestead at the time Ex-Wife investigated the status of the property, and they both travelled. Thus, the jury could have reasonably found that Ex-Wife believed the property was not a homestead and that her lien notice accurately reflected the status of the property. Further, Spouses failed to show that a different jury instruction would have led to a different verdict. Trial court did not err in finding Ex-Wife did not fraudulent file the child support lien.

Tex. R. Civ. P. requires a judgment to be supported by the pleading. However, a prayer for general relief will support a judgment that is consistent with the evidence and the allegations. Both Ex-Wife and Buyer pleaded generally for "such other and further relief." Thus, although the specific verdict was not sought by the parties, the judgment did not fail to conform to the pleadings.

Tex. Const. art XVI, § 50(c) prohibits a lien on a homestead to secure a debt, unless the debt is explicitly excepted from this prohibition in section 50(a). Debt for child support arrearages is not included in this list. Therefore, if the property was a homestead, a lien on the property for child support arrearages would have been void. A family may only be entitled to one homestead exemption. However, a homestead status may attach either to community property or to the separate property of either spouse. Once a property has been determined to be a homestead, it is protected by the homestead exemption, unless the creditor can plead and prove that the homestead has been abandoned. Here, trial court found that the property was New Wife's homestead, and neither of the defendants claimed that Husband had abandoned the homestead. Because the homestead exemption applied to the family, and not just to New Wife, trial court's final judgment gave effect to an unconstitutional lien and forced sale of homestead property. Any attempted transfer of title to Buyer was void. Ex-Wife claimed that Tex. Civ. Prac. & Rem. Code § 34.021 and 34.022 prevented Husband and New Wife from reversing the sale after the fact. However, because Ex-Wife's interpretation of these sections would conflict with Tex. Const., her interpretation could not be valid.

Tex. R. Civ. P. 215.2 permits a court to sanction a party for failing to comply with discovery orders. The rule permits striking of all or part of the parties' pleadings. Because such a sanction is harsh (commonly referred to as "death penalty" sanctions), a court ordinarily must test lesser sanctions first. Here, over a year before striking Husband's pleadings, trial court imposed a $1,000 fine on his prior failures to comply and warned that future failures to comply would result in his pleading being struck. Although Husband proposed that his deposition be taken by telephone, trial court was not required to acquiesce to his proposal. Trial court did not abuse its discretion by striking Husband's pleadings.

AWARD OF ATTORNEY'S FEES WAS IMPROPER BECAUSE NO EVIDENCE WAS PRESENTED AT TRIAL ESTABLISHING THE REASONABLENESS OF THE FEES

¶12-3-42. ***In re Slanker,*** No. 06-12-00036-CV, 2012 WL 1142894 (Tex. App.—Texarkana 2012, orig. proceeding) (mem. op.) (04/05/12).

Facts: Husband and Wife divorced. Husband appealed the final judgment from the divorce, and COA reversed and remanded the case with respect to the property division only. After the remand, trial court entered temporary orders requiring Husband to liquidate community property as necessary to pay Wife $1000 a month for 3 months. Trial court stated that these payments would be taken into consideration when making the final division of the community estate. Trial court also granted Wife's counsel's request for attorney's fees. Wife's counsel asked for $20,000 to be placed in the attorney's trust account to be billed against. Trial court awarded $7500 to be paid in 3 equal payments. Husband filed a petition for writ of mandamus, complaining that temporary spousal support was not available as a matter of law and that there was no evidence to support the award of attorney's fees.

Holding: Petition for Writ of Mandamus Denied in Part and Conditionally Granted in Part; Motion for Temporary Relief Denied

Opinion: To be entitled to mandamus relief, the complaining party must show that the trial court clearly abused its discretion and the party has no adequate remedy by appeal. Husband correctly asserted that a court may not award spousal support after the parties have been divorced, and there is no appeal of the divorce itself. Here, however, the award complained of was not one for spousal support. The order was an interim division of property. Trial courts have broad discretion in dividing the marital estate, and Husband failed to show an abuse of discretion.

To be entitled to an award for attorney's fees, the party seeking fees must establish the reasonableness of the fees. Here, there was no evidence on the record regarding the reasonableness of Wife's attorney's fees. Further, relief from this award could not be found through appeal. Thus, Husband was entitled to a writ of mandamus ordering trial court to strike its award of attorney's fees.

Editor's comment: *This case is a property division resulting from reversal and remand from first appeal. The trial court upon remand granted attorney's fees as an interim division of property, but there was still no evidence of reasonableness and ability of each party to pay. So, mandamus granted and attorney's fee award striken. I wonder if this would have been different if it had just been a temporary order awarding wife use of certain community property with no distinction that it was for attorney's fees? M.M.O.*

TRIAL COURT'S POWER TO CLARIFY OR ENFORCE A PROPERTY DIVISION WAS ABATED WHILE THE PROPERTY DIVISION WAS ON APPEAL; "STAND BY" ORDER PERMITTING WIFE TO RETRIEVE CERTAIN PERSONAL PROPERTY WAS IMPROPERLY ENTERED

¶12-3-43. ***In re Edwards,*** No. 06-12-00037-CV, 2012 WL 1430896 (Tex. App.—Texarkana 2012, orig. proceeding) (mem. op.) (04/25/12).

Facts: Husband and Wife were divorced, and their property was allocated in the final divorce decree. Husband appealed. While the appeal was pending, trial court entered a "stand by" order, directing a sheriff to stand by as Wife retrieved items of personal property from Husband's possession. Husband filed a motion to stay the order and a petition for writ of mandamus. Husband argued that trial court lacked authority to enter the "stand by" order.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: TFC 9.007(c) states that a trial court's power to enforce or clarify a property division is abated on

appeal. TFC 6.709 authorizes a trial court, within 30 days of the filing of an appeal, to enter orders that require support of either spouse, require payment of fees and expenses, appoint a receiver, or award exclusive occupancy of the parties' residence during the pendency of an appeal if the orders are necessary for the preservation of the property. Here, trial court's orders were entered within 30 days, but the orders were not entered to preserve property. The "stand by" order enforced the property division in the divorce decree. Wife did not cite any case that supported her contention that trial court's order was entered to preserve property of the estate.

TFC 9.006 permits a trial court to render orders to enforce a property division to assist in the implementation or to clarify a prior order. Wife argued that because Husband failed to file a supersedeas bond, trial court had authority to enter the "stand by" order. However, Wife failed to state how the general allowance in TFC 9.006 surmounted the specific limitation in TFC 9.007(c).

Editor's comment: *This seems like a very close call. If the trial court felt that a sheriff was needed to "stand by" while the wife retrieved her personal property items from the house, it certainly seems like the order could be construed as one necessary to "preserve property" under TFC 6.709. R.T.*

TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING WIFE'S ATTORNEY TO WITHDRAW 40 DAYS BEFORE TRIAL AND DENYING WIFE'S MOTION FOR CONTINUANCE SO SHE COULD HAVE TIME TO OBTAIN NEW COUNSEL

¶12-3-44. ***Harrison v. Harrison,*** -- S.W.3d --, 2012 WL 1469025 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (04/26/12).

Facts: Husband was a lawyer. Wife had a law degree, but she had never practiced law. Wife was a stay-at-home mom, and Husband had sole access and control of their financial assets. Husband filed for divorce and was represented by an attorney throughout the divorce proceedings. When Husband filed his petition for divorce, Wife was already represented by an attorney in connection with a protective order against Husband. Wife filed a motion to substitute a new attorney for the divorce. Trial court granted the motion, finding that the substitution was not sought to delay the proceedings. Wife later filed a second motion to substitute a new attorney. Trial court granted that motion, again finding the substitution was not sought for delay only. Wife filed a motion for interim fees, which trial court granted, ordering Husband to pay fees for all three of Wife's attorneys. Wife's third attorney filed a motion for withdrawal, to which Wife consented. Wife hired a fourth attorney, who represented her for about 3 months. Then, Wife hired her fifth attorney, who represented her for about 2 months. Subsequently, Wife filed another motion for substitution of counsel. Trial court granted her motion, finding the substitution was not sought for delay only. The case went to trial, but during the initial testimony, the parties asked trial court not to go forward because they wanted to attempt reconciliation. About one year later, the parties entered a Rule 11 agreement to reset a jury trial setting to begin in just under another year. Husband took the position that the parties were "in trial" again once the Rule 11 agreement was entered. Forty days before the jury trial was to begin, Wife's attorney filed a motion to withdraw because Wife "represent[ed] that she [did] not have the financial resources to . . . pay the firm." Trial court held a hearing on the motion to withdraw. Wife opposed the motion and asked for interim attorney's fees. Husband objected to Wife's request, arguing that no written motion for interim fees had been filed. Wife stated that her attorney had been paid $90,000 and was owed only $5000. Husband said that he had not "heard anything about the fees until now." The attorney representing Wife's attorney's firm stated that the firm was owed more than $5000, but the firm's attorney was not sure of the exact amount. The firm's attorney stated that it had been paid about $30,000. Trial court confirmed that Husband had been ordered to pay the firm $40,000. Husband stated that he had made payments based on Wife's attorney's invoices. The firm's attorney did not present any invoices. At the conclusion of the hearing, trial court did not award interim fees. Instead, it granted the motion to withdraw and ordered the parties to attend mediation. Wife filed a motion for a continuance, which trial court denied. At the jury trial, Wife stated that she was not ready, was not representing herself, and was not represented by counsel. She argued a motion to reconsider the motion for continuance. Trial court denied her motion to reconsider. Wife filed a petition for writ of mandamus, which was denied by COA and Tex.

Sup. Court. The jury returned a verdict in the divorce proceedings, and trial court entered a final divorce decree. Mother's motion for new trial was denied, and she appealed. Mother presented five issues for appeal, including a contention that trial court abused its discretion by granting her attorney's motion to withdraw during trial and by denying her motion for continuance.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Disciplinary Rule 1.15 states that an attorney "shall not withdraw from representing a client unless the client fails *substantially* to fulfill an obligation." Here, it was not clear how much Wife's attorney had been paid or how much the attorney was still owed. No records or invoices were produced regarding either of these amounts. No evidence was presented showing whether Wife's attorney provided any services during the Parties' attempted reconciliation. Disc. R. 1.15(b)(6) states that an attorney "shall not withdraw from representing a client unless the representation will result in an *unreasonable* financial burden." No evidence was introduced suggesting that continuing to represent Wife would result in an unreasonable financial burden. No evidence was introduced showing that Wife was unwilling to pay her attorney or that she had the ability to borrow funds but opted not to do so. Further, Wife's attorney did not file a motion requesting interim fees, and there was no information in the record as to why there was no such filing. COA stated that "[w]hile [it was] not prepared to say that allowing [Wife's attorney] to withdraw under these circumstances was an abuse of discretion, . . . allowing withdrawal in this instance approache[d] the outer limits of discretion."

To support the denial of Wife's motion for continuance, Husband pointed to a case in which the client discharged his attorney the morning of a hearing. Here, Wife did not discharge her attorney. In fact, she strenuously opposed her attorney's motion for withdrawal. Husband also relied on a case in which the client had 4 months to secure new counsel and failed to do so. Here, however, Wife only had 40 days to secure new counsel. Finally, Husband cited a case which held that a court acted within its discretion in denying a continuance because the client failed to show that he was not at fault for his counsel's withdrawal or that he had diligently attempted to find new counsel. Here, Wife showed that although she contacted multiple attorneys, none of them would agree to represent her. Wife asserted that no attorney was willing to represent her without a six-month continuance. There was no showing that Wife was able to pay but refused to do so. No evidence was presented indicating that Wife was able to borrow money but refrained from doing so. Wife's attorney did not file a motion seeking interim attorney's fees. Rather, he instructed her to ask the court for fees during the withdrawal hearing. In addition, although he told Wife he would personally appear at the withdrawal hearing, he did not appear. Wife was not at fault for the failure to file a written motion for interim fees.

Husband had taken the position that the Parties were "at trial" once the Rule 11 agreement had been entered. If the parties were "at trial" during the withdrawal hearing, Wife's attorney was permitted to withdraw during trial. Even if "trial" did not begin until the final hearing, Wife's attorney was permitted to withdraw only 40 days before trial. Wife did not fire her attorney, and she attempted, though unsuccessfully, to find new counsel. Finally, despite Husband's contentions to the contrary, nothing in the record established that Wife used the withdrawal of her attorneys as a tactic to delay proceedings. Trial court should have either denied Wife's attorney's motion to withdraw or granted Wife's motion for a continuance. Because it did neither, trial court abused its discretion. COA affirmed as to the divorce of the parties, but reversed and remanded the remainder of the decree for a new trial.

JUDGMENT NUNC PRO TUNC IMPROPERLY MADE SUBSTANTIVE CHANGES TO DIVORCE DECREE

¶12-3-45. ***Gedney v. Gedney,*** No. 09-10-00521-CV, 2012 WL 1448336 (Tex. App.—Beaumont 2012, no pet. h.) (mem. op.) (04/26/12).

Facts: Husband and Wife divorced, and neither party appealed the final judgment. A year later, Husband filed a motion for judgment nunc pro tunc. Trial court signed the judgment nunc pro tunc. Wife appealed the judgment nunc pro tunc. Wife argued that the judgment nunc pro tunc was void because it made substantive changes to the divorce decree.

Holding: Reversed and Remanded

Opinion: Non-substantive changes to a judgment can be made through a clarification order or a judgment nunc pro tunc. A judgment nunc pro tunc should only be used to correct clerical errors or when there is a difference between the oral rendition and the written rendition. Here, the changes that were made related to possession of and access to the Child, including holiday visitation, travel costs, and payment of one-half of private school tuition, and none of these issues were not addressed in trial court's oral rendition of its orders. COA held that the changes were substantive modifications to the decree. Therefore, the changes were made in error. Because the substantive changes to the decree were not addressed in the oral rendition at hearing, trial court erred in granting Husband's motion for judgment nunc pro tunc.

MOTHER MADE A "PROPER SHOWING" FOR COA TO SUSPEND TRIAL COURT'S FINAL DIVORCE DECREE PENDING APPEAL

¶12-3-46. ***Marquez v. Marquez,*** No. 08-12-00129-CV, 2012 WL 1555204 (Tex. App.—El Paso 2012, no pet. h.) (mem. op.) (05/02/12).

Facts: M4ther and Father were involved in divorce proceedings. They had one Child. Trial court entered temporary orders appointing Mother SMC and awarding Father weekly supervised visitation. After a hearing on the merits, Father was granted five hours of unsupervised visitation. After the status hearing on visitation, trial court increased the visitation by one-and-a-half hours. Subsequently, Mother moved for trial court to enter a divorce decree based on trial court's previous rulings. Father, without providing notice, asked trial court for an extended standard possession schedule. Trial court granted Father's request. In the final divorce decree, "Phase Two"—the extended standard possession schedule—would take effect two-and-a-half weeks after the decree was signed. Mother moved trial court to suspend "Phase Two" and filed a notice of appeal. After a hearing, trial court denied Mother's motion.

Holding: Motion Granted

Opinion: TFC 109.002(c) and Tex. R. App. P. 24.2(a)(4) give appellate courts the power to suspend a final order from a SAPCR, pending an appeal, upon a proper showing. Here, Mother made a "proper showing" that she was entitled to relief. COA suspended enforcement of "Phase Two" of the divorce decree, which related to Father's extended standard possession. All other provisions of the divorce decree remained in effect, subject to each party's right of appeal.

PETITION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL DENIED BECAUSE CPRC 51.014 DOES NOT APPLY TO TFC.

¶12-3-47. ***Hernandez v. DFPS,*** ___ S.W.3d ___, 2012 WL 1647984 (Tex. App.—El Paso 2012, no pet. h.) (05/09/12).

FACTS: The Department filed suit to terminate Father's parental rights. Trial court waived continuing reunification efforts and requirements for a prepared service plan. Trial court also ordered that a trial on the merits be accelerated because of aggravating circumstances. Father filed a motion requesting permission to appeal pursuant to Civ. Prac. & Rem. Code 51.014(d)-(f) and Tex. R. App. P. 28.3, although he had not received permission from the trial court.

Holding: Petition Denied

Opinion: Civ. Prac. & Rem. Code 51.014(d) provides that a trial court may, by written order, permit an appeal from an order that is not otherwise appealable. However, Civ. Prac. & Rem. Code 51.014(d-1) specifically states that this section does not apply to TFC. Tex. R. App. P. also states that a trial court may permit an appeal where one is not normally permitted. However, Father did not obtain trial court's permission to appeal.

MOTHER WAS NOT ENTITLED TO BILL OF REVIEW BECAUSE SHE FAILED TO PLEAD EXTRINISIC FRAUD; FRAUD WAS INTRINSIC IN NATURE BECAUSE PARENTAGE WAS THE BASIS OF THE ORIGINAL SAPCR ORDER AND ALLEGED FRAUD WAS CONDUCTED BY FATHER WHO WAS A PARTY TO THE SUIT

¶12-3-48. ***In re J.M., IV,*** -- S.W.3d --, 2012 WL 1864357 (Tex. App.—San Antonio 2012, no pet. h.) (05/23/12).

Facts: SAPCR order appointed Father and Mother JMCs over their Child and named Mother as the conservator with the exclusive right to establish residency of the Child. A birth certificate was filed with the State of Texas, signed by both Father and Mother. Father was granted standard visitation rights and ordered to pay child support. Seven months later, Mother was convicted of drug trafficking and sentenced to five years in prison. Father filed a petition to modify custody, seeking to be named conservator with the exclusive right to establish the Child's residency. Temporary orders were entered granting Father custody. Because of Mother's incarceration, she was not notified of the petition to modify until a few months later. Mother then filed a petition for bill of review, seeking to set aside and vacate the original SAPCR order. She alleges that she did not understand English, that Father misrepresented the terms of the custody arrangement, and that Father was not the biological father of the Child. The petition was not verified and did not contain an affidavit or sworn testimony by Father. The trial court considered the petition but received no evidence or testimony in support of the allegations. Nevertheless, the trial court ordered Father to submit to genetic testing to prove paternity. Father then filed a petition for writ of mandamus.

Holding: Writ Conditionally Granted

Opinion: To be entitled to a bill of review, a petitioner must plead extrinsic fraud as opposed to intrinsic fraud. Extrinsic fraud is wrongful conduct practiced outside of the adversary trial, such as keeping a party away from court, making false promises of compromise, or denying a party knowledge of the suit, which affects the manner in which the judgment is procured. Intrinsic fraud relates to the merits of the issues that were presented and presumably were or should have been settled in the former action. The Texas Supreme Court has said that when the fraudulent acts themselves are in issue, or could have been in issue, in the prior proceeding, the fraud is intrinsic.

In this case. Mother alleged that Father prevented her from asserting that Father was not the biological father by taking advantage of her lack of English. But, because parentage was the basis of the original SAPCR order and the alleged fraud was conducted by Father, who was a party to the suit, Mother's claims regarding Father's misrepresentations were intrinsic in nature. Mother failed to establish her entitlement to a bill of review by failing to present a prima facie case that Father prevented her from having a fair opportunity to assert that Father was not the Child's biological father when the SAPCR order was entered by the trial court.

Editor's comment: *The courts of appeals, across the board, could not be MORE CLEAR AND CONSISTENT that extrinsic fraud is a very narrow and specific concept. Any fraud that is related to anything that was part of the underlying suit is NOT extrinsic fraud. Even here, where the mother alleges that the father took advantage of her lack of English in his misrepresentations about the suit, is not enough to rise to the level of extrinsic fraud. I think such facts, if true, could possibly rise to the level of "keeping a party away from court" or "denying a party knowledge of the suit," which would be extrinsic fraud under the case law. But, it still doesn't get there. R.T.*

FATHER WAS ENTITLED TO NEW TRIAL ON ATTORNEY'S FEES WHERE MOTHER HAD REQUESTED AND WAS GRANTED ATTORNEY'S FEES BUT HAD PROVIDED NO SPECIFIC INFORMATION TO SUPPORT THAT THE FEES WERE REASONABLE

¶12-3-49. ***In re A.A.L.,*** -- S.W.3d --, 2012 WL 1883763 (Tex. App.—Tyler 2012, no pet. h.) (05/23/12).

Facts: Mother and Father had three Children before they divorced. Father filed a SAPCR. Mother filed an answer and requested attorney's fees. Father filed three amended petitions to modify, and Mother filed an original and amended counter-petition to modify, and requested attorney's fees in both petitions. When the trial court heard Father's motion to modify, Mother's attorney testified regarding attorney's fees, quoting his fees as $42,525. The trial court appointed Mother and Father JMCs of the Children, granted Mother the exclusive right to designate the primary residence of the children within the county, granted Father additional periods of visitation, and awarded Mother attorney's fees. Father appealed only the award of attorney's fees.

Holding: Reversed and Remanded

Opinion: Under the TFC, a court may render judgment for reasonable attorney's fees and expenses and order the judgment and post-judgment interest to be paid directly to an attorney. A party seeking fees must prove the reasonableness of the fees. The COA must consider whether the trial court had sufficient information upon which to exercise its discretion in determining the award of attorney's fees.

Here, the record is devoid of evidence relating to Mother's attorney's experience, the time and labor involved, the difficulty of the task, his hourly rates, the rates customarily charged for similar services, or his fee agreement with Mother. While a party need not offer proof of all of these factors, Mother's attorney did not offer proof of any of them. The attorney's testimony was completely devoid of specifics and therefore was merely conclusory.

Editor's comment: *Lesson #2 on attorney's fees awards. You have to put on the proof about the attorney's experience, time, labor, difficulty, etc. You can't get by with simple conclusory statements. Whether it's a divorce, or a SAPCR (see Rogers, hereinabove), double check what's necessary and required BEFORE you start testifying on your fees. R.T.*