SECTION REPORT
FAMILY LAW
http://www.sbotfam.orgVolume 2013-2 (Spring)

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Section Wear and Publications

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MESSAGE FROM THE CHAIR

This is my last Message from the Chair during my term and must say that this past year has been both busy and exciting. It has been a great honor to chair such a dynamic section of the Bar. We have faced some adversity with the forms and proposed revisions to the Texas Rules of Civil Procedure and our membership has ballooned in response. We are the fourth largest section of the Bar with over 6000 members.

Family Law Cares

We have launched a program called Family Law Cares which will mobilize lawyers (both family law and non-family law) to provide legal services to the poor. While the program is still in its infancy, Larry Upshaw from our PR firm, Pro Solutions, has been instrumental in helping us get the program started and publicized on local, state and national levels. Awe will keep you posted about upcoming events.

Family Law Forms

The Family Law Council sent comments to the Supreme Court critiquing the Forms, which were published in the December Bar Journal, and in addition filed an amicus brief opposing the inclusion of retirement in the Divorce Set One. At this point, we have not heard when the Supreme Court will be reviewing those comments and voting on possible changes. The Uniform Task Force that initially drafted the forms is meeting again in March and discussed forms for name changes and probate. We are told that there are no immediate plans for more family law forms but will keep you informed as more information becomes available.

Rules for Expedited Cases/ Discovery

The December Bar Journal also included changes to the Texas Rules of Civil Procedure 47, 169 and 190.2, which would include family law in expedited actions and limit discovery in cases under $100,000. The Family Law Council submitted comments in opposition to those rules as well. We are told that the Supreme Court has already met and voted to accommodate most of our requests.

Legislative Session

The legislative session is full force and as always there are a large number of family law bills that have already been filed. The Foundation Bill Review Committee led by Chris Wrampelmeier is diligently reviewing all of the bills filed to help the Foundation lobbyists. There were 226 family law bills filed as of late last week and there were still more to come. Steve Bresnan and our lobby team are working hard for us and we will provide you with periodic updates on family law bills as the bills progress throughout the session.

I hope to see you all at Marriage Dissolution April 18-19 in Galveston!

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

2013 Recommended Nominations Slate
State Bar of Texas
Family Law Section

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

Officers	
Chair:	**Sherri Evans**
Chair-Elect:	**Jimmy Vaught**
Vice-Chair:	**Heather King**
Treasurer:	**Kathryn Murphy**
Secretary:	**Cindy Tisdale**
Immediate Past Chair:	**Diana Friedman**

Nominations to the Class 2018

1. **Thelma Sander Clardy (Dallas)**
2. **Karl Hays (Austin)**
3. **Joseph Indelicato, Jr. (Houston)**
4. **Eddie Lucio III (Harlingen)**
5. **Lynn Kamin (Houston)**

The election will take place on April 18, 2013 at the section meeting during Marriage Dissolution.

Office of Attorney General
2013 Revised Tax Charts

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

INSTRUCTIONS FOR USE

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

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

Note regarding Texas Family Code section 154.125:

Texas Family Code section 154.125 provides "The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are not greater than $7,500 or the adjusted amount determined under Subsection (a-1), whichever is greater."

On September 1, 2013 the $7,500 amount will be adjusted as required by Texas Family Code section 154.125. Before September 1, 2013 the Office of the Attorney General shall publish the adjusted amount in the Texas Register. These charts will be revised and republished with a September 1, 2013 effective date showing the point where Monthly Gross Wages (Employed Persons) or Monthly Net Earnings From Self-Employment (Self Employed Persons) would result in the adjusted amount of net resources.

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EMPLOYED PERSONS
2013 TAX CHART

Monthly Gross Wages	Social Security Taxes: Old-Age, Survivors and Disability Insurance Taxes (6.2%)*	Social Security Taxes: Hospital (Medicare) Insurance Taxes (1.45%)*,**	Federal Income Taxes***	Net Monthly Income
$100.00	$6.20	$1.45	$0.00	$92.35
$200.00	$12.40	$2.90	$0.00	$184.70
$300.00	$18.60	$4.35	$0.00	$277.05
$400.00	$24.80	$5.80	$0.00	$369.40
$500.00	$31.00	$7.25	$0.00	$461.75
$600.00	$37.20	$8.70	$0.00	$554.10
$700.00	$43.40	$10.15	$0.00	$646.45
$800.00	$49.60	$11.60	$0.00	$738.80
$900.00	$55.80	$13.05	$6.67	$824.48
$1,000.00	$62.00	$14.50	$16.67	$906.83
$1,100.00	$68.20	$15.95	$26.67	$989.18
$1,200.00	$74.40	$17.40	$36.67	$1,071.53
$1,256.67****	$77.91	$18.22	$42.33	$1,118.21
$1,300.00	$80.60	$18.85	$46.67	$1,153.88
$1,400.00	$86.80	$20.30	$56.67	$1,236.23
$1,500.00	$93.00	$21.75	$66.67	$1,318.58
$1,600.00	$99.20	$23.20	$77.81	$1,399.79
$1,700.00	$105.40	$24.65	$92.81	$1,477.14
$1,800.00	$111.60	$26.10	$107.81	$1,554.49
$1,900.00	$117.80	$27.55	$122.81	$1,631.84
$2,000.00	$124.00	$29.00	$137.81	$1,709.19
$2,100.00	$130.20	$30.45	$152.81	$1,786.54
$2,200.00	$136.40	$31.90	$167.81	$1,863.89
$2,300.00	$142.60	$33.35	$182.81	$1,941.24
$2,400.00	$148.80	$34.80	$197.81	$2,018.59
$2,500.00	$155.00	$36.25	$212.81	$2,095.94
$2,600.00	$161.20	$37.70	$227.81	$2,173.29
$2,700.00	$167.40	$39.15	$242.81	$2,250.64
$2,800.00	$173.60	$40.60	$257.81	$2,327.99
$2,900.00	$179.80	$42.05	$272.81	$2,405.34
$3,000.00	$186.00	$43.50	$287.81	$2,482.69
$3,100.00	$192.20	$44.95	$302.81	$2,560.04
$3,200.00	$198.40	$46.40	$317.81	$2,637.39
$3,300.00	$204.60	$47.85	$332.81	$2,714.74
$3,400.00	$210.80	$49.30	$347.81	$2,792.09
$3,500.00	$217.00	$50.75	$362.81	$2,869.44
$3,600.00	$223.20	$52.20	$377.81	$2,946.79
$3,700.00	$229.40	$53.65	$392.81	$3,024.14
$3,800.00	$235.60	$55.10	$407.81	$3,101.49
$3,900.00	$241.80	$56.55	$427.40	$3,174.25
$4,000.00	$248.00	$58.00	$452.40	$3,241.60
$4,250.00	$263.50	$61.63	$514.90	$3,409.97
$4,500.00	$279.00	$65.25	$577.40	$3,578.35
$4,750.00	$294.50	$68.88	$639.90	$3,746.72
$5,000.00	$310.00	$72.50	$702.40	$3,915.10
$5,250.00	$325.50	$76.13	$764.90	$4,083.47
$5,500.00	$341.00	$79.75	$827.40	$4,251.85
$5,750.00	$356.50	$83.38	$889.90	$4,420.22
$6,000.00	$372.00	$87.00	$952.40	$4,588.60
$6,250.00	$387.50	$90.63	$1,014.90	$4,756.97
$6,500.00	$403.00	$94.25	$1,077.40	$4,925.35
$6,750.00	$418.50	$97.88	$1,139.90	$5,093.72
$7,000.00	$434.00	$101.50	$1,202.40	$5,262.10
$7,500.00	$465.00	$108.75	$1,327.40	$5,598.85
$8,000.00	$496.00	$116.00	$1,452.40	$5,935.60
$8,500.00	$527.00	$123.25	$1,587.77	$6,261.98
$9,000.00	$558.00	$130.50	$1,727.77	$6,583.73
$9,500.00	$587.45*****	$137.75	$1,867.77	$6,907.03
$10,000.00	$587.45	$145.00	$2,007.77	$7,259.78
$10,340.50******	$587.45	$149.94	$2,103.11	$7,500.00
$10,500.00	$587.45	$152.25	$2,147.77	$7,612.53
$11,000.00	$587.45	$159.50	$2,287.77	$7,965.28
$11,500.00	$587.45	$166.75	$2,427.77	$8,318.03
$12,000.00	$587.45	$174.00	$2,567.77	$8,670.78
$12,500.00	$587.45	$181.25	$2,707.77	$9,023.53
$13,000.00	$587.45	$188.50	$2,847.77	$9,376.28
$13,500.00	$587.45	$195.75	$2,987.77	$9,729.03
$14,000.00	$587.45	$203.00	$3,127.77	$10,081.78

$14,500.00	$587.45	$210.25	$3,267.77	$10,434.53
$15,000.00	$587.45	$217.50	$3,407.77	$10,787.28

Footnotes to Employed Persons 2013 Tax Chart:

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

** When income exceeds $200,000.00 per year there is an additional Medicare Tax of 0.9%. The additional Medicare Tax does not apply to any values shown on this chart because the highest gross income included is $15,000.00 per month ($180,000.00 per year).

*** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption ($3,900.00, subject to reduction in certain cases, as described below in this footnote) and taking the standard deduction ($6,100.00).

For a single taxpayer with an adjusted gross income in excess of $250,000.00, the deduction for the personal exemption is reduced by two percent (2%) for each $2,500.00 or fraction thereof by which adjusted gross income exceeds $250,000.00. The reduction is completed (i.e., the deduction for the personal exemption is eliminated) for adjusted gross income in excess of 372,500.00. In no case is the deduction for the personal exemption reduced by more than 100%. The phase out of the Personal Exemption does not apply to any values shown on this chart because the highest income included is $15,000.00 per month ($180,000.00 per year).

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

***** For annual gross wages above $113,700.00, this amount represents a monthly average of the Old-Age, Survivors and Disability Insurance tax based on the 2013 maximum Old-Age, Survivors and Disability Insurance tax of $7,049.40 per person (6.2% of the first $113,700.00 of annual gross wages equals $7,049.40). One-twelfth (1/12) of $7,049.40 equals $587.45.

****** This amount represents the point where the monthly gross wages of an employed individual would result in $7,500.00 of net resources. Texas Family Code section 154.125 provides "The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are not greater than $7,500 or the adjusted amount determined under Subsection (a-1), whichever is greater." On September 1, 2013 this amount will be adjusted as required by Texas Family Code section 154.125. Before September 1, 2013 the Office of the Attorney General shall publish the adjusted amount in the Texas Register.

* *

References Relating to Employed Persons 2013 Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax

(a) Contribution Base

(1) Social Security Administration's notice dated October 23, 2012 appearing in 77 Fed. Reg. 65754 (October 30, 2012)

(2) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))

(3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

(b) Tax Rate

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

2. Hospital (Medicare) Insurance Tax

(a) Contribution Base

(1) Section 3121(a) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 3121(a))

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

(b) Tax Rate

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

3. Federal Income Tax

(a) Tax Rate Schedule for 2013 for Single Taxpayers

(1) Revenue Procedure 2013-15, Section 2.01, Table 3 which appears in Internal Revenue Bulletin 2013-5, dated January 28, 2013

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

(b) Standard Deduction

(1) Revenue Procedure 2013-15, Section 2.07(1), which appears in Internal Revenue Bulletin 2013-5, dated January 28, 2013

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

(c) Personal Exemption

(1) Revenue Procedure 2013-15, Section 2.11, which appears in Internal Revenue Bulletin 2013-5, dated January 28, 2013

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

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SELF-EMPLOYED PERSONS
2013 TAX CHART

Monthly Net Earnings From Self-Employment*	Social Security Taxes: Old-Age, Survivors and Disability Insurance Taxes (12.4%)**	Social Security Taxes: Hospital (Medicare) Insurance Taxes (2.9%)**, ***	Federal Income Taxes****	Net Monthly Income
$100.00	$11.45	$2.68	$0.00	$85.87
$200.00	$22.90	$5.36	$0.00	$171.74
$300.00	$34.35	$8.03	$0.00	$257.62
$400.00	$45.81	$10.71	$0.00	$343.48
$500.00	$57.26	$13.39	$0.00	$429.35
$600.00	$68.71	$16.07	$0.00	$515.22
$700.00	$80.16	$18.75	$0.00	$601.09
$800.00	$91.61	$21.43	$0.00	$686.96
$900.00	$103.06	$24.10	$0.31	$772.53
$1,000.00	$114.51	$26.78	$9.60	$849.11
$1,100.00	$125.97	$29.46	$18.90	$925.67
$1,200.00	$137.42	$32.14	$28.19	$1,002.25
$1,300.00	$148.87	$34.82	$37.48	$1,078.83
$1,400.00	$160.32	$37.49	$46.78	$1,155.41
$1,500.00	$171.77	$40.17	$56.07	$1,231.99
$1,600.00	$183.22	$42.85	$65.36	$1,308.57
$1,700.00	$194.67	$45.53	$74.80	$1,385.00
$1,800.00	$206.13	$48.21	$88.74	$1,456.92
$1,900.00	$217.58	$50.88	$102.68	$1,528.86
$2,000.00	$229.03	$53.56	$116.62	$1,600.79
$2,100.00	$240.48	$56.24	$130.56	$1,672.72
$2,200.00	$251.93	$58.92	$144.50	$1,744.65
$2,300.00	$263.38	$61.60	$158.44	$1,816.58
$2,400.00	$274.83	$64.28	$172.38	$1,888.51
$2,500.00	$286.29	$66.95	$186.32	$1,960.44
$2,600.00	$297.74	$69.63	$200.26	$2,032.37
$2,700.00	$309.19	$72.31	$214.20	$2,104.30
$2,800.00	$320.64	$74.99	$228.14	$2,176.23
$2,900.00	$332.09	$77.67	$242.08	$2,248.16
$3,000.00	$343.54	$80.34	$256.02	$2,320.10
$3,100.00	$354.99	$83.02	$269.96	$2,392.03
$3,200.00	$366.44	$85.70	$283.90	$2,463.96
$3,300.00	$377.90	$88.38	$297.84	$2,535.88
$3,400.00	$389.35	$91.06	$311.78	$2,607.81
$3,500.00	$400.80	$93.74	$325.72	$2,679.74
$3,600.00	$412.25	$96.41	$339.66	$2,751.68
$3,700.00	$423.70	$99.09	$353.60	$2,823.61
$3,800.00	$435.15	$101.77	$367.54	$2,895.54
$3,900.00	$446.60	$104.45	$381.48	$2,967.47
$4,000.00	$458.06	$107.13	$395.42	$3,039.39
$4,250.00	$486.68	$113.82	$439.83	$3,209.67
$4,500.00	$515.31	$120.52	$497.92	$3,366.25
$4,750.00	$543.94	$127.21	$556.00	$3,522.85
$5,000.00	$572.57	$133.91	$614.09	$3,679.43
$5,250.00	$601.20	$140.60	$672.17	$3,836.03
$5,500.00	$629.83	$147.30	$730.25	$3,992.62
$5,750.00	$658.46	$153.99	$788.34	$4,149.21
$6,000.00	$687.08	$160.69	$846.42	$4,305.81
$6,250.00	$715.71	$167.38	$904.51	$4,462.40
$6,500.00	$744.34	$174.08	$962.59	$4,618.99
$6,750.00	$772.97	$180.78	$1,020.68	$4,775.57
$7,000.00	$801.60	$187.47	$1,078.76	$4,932.17
$7,500.00	$858.86	$200.86	$1,194.93	$5,245.35
$8,000.00	$916.11	$214.25	$1,311.10	$5,558.54
$8,500.00	$973.37	$227.64	$1,427.27	$5,871.72
$9,000.00	$1,030.63	$241.03	$1,549.74	$6,178.60
$9,500.00	$1,087.88	$254.42	$1,679.85	$6,477.85
$10,000.00	$1,145.14	$267.82	$1,809.96	$6,777.08
$10,500.00	$1,174.90*****	$281.21	$1,943.92	$7,099.97
$11,000.00	$1,174.90	$294.60	$2,082.04	$7,448.46
$11,073.95******	$1,174.90	$296.58	$2,102.47	$7,500.00
$11,500.00	$1,174.90	$307.99	$2,220.17	$7,796.94
$12,000.00	$1,174.90	$321.38	$2,358.29	$8,145.43
$12,500.00	$1,174.90	$334.77	$2,496.42	$8,493.91
$13,000.00	$1,174.90	$348.16	$2,634.54	$8,842.40
$13,500.00	$1,174.90	$361.55	$2,772.67	$9,190.88
$14,000.00	$1,174.90	$374.94	$2,910.79	$9,539.37
$14,500.00	$1,174.90	$388.33	$3,048.92	$9,887.85
$15,000.00	$1,174.90	$401.72	$3,187.04	$10,236.34

Footnotes to Self-Employed Persons 2013 Tax Chart:

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

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

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

(i) Old-Age, Survivors and Disability Insurance Taxes:

$2,500.00 x 92.35% x 12.4% = $286.29

(ii) Hospital (Medicare) Insurance Taxes:

$2,500.00 x 92.35% x 2.9% = $66.95

*** When income exceeds $200,000.00 per year there is an additional Medicare Tax of 0.9%. The additional Medicare Tax does not apply to any values shown on this chart because the highest gross income included is $15,000.00 per month ($180,000.00 per year).

**** These amounts represent one-twelfth (1/12) of the annual federal income tax calculated for a single taxpayer claiming one personal exemption ($3,900.00, subject to reduction in certain cases, as described below in this footnote) and taking the standard deduction ($6,100.00).

In calculating the annual federal income tax, gross income is reduced by the deduction under Section 164(f) of the Code. For example, monthly net earnings from self-employment of $8,500.00 times 12 months equals $102,000.00. The Old-Age, Survivors and Disability Insurance taxes imposed by Section 1401 of the Code for the taxable year equal $9,796.49 ($102,000.00 x .9235 x 12.4% = $11,680.43). The Hospital (Medicare) Insurance taxes imposed by Section 1401 of the Code for the taxable year equal $2,731.71 ($102,000.00 x .9235 x 2.9% = $2,731.71). The deduction under Section 164(f) of the Code for 2013 is equal to $7,206.08 (($11,680.43 x 0.5) + ($2,731.72 x 0.5) = $7,206.08).

For a single taxpayer with an adjusted gross income in excess of $250,000.00, the deduction for the personal exemption is reduced by two percent (2%) for each $2,500.00 or fraction thereof by which adjusted gross income exceeds $250,000.00. The reduction is completed (i.e., the deduction for the personal exemption is eliminated) for adjusted gross income in excess of $372,500.00. In no case is the deduction for the personal exemption reduced by more than 100%. The phase out of the Personal Exemption does not apply to any values shown on this chart because the highest income included is $15,000.00 per month ($180,000.00 per year).

***** For annual net earnings from self-employment (determined with regard to Section 1402(a)(12) of the Code) above $113,700.00, this amount represents a monthly average of the Old-Age, Survivors and Disability Insurance tax based on the 2013 maximum Old-Age, Survivors and Disability Insurance tax of $14,098.80 per person (12.4% of the first $113,700.00 of net earnings from self-employment (determined with regard to Section 1402(a)(12) of the Code) equals $14,098.80). One-twelfth (1/12) of $14,098.80 equals $1,174.90.

****** This amount represents the point where the monthly net earnings from self-employment of a self-employed individual would result in $7,500.00 of net resources. Texas Family Code section 154.125 provides "The guidelines for the support of a child in this section are specifically designed to apply to situations in which the obligor's monthly net resources are not greater than $7,500 or the adjusted amount determined under Subsection (a-1), whichever is greater." On September 1, 2013 this amount will be adjusted as required by Texas Family Code section 154.125. Before September 1, 2013 the Office of the Attorney General shall publish the adjusted amount in the Texas Register.

* *

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References Relating to Self-Employed Persons 2013 Tax Chart:

1. Old-Age, Survivors and Disability Insurance Tax

(a) Contribution Base
(1) Social Security Administration's notice dated October 23, 2012 appearing in 77 Fed. Reg. 65754 (October 30, 2012)
(2) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))
(3) Section 230 of the Social Security Act, as amended (42 U.S.C. § 430)

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

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

2. Hospital (Medicare) Insurance Tax

(a) Contribution Base
(1) Section 1402(b) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1402(b))
(2) Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13207, 107 Stat. 312, 467-69 (1993)

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

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

3. Federal Income Tax

(a) Tax Rate Schedule for 2013 for Single Taxpayers
(1) Revenue Procedure 2013-15, Section 2.01, Table 3 which appears in Internal Revenue Bulletin 2013-5, dated January 28, 2013
(2) Section 1(c), (f) and (i) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 1(c), 1(f), 1(i))

(b) Standard Deduction
(1) Revenue Procedure 2013-15, Section 2.07(1), which appears in Internal Revenue Bulletin 2013-5, dated January 28, 2013
(2) Section 63(c) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 63(c))

(c) Personal Exemption
(1) Revenue Procedure 2013-15, Section 2.11, which appears in Internal Revenue Bulletin 2013-5, dated January 28, 2013
(2) Section 151(d) of the Internal Revenue Code of 1986, as amended (26 U.S.C. § 151(d))

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

CALL FOR NOMINATIONS

for the

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Procedure:

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fernando.guerrero@texasbar.com

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Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families, J. Herbie **DiFonzo** & Ruth C. **Stern**, 51 FAM. CT. REV. 104 (2013)

Beyond Divorce: Research on Children in Repartnered and Remarried Families, Edward R. **Anderson** & Shannon M. **Greene**, 51 FAM. CT. REV. 119 (2013)

Taking Stock of Parent Education in the Family Courts: Envisioning A Public Health Approach, Peter **Salem**, Irwin **Sandler** & Sharlene **Wolchik** 51 FAM. CT. REV. 131 (2013).

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Brown v. Continental Airlines: *Is A Fraudulent Divorce A Valid Way For A Plan Participant To Manipulate the Provisions of ERISA?*, Aunica **Smith,** 14 J. L. & FAM. STUD. 259 (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 am representing a mother in a custody case. I anticipate that the trial court is not going to let one of my important witnesses testify at trial. If that in fact occurs, what do I need to do in case my client wants to appeal the decision. ***Worried in Wortham

***Dear Worried in Wortham*:** To challenge exclusion of evidence by the trial court on appeal, the complaining party must present the excluded evidence to the trial court by offer of proof or bill of exception. Tex. R. Civ. Evid. 103(a), (b); Tex. R. App. P. 33.2; *In re Estate of Miller*, 243 S.W.3d 831, 837 (Tex. App.—Dallas 2008, no pet.). An offer of proof consists of making the substance of the evidence known to the court and shall be made as soon as practicable after the ruling excluding the evidence, but before the court's charge is read before the jury. Tex. R. Civ. Evid. 103(a), (b); *Miller*, 243 S.W.3d at 837. An offer of proof preserves error for appeal if (1) it is made before the court, the court reporter, and opposing counsel, outside the presence of the jury; (2) it is preserved in the reporter's record; and (3) it is made before the charge is read to the jury. *Fletcher v. Minnesota Min. & Mfg. Co.*, 57 S.W.3d 602, 607 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). The offer of proof allows a trial court to reconsider its ruling in light of the actual evidence. Miller, 243 S.W.3d at 837.

JUST FOR FUN

Trial docket—pro se's using access to justice forms:

"The marriage has become irresponsible because of disgust and conflict between the parties….."

THERAPY TO GO

Dear TTG:

Our legal practice is fairly large, and we see a wide range of clients. I would like some insight into the world of chemical dependency and addiction. I have clients who come to me for a consultation, and I know that they are "on something." What is the best way to relate to my clients who are struggling with addiction and chemical dependency? *Concerned Christine*.

Dear CC,

Thank you for the concern you have for your clients. There is no easy answer to your question. Addiction to alcohol, tobacco, and illicit drugs is on the rise, and in many ways the trend has an impact on all of us. According to The National Institute on Drug Abuse, abuse of tobacco, alcohol, and illicit drugs is costly to our Nation, exacting over $600 billion annually in costs related to crime, lost work productivity and healthcare. Out there in the world there is a collective struggle going on. There are people out there who simply feel the need to numb their senses, or escape into an altered conscious. With financial struggles on the rise and a continued morphing of the family household, there is little wonder why as stress levels rise, so does substance abuse. People often seek legal counsel when problems surface. Your clients are at a very vulnerable point in their life when they come to see you. Many of your clients are struggling with fear, anxiety, and depression. Substance abuse and chemical dependency often co-occur with these struggles. In 2011, an estimated 22.5 million Americans aged 12 or older, or 8.7 percent of the population, had used an illicit drug or abused a psychotherapeutic medication (such as a pain reliever, stimulant, or tranquilizer) in the past month. This is up from 8.3 percent in 2002. The increase mostly reflects a recent rise in the use of marijuana, the most commonly used illicit drug (NIDA).

When it comes to how you relate to this client population just know that you have taken the very first step, and arguably, the most important one…you care. The relationship that you have with your client is one of connection and service. The person in front of you is looking for your help in mobilizing resources. During your client's time of need you may find yourself helping them change or modify attitudes and values. Oftentimes you may find yourself talking to the addiction and not the person. People who struggle with addictions often are on a continual cycle of Pain-Use-Guilt-Shame-Repeat. You may encounter a client who is in the throes of this cycle. Where they are at in this cycle may be unclear. The difference that you can make for your clients cannot be understated. Try talking to your client as opposed to talking at your client. Your goal is to communicate understanding and support for the person, not necessarily the behavior. Accurate empathy is the ability to feel with your client and sense what his or her world is actually like. The internal struggle that this population experiences at the hands of their addiction is intense. The road to recovery for your client often involves many people and experiences. It can be a good feeling to know that your positive interaction with your client is one of many that paves the road to recovery.

Jeremy J. Lanning, MA, LCDC-Intern, LPC-Intern
Former Petty Officer in the United States Navy, Hospital Corps / Field Medicine

IN BRIEF

Family Law From Around the Nation

by

Jimmy L. Verner, Jr.

Alimony: The Delaware Supreme Court reversed a trial court that denied a petition to terminate alimony based on cohabitation when, even though the obligee and her boyfriend maintained separate residences, a private investigator testified that he often saw the boyfriend's car at the obligee's home late at night and early in the morning plus observed the boyfriend "retrieving the paper, taking the trash out, feeding the cat, opening the garage door . . . . watering plants . . . doing yard work and escorting a painter into the house." *Paul v. Paul*, -- A.3d --, 2012 WL 6115806 (Del. Dec. 10, 2012). A Maine trial court did not abuse its discretion when it found no cohabitation even though the obligee admitted to a significant, ongoing relationship with her boyfriend, a boyfriend who also did some minor carpentry work for her, mowed her lawn and did her snowblowing, because the obligor failed to prove that the boyfriend provided any significant direct financial support to the obligee. *Charette v. Charette*, -- A.3d. --, 2013 WL 69209 (Me. Jan. 8, 2013). Holding that alimony cannot be ordered based on a divorce following a void marriage, the Georgia Supreme Court relieved a man of his alimony obligation when, twelve years after divorce, the man discovered that the obligee had committed fraud by marrying him because she and her first husband never had divorced. *Wright v. Hall*,-- S.E.2d --, 2013 WL 593499 (Ga. Feb. 18, 2013).

Counsel? The Wyoming Supreme Court held that due process does not require Wyoming to provide an indigent party with counsel at a contempt hearing for failure to pay child support, even though incarceration is one of the possible penalties, because "Wyoming has sufficient substitute procedural safeguards to protect indigent obligors against the possibility of wrongful incarceration." *State v. Currier*, -- P.3d --, 2013 WL 475244 (Wyo. Feb. 8, 2013). The Delaware Supreme Court held that due process required a court to appoint counsel for an indigent father in a termination case when the father, who had a fourth-grade education, did not knowingly and intelligently waive his right to counsel. *Moore v. Hall*, -- A.3d --, 2013 WL 563348 (Del. Feb. 15, 2013).

Enforcement by prosecution: The Idaho Supreme Court affirmed the denial of a mother's motion to dismiss a criminal complaint against her for kidnapping the parties' child by refusing to exchange the child for visitation with the father because, despite the mother's claim that she alone had custody of the child under the parties' divorce decree and therefore could not be charged with kidnapping, the father was a "custodial parent" within the meaning of the kidnapping statute. *State v. Anderson*, -- P.3d --, 2013 WL 264432 (Ida. Jan. 24, 2013). The Indiana Supreme Court affirmed a trial court's order that a man convicted of felony nonsupport make restitution of the back child support to the children's mother, rather than to the now-adult children, because the mother was a victim of the crime and therefore the trial court had discretion to order restitution to her. *Sickels v. State*, -- N.E.2d --, 2013 WL 653027 (Ind. Feb. 22, 2013).

Evidence: A South Dakota trial court erred when, at a hearing on a domestic abuse protection order, it restricted the respondent's counsel's cross-examination of the petitioner to questions regarding emails the respondent had sent the petitioner. *Castano v. Ishol*, 824 N.W.2d 116 (S.D. Dec. 5, 2012). In an Oregon juvenile dependency proceeding based on an accusation that a father had sexually abused one of his children, the trial court erred when it admitted the child's out-of-court statements on the theory that they were statements of a party opponent. *Department of Human Servs. v. G.D.W.*, 278 P.3d 18 (Ore. Dec. 13, 2012) (en banc). The Colorado Supreme Court recognized that a guardian ad litem may hold a psychotherapist-patient privilege on behalf of a child in a dependency and neglect proceeding when the child is too young or is otherwise incompetent to hold the privilege and the child's interests are adverse to the interests of the child's parents. *L.A.N. v. L.M.B.*, 292 P.3d 942 (Colo. Jan. 22, 2013).

Possession: The Georgia Supreme Court upheld a divorce decree that granted a father no visitation with his two-year-old when the evidence showed that the father lived out-of-state, had not seen the child for eighteen months, had two DUI convictions, had been charged (but not convicted) of stalking and rape in in incident involving alcohol, and refused to take a drug test at the time it was requested. *Bishop v. Baumgartner*, -- S.E.2d --, 2013 WL 593510 (Ga. Feb. 18, 2013). A Vermont trial court that ordered stair-stepped contact between a mother and her children, as determined by the children's pediatrician and their therapist, erred because Vermont law does not permit a court to delegate visitation decisions to another agency or individual. *Engel v. Engel*, -- A.3d --, 2012 WL 5990044 (VT. Nov. 30, 2012).

SCOTUS on the Hague Convention: An order that a Scottish mother be allowed to return to Scotland from the United States with the parties' child because Scotland was the child's country of habitual residence was not rendered moot by the child's return to Scotland. Moreover, because "shuttling children back and forth between parents and across international borders" would not be good for children, "courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation." *Chafin v. Chafin*, --S.Ct.--, 2013 WL 598436 (U.S. Feb. 19, 2013).

What's in a name? A trial court abused its discretion when it granted an unmarried father's request to change the surname of his five-year-old from that of the mother to that of the father when the child's second and third names were the father's first and last names and the basis for the request was that the father, a solider, wanted his son to "have something of mine" while the father was deployed and "to carry on the father's legacy through his surname should the father be killed in combat." *D.W. v. T.L.*, -- N.E.2d --, 2012 WL 6199253 (Ohio Dec. 6, 2012).

COLUMNS

DRILL DEEPER INTO EXPERT TESTIMONY

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

Lawyers and judges often question the quality of mental health experts' opinions. Sometimes the opinions provide what the court needs: valuable information, which is reliably grounded in professional psychology that addresses relevant case issues. Other times, the opinions seem equivocal or supported merely by vague, abstract theories.

Concerns about mental health experts' opinions are no different than concerns about other professionals' opinions. An expert is permitted "wide latitude" in his or her testimony "on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). But this "wide latitude" begs for problems when the expert offers opinions that are merely personal beliefs, biased judgments, or weakly supported assertions intended to favor the retaining lawyer— "An expert may be very believable, but his or her conclusions may be based upon unreliable methodology. A person with a degree should not be allowed to testify that the world is flat . . . ." *EI du Pont de Nemours & Co. v. Robinson*, 923 S.W. 2d 549, 558 (Tex. 1995).

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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.*

One way to hold mental health experts accountable to the knowledge and experience of their disciplines is to reference the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct* (*Ethics Code*). The *Ethics Code* provides a base from which to showcase credible expert testimony or expose poor testimony. Two key principles apply. First, the *Ethics Code*, as well as many state licensing codes, requires psychologists to base their forensic testimony—including reports, opinions, and recommendations—"on information and techniques sufficient to substantiate their findings." *Ethics Code*, Std. 9.01(a). The Texas psychology licensing board's *Rules and Regulations* reads more specifically: " . . . sufficient to provide appropriate substantiation for *each* finding." Second, the *Ethics Code* requires psychologists to base their judgments "upon established scientific and professional knowledge of the discipline." *Ethics Code*, Std. 2.04.

Because the language of these *Ethics Code* provisions echo legal reliability tenets of *Daubert-Robinson* caselaw, use those provisions to drill deep into mental health testimony—on direct or cross examination. Ask the expert to substantiate *each* finding with conclusions that are based on psychology's established scientific and professional knowledge. Don't settle for summary responses as, "in my experience . . .," or "the research shows . . . ." If the expert relies mainly on her experience to support her testimony, ask her to explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *See* Fed. R. Evid. 702 advisory committee's note. If the expert claims that "research shows . . .," ask her to cite specific research or name persons who conducted that research and to explain how the research findings, supported by reliable methods, apply to her testimony. The expert's responses to these inquiries will reveal the quality of the methods and reasoning upon which the expert relied for his or her testimony.

Finally, use the expert's testimony to set up your legal arguments to the court. Tie the expert's testimony to whether the testimony sufficiently satisfied the two key *Ethics Code* principles described above. Then link that analysis to the basic *Daubert-Robinson* demand, reflected in the *Ethics Code*, that expert testimony is trustworthy only when it properly has "a reliable basis in the knowledge and experience of [the expert's] discipline."

SURVIVING THE LOSE OF A LOVED ONE

By Christy Adamcik Gammill, CDFA[1]

One of the most trying experiences in a person's life is the loss of a loved one. During the grieving process, you may also feel stress associated with needing to make many important financial decisions. In order to feel secure, you need to know that your loved one's affairs will be properly managed. You will make many serious decisions, which may have a lasting impact on your financial situation.

One unpredictable aspect of sudden loss is that you never know how you will react to events until they actually occur. No one can ever be completely prepared to deal with personal trauma compounded by legal and financial concerns, but there *are* steps you can take to help you find your way through this difficult period. During this time, maintaining structure in your life is essential as you face increased responsibilities.

ESTATE FUNDAMENTALS

There are many aspects of handling the financial affairs of the deceased, and among the most important is settling his or her estate. Almost immediately, there will be matters requiring attention, among them: notification of family and friends, as well as funeral arrangements. Let your family, closest friends, and most trusted advisors help you with some of these details and short-term decisions, but proceed with caution regarding

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[1]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.comor 214-732-0917. GE-62665 (5/11)

major financial decisions. It's best to contact an attorney to review the Will and handle the legal aspects of your loved one's estate.

A Will typically provides guidance for asset distributions and may also appoint an estate executor, as well as guardians for minor children. A probate court determines the validity of a Will and ensures that it is faithfully executed according to your loved one's wishes. Certain property transfers occur outside a Will, for example, assets such as retirement accounts, property in a trust, or jointly owned property. These assets will pass to the designated beneficiaries (if any), avoiding probate.

Depending on the size of your loved one's estate, federal estate taxes may be due. Transfers to beneficiaries other than a spouse that exceed the federal estate tax exemption ($5,000,000 in 2011 and 2012) are subject to estate tax.* An unlimited amount may be transferred to a spouse free of federal estate tax. Qualified legal and tax professionals can offer specific guidance.

As you tie up loose ends, another important step will be to notify the appropriate insurance companies (life, home, auto, health etc.) of your loved one's death. Beneficiaries of life insurance policies will receive death benefits income tax free and, in the event of accidental death, a policy may provide additional benefits.

For health insurance purposes, if you were covered under your loved one's group employer plan, you will need to determine what your current and future benefits are. You may need to secure coverage through your own employer, purchase private insurance, or determine whether you, and perhaps your family, qualify for COBRA benefits. In certain instances, COBRA, which refers to the Consolidated Omnibus Reconciliation Act, provides for continued health insurance coverage for those who meet certain requirements, such as former employees and their families.

Organization will help this difficult planning process go as smoothly as possible. Gather all documents regarding your loved one's assets, including property deeds, titles, insurance policies, and information for investment, savings, and retirement accounts. Financial and investment institutions often require a death certificate before they transfer assets to named beneficiaries. Other important items to find include a marriage license, birth certificate, and Social Security card. If you are eligible, you will need to file a claim to receive Social Security benefits.

Planning for the Future

During this transitional period, you may face competing demands on your financial resources. If your loved one was the primary breadwinner in your family, it may take some time to assess your financial situation. During the first few months pay bills that need to be paid, but spend cautiously and pay attention to cash flow and liquidity.

As you take things one step at a time, certain deadlines (e.g., timely filing of tax returns) must be considered. Allow yourself to take things as slowly as you can. Your goal should be to develop a sense of command and control concerning financial matters. Align yourself with financial professionals who will have the patience to work with you at *your* pace—professionals who will help you gain the knowledge and confidence to take the necessary steps.

As you can see, the earlier you begin to educate yourself concerning financial matters, the better prepared you will be to withstand the impact of facing sudden loss. Your family's quality of life may depend on your financial skills and your willingness to take responsibility for significant financial decisions. With time and planning, things will begin to improve.

**Please note:* Under current law, all estate taxes are scheduled to be reinstated at their 2001 rates in 2013. Therefore, unless Congress passes further legislations, the estate tax exemption will be $1,000,000 per person beginning in 2013.

THE TEXAS PARALEGAL'S CREED
An Introduction By Kay Redburn, TBLS-BCP[1]

"I AM COMMITTED TO THIS CREED FOR NO OTHER REASON THAN IT IS RIGHT." That is the last line of the first paragraph of the Texas Lawyer's Creed. That commitment is based on one's personal moral compass - not on what organization you happen to belong to or what license you hold.

In 1995 I co-wrote an article with Mike McCurley entitled "Ethics, What Does is Mean and Why Should You Care?" that was presented at a local CLE seminar in Dallas. In reading over the Texas Disciplinary Rules of Professional Conduct and the Texas Lawyer's Creed in preparation for that presentation, it occurred to me that not only should lawyers adhere to the highest ethical standards, but paralegals (back then, legal assistants) should also. After all, if an ethical attorney had an unethical paralegal working in the firm, what havoc could that wreak?

So, I took the Texas Lawyer's Creed and modified it to conform to the paralegal's role in providing legal services alongside a supervising attorney. I included it in subsequent papers and presentations as my "unsponsored" Creed for paralegals and attorneys to consider. I always hoped that one day the Texas Paralegal's Creed would be promulgated or approved by the State Bar of Texas and to that end, in 2012 I requested that the State Bar's Standing Committee on Paralegals, chaired by Chief Justice Linda Thomas (Ret.), review the Texas Paralegal's Creed, make any revisions the Standing Committee deemed necessary, and then present it to the State Bar Board of Directors requesting their approval.

On January 25, 2013, the State Bar Board of Directors considered the Texas Paralegal's Creed on their consent agenda, and did, in fact approve it. Please read the Texas Paralegal's Creed, and pass a copy on to your paralegals and other attorneys in your firm, as well as your clients as a declaration of your commitment to professionalism.

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TEXAS PARALEGAL'S CREED

I work with, and under the supervision of, a lawyer who is entrusted by the People of Texas to preserve and improve our legal system. I realize that unethical or improper behavior on my part may result in disciplinary action against my supervising attorney. As a Paralegal, I must abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A Paralegal owes to the administration of justice personal dignity, integrity, and independence. A Paralegal should always adhere to the highest principles of Professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I will work with my supervising attorney to educate clients, the public, and other lawyers and Paralegals regarding the spirit and letter of this Creed.
3. I will always be conscious of my duty to the judicial system.

II. PARALEGAL TO CLIENT

A Paralegal owes to the supervising attorney and the client allegiance, learning, skill, and industry. A Paralegal shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by self-interest.

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[1]Kay Redburn is a board certified paralegal—family law working with Brian Webb at the Webb Family Law Firm and can be reached at kay@webbfamilylaw.com.

1. With, and under the direction of, my supervising attorney, I will endeavor to achieve the client's lawful objectives in legal transactions and litigation as quickly and economically as possible.
2. I will be loyal and committed to the client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my ability to be objective.
3. I will inform the client that civility and courtesy are expected and not a sign of weakness.
4. I will inform the client of proper and expected behavior.
5. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
6. I will inform the client that my supervising attorney and I will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
7. I will inform the client that my supervising attorney and I will not pursue tactics which are intended primarily for delay.

III. PARALEGAL TO OPPOSING LAWYER

A Paralegal owes to opposing counsel and their staff, in the conduct of legal transactions and pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a Paralegal's conduct, attitude, or demeanor toward opposing counsel or their staff. A Paralegal shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will identify for other counsel and parties all changes made by my supervising attorney in documents submitted for review.
3. I will attempt to prepare drafts for my supervising attorney's review which correctly reflect the agreement of the parties and not arbitrarily include provisions which have not been agreed upon or omit provisions necessary to reflect the agreement of the parties.
4. I will notify opposing counsel, and, if appropriate, the Court, Court staff, or other persons, as soon as practicable, when hearings, depositions, meetings, conferences, or closings are canceled.
5. I can relay a disagreement without being disagreeable. I realize that effective representation by my supervising attorney does not require antagonistic or obnoxious behavior. I will not encourage or knowingly permit the client to do anything which would be unethical or improper if done by me or my supervising attorney.
6. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel, nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony toward opposing counsel, opposing counsel’s staff, parties, and witnesses. I will not be influenced by ill feelings between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel or other Paralegals.
7. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
8. I will assist my supervising attorney in complying with all reasonable discovery requests. I will not encourage the client to quibble about words where their meaning is reasonably clear.

IV. PARALEGAL AND JUDGE

Paralegals owe judges and the Court respect, diligence, candor, and punctuality. Paralegals share in the responsibility to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in Court in a professional manner, and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.
4. I will be punctual and will assist my supervising attorney in being punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

ARTICLES

BINDING DECISION PROVISIONS IN MEDIATED SETTLEMENT AGREEMENTS:
Background: Family Law Mediation – Dallas County, Texas – The Early Years
By Tom Noble[2]

In 1987, the Texas Legislature gave lawyers and judges a toolbox full of "alternative dispute resolution" procedures, including mediation, arbitration, summary jury trials, and mini-trials. Some of these ideas gained traction; others, not so much. Arbitration is still alive and well, but, clearly, mediation has become the LeBron of ADR.

The underlying rationale of mediation is: (1) people are *more satisfied* with negotiated resolutions than with orders imposed upon them by judges or "adjudicators"; and (2) people are *more likely to comply* with negotiated agreements than orders and rulings imposed upon them. That is clear. The best method to accomplish a successful mediation in a *family law* case, however, is still the subject of considerable controversy.

Mediation emerged in the civil courts first; court-annexed mediation meandered into the family courts several years later.[3] I said "court-annexed." In fact, while lawyers were bringing the "lawyer model" to the civil courts in Dallas, non-lawyers were providing non-court-annexed mediation services for consumers of family law cases. Many of these non-lawyers were mental-health professionals. While mediation in the civil courts was based almost exclusively on the lawyer model, family law mediation evolved more as a New Orleans patois, blending styles/cultures/biases, sometimes as experimental as jazz, more willing to take risks, culminating in a matrix, consisting of the "lawyer" model, the "mental-health" model, the "empowerment" model, and the "evaluative" model.[4]

The *lawyer model* is based upon day-long, sometimes into the wee hours, bop-til-you- drop negotiation with lawyers attending. The lawyer model typically starts with a joint session, moves into caucuses, and ends with an agreement prepared by the lawyers. In the lawyer model, the goal of the mediation is to resolve legal issues.

The *mental-health model*, in its early days, excluded lawyers as much as possible. Divorcing parties met with a mediator in sessions lasting approximately two hours each over a series of weeks. When they reached an agreement, the mediator prepared a non-binding memorandum confirming their understanding and, then,

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[2] The original version of this article is posted at www.negotiatewithwisdom.com. The author, Thomas Noble, has been practicing family law in North Texas since 1980 and serving as a mediator since 1991. He is also a Certified Financial Planner and a Life Coach. He can be reached at tom@tnoblelaw.com.

[3] To this day, ironically, civil district courts of Dallas County are more proactive about mediation than the family courts.

[4] In making these distinctions, I ignore one of the more important ones: the cooperative (or "integrative") model versus the competitive (or "positional") model. This is really important, but I couldn't figure out how to weave it into the narrative. For the uninitiated, Herb Cohen does a good job of describing the cooperative approach in *Negotiate This!*

someone found a lawyer to prepare the necessary legal documents. In the mental-health model, the goal of the mediation is to improve the dynamics between the parties and make agreements that may or may not have legal significance.

In the *evaluative* model, the mediator is much more pro-active about offering his or her evaluation of the case. At its extreme, the evaluative model becomes a quasi-adjudication.[5]

In the *empowerment* model, the mediator is relatively passive. For believers in the empowerment model, mediation allows the parties to make their own agreements; lawyers provide advice to allow for informed consent; but, the deal belongs to the parties, not an adjudicator. To complicate the matrix, while most mental-health-style mediators subscribed to the empowerment model, those practicing the lawyer model could favor empowerment or evaluative, or they could vary their style from case to case.

Family Law Mediation Evolves

That was the state of affairs in the early 1990s; systems competed, family law mediators tried out various styles and methods, searching for the most effective ways of resolving disputes with less court intervention. As you will see, the trend has been to an increasingly evaluative approach based almost exclusively upon the lawyer model.

Co-mediation: an experiment that failed.

We tried the "co-mediation project" in the early 1990s, which paired lawyers and non-lawyers, males and females, with two mediators per case instead of one. With most lawyers taking a pay cut to mediate instead of litigate, the economics of this approach, as well as the obvious scheduling problems related to using two mediators instead of one, resulted in an early demise.

The lawyer model gains hegemony.

The lawyer model soon edged out the mental-health model because the results of the mental health model were often convoluted and legally unenforceable; and, as court-annexed mediation became more the norm, judges were more inclined to refer cases to lawyers.

Initial joint sessions? Too volatile.

Family law mediators varied, however, from the traditional lawyer model by eliminating, or, at least de-emphasizing, the initial joint session. The lawyer model prescribes a joint session to begin every mediation, where the parties and their lawyers come together, the mediator explains the rules and exacts a promise of good faith negotiation, among other things. Family law attorney-mediators quickly concluded that initial joint sessions in divorce cases or custody modifications were often a recipe for a really bad start, so they jettisoned that idea. Today, most family law mediations in my universe do not begin with a joint session. Personally, I prefer a joint meeting with the lawyers, at which I ask them if a joint session with their crazy clients will be constructive.

Lawyers expect the mediator to prepare the MSA.

For reasons I do not understand, family lawyers decided that they wanted the mediator to prepare the mediated settlement agreement. As an advocate, to this day, I will cage-fight a mediator over drafting rights, but the conventional wisdom has become that the mediator in family law cases should prepare the MSA. Some lawyers think that this assures fairness. More often than not, it just delays closing.

Short-cut enforcement procedure.

Around 1995, the Texas Legislature decided that enforcing MSAs in family law cases should be easier than in civil cases. Why? I'm not sure, but, in a civil case, if a party signs an MSA, and then reneges, the other party can sue him for breach of contract, which makes sense. The defending party can defend with typical contract defenses, like fraudulent inducement, failure of consideration, waiver, prior breach, etc. In family law cases, no suit for breach of contract is necessary. Once the parties have signed an MSA, assuming that the

[5] I am really not sure what a "quasi-adjudication" is, but, I'm pretty sure that I am right about this anyway.

agreement meets the requirements of the applicable statute, which are minimal, at best, either party can file a motion asking that the court enter a judgment based upon the MSA. The only defenses available, developed by case law, are fraud and illegality.

Collaborative law comes to town.

In the late 90s, a couple of local lawyers brought the collaborative law model to town. In many ways, the collaborative model, when applied to family law cases, represents a re-emergence of the mental-health model: a mental health professional runs the meeting; the parties meet over a series of weeks for an hour or two, instead of for day-long sessions. Only now, the lawyers are invited to participate – on penalty of disqualification if litigation breaks out. I am not sure what the impact of emergence of the collaborative model is on mediation. This is an interesting question worthy of further study.

2006 Election

Dallas County poured out most incumbent Republican family law judges in 2006. What do judges do when they lose an election? They become mediators. What kind of mediators do they become? Facilitative or evaluative? I'll give you three guesses.

The problem of the binding MSA.

When the legislature decided that a party to a family law MSA could enforce it simply by filing a motion for entry of judgment, it caused certain likely unforeseen consequences: the damn thing was really, really binding. What to do about all of those sloppy, midnight agreements? For many of us the answers were: don't negotiate until midnight; if you do, don't sign anything then; if you do, make sure that the MSA says that, if disputes arose about the agreement when preparing final orders, the parties would return to mediation and deal with them, as they had done with the other issues in the case – through negotiation. For others, however, the answer was to take the evaluative model to its extreme: turn the remaining portion of the mediation, the end game, into an adjudication. How? By inserting BDPs in MSAs.

BDPs: Binding Decision Provisions

What's a BDP, and why does it matter?

I know this sounds pedantic, but, please don't go to sleep on me now! This is important! A BDP can slip into the cracks of a lengthy agreement reached late at night after a long day of negotiating, and the next thing you know, you are down the rabbit hole. What am I talking about? Two warring ex-spouses engage in negotiation/litigation/ex-spousewarfare, wind up in mediation, negotiate a solution to all of the important issues, and, then, sign an MSA, which just happens to contain, like a virus in your computer, and this only seems to be happening in family law cases, a seemingly innocuous provision that says something like: "if there are any disputes about the interpretation of this agreement, the mediator will make a binding decision."[6] It sounds so innocent, doesn't it? BDPs often have references to soft-sounding concepts, like telephone conferences with the mediator (lawyers only; parties are not invited) to resolve the remaining issues. Doesn't it all sound, well, expedient?

What's wrong with BDPs?

In some cases, I am sure that, if the BDP is implemented, the mediator makes a couple of calls, and the case is all buttoned up without the "unnecessary expense" of additional mediation. But, what about cases in which the MSA is full of late-at-night ambiguities, cases where 40-50 issues come up? Think it doesn't happen? I'm here to testify! What then? Here's a short list of problems with implementation of a BDP in a complex case:

[6] There are at least two types of BDPs: those that use the word "arbitrate" or "arbitration" and those that do not.

1. The mediator is violating ethical Rule 12[7], and, typically, there is no express waiver.[8]
2. They do not define *how* binding decisions will be made.
3. They do not state *who* will make the rules.
4. They say nothing about the *deadlines* for whatever the procedure is, rendering them suspect for due process reasons, as far as I'm concerned.
5. Naïve consumers do not understand their ramifications.
6. Naïve lawyers do not understand their ramifications.
7. The mediator may expose himself or herself to liability.

Why are BDPs unethical?

In addition to suffering from procedural chaos, BDPs violate the Texas Ethical Guidelines for Mediators. Rule 12 provides:

> **12. No Judicial Action Taken.** A person serving as a mediator generally should not subsequently serve as a judge, master, guardian ad litem or in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.
>
> **Comment**. It is generally inappropriate for a mediator to serve in a judicial or quasi-judicial capacity in a matter in which the mediator has had communications with one or more parties without all other parties present. For example, an attorney-mediator who has served as a mediator in a pending litigation should not subsequently serve in the same case as a special master, guardian ad litem or in any other judicial or quasi-judicial capacity with binding decision-making authority. Notwithstanding the foregoing, where an impasse has been declared at the conclusion of a mediation, the mediator, if requested and agreed to by all parties, may serve as the arbitrator in a binding arbitration of the dispute, or as a third-party neutral in any other alternative dispute proceeding, so long as the mediator believes nothing learned during private conferences with any party to the mediation will bias the mediator or will unfairly influence the mediator's decisions while acting in the mediator's subsequent capacity. (emphasis supplied)

To paraphrase: a *mediator* can only turn into an *adjudicator* when there has been an *impasse*, when *requested* by the parties, and when *the mediator has not formed a bias* (clearly a subjective test). The rationale is easy to understand: in most mediations (probably "all" would be more accurate in the lawyer model), the mediator meets with each party in "private caucus". What goes on there? Systems based upon adjudication as a method of resolving disputes generally prohibit "ex parte communications" in order to assure the appearance of fairness. A typical mediation involves a continuous stream of ex parte communications. A BDP that is part of an MSA are *prima facie* unethical because they are part of an agreement, and the rule only allows them when an impasse has been declared. In many cases, the parties do not request a BDP; instead, it is in the boilerplate of the agreement that the mediator prepares and provides. Those cases include additional violations of the rule.

Can the ethical violation be waived?

Lawyers know that most legal rights can be waived. Black-letter law teaches that an effective waiver must be "knowing and intelligent." In other words, if you are going to waive your rights, you have to know what you are waiving. What if the BDP included language that stated that the parties acknowledged that the mediator had met with each of them in private caucuses and they waived any rights to complain about that fact? The problem that I have with this idea is: if you do not know what has been said and done in the other room, how do you know what you are waiving?

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[7] Texas Ethical Guidelines for Mediators. See below.
[8] I've never seen one.

Case Study

- Mediation – two days in mid-September.
- MSA signed at 11:00 p.m. after the second day.
- Trial date – two months later.
- Pre-trial – two weeks before trial.
- MSA is a mess of ambiguities.
- Dad's lawyer drafts an Order.
- Mediator contacts lawyers and schedules a telephone conference for a status report.
- On the morning of the telephone conference, Mom's lawyer e-mails a 20-page letter, including multiple attachments, raising 75 drafting issues, and stating that Dad's Order is "not even a basis for discussion."
- Three days before the pretrial conference, Mom's lawyer files a motion to compel arbitration based upon the BDP.
- Dad objects, raises the ethical issue, and proposes that the Court order the parties back to mediation.
- The Court overrules the motion to compel arbitration, refuses to order the parties back to mediation, and tells everyone that s/he is going to enter a final order on the trial date.
- Mom's lawyer contacts the mediator and requests that she implement the BDP.
- Dad's lawyer continues to pitch mediation (to the mediator) but says that he will go along with the BDP process if he knows what the rules are.
- The lawyers continue to banter daily with the mediator for approximately eight days, proposing different ways of proceeding and puzzling over the process.
- The mediator sends an email on Friday (six days before trial), telling the lawyers to submit whatever they wanted by the following Sunday. She is going to prepare her own order, which is what she did.
- In that process, she completely changes the deal, adds at least one provision to the Order about which the Court has no subject-matter jurisdiction, and submits the so-called "Final Order" at 11:00 on a Sunday night.
- Can you file a motion to reconsider? Who knows?
- Three days before the trial date: both lawyers continue to submit multiple requests for revisions. The mediator makes some and refuses some. This goes on until 5:00 p.m. the day before the trial date (set for 9:00 a.m.).
- The Court signs, not an Agreed Order, as it should be, but an Order resulting in an adjudication with no rules. Due process? What's that?
- And, then: request for findings, post-trial motions, notice of appeal, etc.
- The process is purely adversarial; whatever spirit of cooperation or compromise that brought the parties to some form of partial, albeit ambiguous, agreement is gone.

Advocates of BDPs argue that they are more expedient than reconvening mediation. Really?

Recent Case Law

BDPs started showing up in appellate opinions in 2003, but, as you can see from the summaries below, they are now starting to pop up with greater frequency. So far, these are all family law cases. As noted above, these cases break down into BDPs (a) with express arbitration provisions, and (b) without. At least the word "arbitrate" gives the lawyers some hint as to procedure if the BDP is implemented; otherwise, it is just a vague contractual provision, which, more likely than not, no one seriously considered beforehand.

The *Cartwright* case is must reading for anyone interested in this issue. It is another example of dispute resolution run amok. It is unique in at least giving lip service to the ethical issue.

In re Cartwright, 104 S.W.3d 706 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding) – **BDP by arbitration**; post-divorce dispute over property, Agreement Incident to Divorce provided that post-divorce disputes be submitted to a particular mediator for mediation and, then, "if the parties cannot resolve the matter

through mediation", the mediator will arbitrate; ethical issue considered; the trial court thought the parties were delaying resolution so it appointed an arbitrator other than the one the parties selected; unfortunately, that arbitrator had previously mediated a related matter. Held: you can make them arbitrate but not with an arbitrator with a conflict (because of a prior mediation); the trial court could not appoint a substitute arbitrator unless it found that the agreed-upon person was unable to do it before "any new trial setting."

Provine, in my opinion, is unique in that the MSA was attached to the Decree. Conventional practice in Dallas County is to convert the MSA to an order or decree. Regardless, it is hard to read this case and imagine that the parties selected the most efficient method of resolving their disputes after they spent years litigating whether the BDP applied to disputes arising years after divorce.

In re Provine, 312 S.W.3d 824 (Tex. App.—Houston [1st Dist.] 2009, orig. proceeding) - **BDP by arbitration** re "drafting the decree, closing documents, the interpretation, omitted issues, and/or performance of this agreement"**;** MSA was attached to and incorporated into the Decree; post-divorce dispute over property; trial court held that MSA was merged into Decree and, therefore, arbitration provision no longer applied. "A mediator can serve as an arbitrator if the parties consent," citing *Cartwright*. Held: reversed and remanded; arbitration compelled. Query whether the COA would have reached a different result if the MSA had not been attached to the Decree.

As I read *Moore*, this is another case manifesting procedural madness. In the end, it appears that the husband got screwed. After mediation, Mrs. M raised an issue about how the MSA should be construed concerning the division of Mr. M's ESOP plan. She argued that even though the MSA awarded Mr. M 100% of his ESOP plan, she should be entitled to 50% of "future benefits." In the real world: unheard of. She pitched that argument to the mediator (now adjudicator). He rejected it twice. She continued to badger him, and on the third try, he reversed himself. It made no sense to the trial judge, so he refused to enforce the mediator/adjudicator's third ruling. Reversed!

Moore v. Moore, 2011 WL 6147771 (Tex. App. – Houston [1st Dist.]) – unpublished opinion; **BDP – no express arbitration**; dispute over retirement benefits after MSA is signed; mediator changes his mind three times; rules twice for Husband, and the third time for Wife. Trial court finds that the third ruling makes no sense and rules for Husband. Held: reversed; Decree reformed to conform with mediator's third ruling.

Milner is the best argument that I could muster for why lawyers err when they approve MSAs in complex cases at the end of a long day without proper vetting (assuming that this is what happened; if not, some lawyer may be discussing this case with his carrier right about now). Mrs. M probably got screwed in this one. What blows me away is that this is an opinion by the Texas Supreme Court, and they never mention the Texas Ethical Guidelines for Mediators, which they promulgated in 2005. Indeed, they reversed the Court of Appeals, which judiciously determined that the parties simply did not have a meeting of the minds, often the reality in these situations; and, they sent the case back to the mediator to arbitrate pursuant to the BDP.

Milner v. Milner, 361 S.W.3d 615 (Tex. 2012): **BDP by arbitration**; complex dispute over MSA and whether wife could step into husband's shoes as partner of recycling business without consent of other partners. Wife withdrew her consent to MSA. COA held: no meeting of the minds. Held: reversed and remanded back to mediator to resolve ambiguities; no mention of ethical issue. Three justices dissent and find no ambiguities.

What if I like BDPs?

Obviously, I am not a fan of BDPs. I have dealt with them as mediator and as advocate and found them to have dramatically untoward results. A recent discussion on LinkedIn regarding "binding mediations" in California reveals that my opinion is not unanimously shared. Okay. I can accept that. If you are one of those unenlightened souls who disagrees with me, please consider the following suggestions for using BDPs in a manner that is safer and more effective:

- Make sure that the BDP expressly states that the mediator has had ex parte communications with the parties and the parties waive any objections to an adjudication regardless.

- Make sure that the BDP expressly provides that the mediator will become an *arbitrator* (not just a decision maker) only after the mediator declares an *impasse* and only if the mediator believes that he has seen or heard nothing that will cause him to have any bias.
- Do not rely upon the typical short paragraph; instead, have the parties sign a short-form arbitration agreement, which describes the rules of arbitration, if needed.

Conclusion

When it comes to the various methods of mediating family law cases, my bias is to favor a balanced, flexible approach; mediators should be evaluative, when need be, but not to the extent that it undermines the rationale for mediation. If parties have disputes about an MSA after mediation, they should negotiate these remaining issues; sloughing them off on the mediator should only be done when all attempts to reach a negotiated agreement have failed and the rules of arbitration are clear and agreed upon.

In the words of the great comic-strip sage, Charlie Brown, "If you can't beat 'em, cooperate 'em to death."

HOME SWEET HOME: DIVORCES DENIED UNDER TEXAS DOMICILE LAWS?

BY JACKIE AMMONS[9]

I. Introduction

A. IN GENERAL: TEXAS DURATIONAL RESIDENCY & DOMICILE TO JUSTIFY DIVORCE JURISDICTION

1. Easy Divorce

Many people think it is easy to obtain a divorce, perhaps because the phrase "no-fault divorce" is in wide circulation.[10] Further, most individuals understand that one out of two marriages end in divorce.[11] This statistic is commonly known, albeit poorly documented and much more complex than it appears. Still, it confirms the ease with which a person can obtain a divorce. In most cases, this perception of an "easy" divorce is reasonably correct. However, if an individual seeks a divorce in Texas, the court is virtually certain to grant a divorce eventually. Divorce in Texas and the United States is relatively straightforward: an individual files for divorce, deals with courts, property, and attorneys and, finally, exits the divorce as a free, single person. In the end, the vast majority of couples seeking to divorce usually leave their marriages as unmarried people—no one will stop them from getting divorces.

But, under certain circumstances, the process of obtaining a divorce may be more complex than it first appears. For example, before a Texas court grants divorces, state law requires that a person establish both residency and domicile in the state of Texas.[12]

B. THE ADULI CASE

In *Aduli v. Aduli*, the trial court granted a couple a divorce even though both the husband and wife lived in the United States with temporary visas.[13] The husband was a citizen of Iran and held a temporary work visa, and the wife was a citizen of France.[14] The wife's a temporary visa was contingent upon her husband's

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[10] *See* Insupportability, 1 TEX. PRAC. GUIDE FAMILY LAW § 3:131 ("'no-fault' divorce…was enacted in 1970 to abolish the necessity of the spouses' presenting details of each other's misconduct in order to obtain a divorce").

[11] National Vital Statistics Report, Vol. 58, No. 25 (Aug. 27, 2010), Center for Disease Control, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf.

[12] TEX. FAM. CODE § 6.301 (West 2012).

[13] Aduli v. Aduli, 368 S.W.3d 805 (Tex. App.—Houston [14th Dist.] 2012, *no pet. h.*).

[14] *Id.*

temporary work visa.[15] When the couple separated, the husband bought his wife a condo in Houston, Texas.[16] Based on the wife's residency in Texas and the husband's ownership of the Houston condo, the couple could easily establish residency under the Texas Family Code's Section 6.301(2).[17] Therefore, the legal question of their residency was undisputed.[18] However, even though the court granted their divorce, a question of whether the *Aduli* couple met Texas Family Code Section 6.301(1)'s domicile requirements may be posed.[19] Because the husband and wife both held temporary visas, they arguably could not have formed the necessary intents to remain in Texas—or even in the United States—per Texas' rules for domicile because their temporary visas required them to leave the United States at some point and return to their home countries.

In her analysis of the *Aduli* case, the editor of the *Family Law Section Report* of the State Bar of Texas (hereinafter "the editor") argues that the *Aduli* couple could *not* establish domicile because of their temporary statuses in the United States; at some point, their visas required them to leave the United States.[20] According to the editor, the *Aduli* couple's temporary status bars them from forming domicile's requisite intent to remain.[21] In her commentary on the *Aduli* case, the editor wrote:

> [The question is] whether [the *Aduli*] Wife could establish Texas as her domicile…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 an alien who is in the country illegally…A person residing in the U.S. under a temporary visa cannot be considered a "permanent" resident…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.[22]

In sum, the editor takes issue with the fact that the *Aduli* wife's temporary visa required her to return to her home country at some point; because of the legal constraints on her stay in the United States, the editor contends that the *Aduli* wife could not establish domicile under Texas law because she does not have the "ability" to intend to stay in the United States or, more particularly, in Texas.[23] For these reasons, the editor asserts that the Texas court does not have the authority to grant the *Aduli* couple a divorce under Texas law.[24]

While the editor poses a facially reasonable viewpoint, this article will take the opposite position. "Intent" to remain in Texas arguably could have a broader meaning under Texas law than the editor of the *Family Law Section Report* describes. Intent could encompass an individual's mental intentions rather than the legal constrains affecting these intentions. A person could *intend* to stay in Texas in spite of legal constraints, such as temporary visas. This argument pertaining to domicile focuses more on a petitioner's inner motivations and feelings rather than on legal constraints surrounding her tenure in the United States. For example, individuals can have no legal bases for remaining in the United States but not only "intend" to remain here, but many do so for their entire lives. Even though federal or state law may require them to return to their home countries, such illegal immigrants intend to remain in the United States indefinitely—and illegally—without any thought of return to their home countries.

Based upon these arguments, this article will consider the legal issue of domicile and residency in the context of a Texas divorce suit. More specifically, this paper will examine at what stages of residency and citizenship individuals can obtain divorces in Texas. This article will particularly consider the domicile statuses of temporary visa holders and illegal immigrants. Even though the focus of this article is to examine the inconsistencies between Texas law and practice and what Texas law allows (rather than what it should allow), this article will also discuss the public policy pertaining to divorce that Texas might promote regarding resi-

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[15] *Id.*
[16] *Id.*
[17] TEX. FAM. CODE § 6.301(2); *see also* 19 TEX. ADMIN. CODE § 21.24.
[18] *Aduli*, 368 S.W.3d 805.
[19] FAMILY LAW SECTION REPORT (State Bar of Texas), Volume 2012-3 (Summer), http://sbotfam.org, G.L.S. editor's note to *Aduli v. Aduli*; TEX. FAM. CODE § 6.301(1).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*

dency and domicile status and how the Texas Family Code and courts might reflect these policies in the future.

In order to fully explore these issues, this article first addresses the basic jurisdiction requirements for divorces in Texas per the Texas Family Code. Next, this paper explores these definitions of domicile and residency, including last marital residence, under Texas case law and statute. This article then applies these definitions to establish the rights of foreigners to divorce in Texas at different stages of residency and citizenship, including citizens and obvious citizen domiciliaries, permanent residents, visa holders, temporary visa holders (such as work and student temporary visas), and illegal immigrants.

Note that there are three recognized terms used to describe individuals who have entered the United States illegally and have remained in the country without authorization: "illegal alien," "illegal immigrant," and "undocumented worker."[25] For the purposes of this paper, all references to such illegal inhabitants of the United States will incorporate the term "illegal immigrant."

The purpose of this article is to address the inconsistencies between the Texas Family Code and Texas case law in order to address the legal question of the definition of domicile. Therefore, this article does not propose new or amended legislation or changes in policy. Instead, the focus of this article is on the legal question of whether Texas law allows non-citizens to obtain divorces rather than the political question of whether illegal immigrants *should* have access to divorce courts, given their statuses as citizens, permanent residents, visa holders, or illegal immigrants.

II. Texas Family Code Requirements for Divorce

Two of the basic requirements for divorce in Texas are domicile and residence; per the Texas Family Code:

> A suit for divorce may not be maintained in this state unless at the time the suit is filed either the petitioner or the respondent has been:
> (1) a *domiciliary* of this state for the preceding six-month period; and
> (2) a *resident* of the county in which the suit is filed for the preceding 90-day period.[26]

Either the husband or the wife—not necessarily both—must meet these requirements.[27] Therefore, if one spouse lives out of state, the other spouse may still establish residency and domicile in Texas and file for divorce; Texas law regarding the divorce applies to both the out-of-state spouse and the Texan.[28] According to the Texas Family Code, "The law of this state applies to persons married elsewhere who are domiciled in this state."[29]

These requirements of residency and domicile are relatively set in stone; a judge cannot—or, at least, should not—be able to waive the domicile and residency requirements of the Texas Family Code.[30] Domicile and residency have been requirements for divorce in Texas for over a century and are parts of firmly established case law.[31]

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[25] Ruben Navarette, *"Illegal immigrant" by any other name is still illegal*. AUSTIN-AMERICAN STATESMAN (Nov. 12, 2012).
[26] TEX. FAM. CODE § 6.301 (emphasis added).
[27] *Id.*; Texas still has jurisdiction over the respondent if he or she does not reside in Texas:
> (a) If the petitioner in a suit for dissolution of a marriage is a resident or a domiciliary of this state at the time the suit for dissolution is filed, the court may exercise personal jurisdiction over the respondent or over the respondent's personal representative although the respondent is not a resident of this state if:
> (1) this state is the *last marital residence* of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which marital residence ended; or
> (2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.
> (b) A court acquiring jurisdiction under this section also acquires jurisdiction over the respondent in a suit affecting the parent-child relationship. TEX. FAM. CODE § 6.305 (emphasis added).

[28] *Id.* § 1.103.
[29] *Id.*
[30] Reynolds v. Reynolds, 86 S.W.3d 272, 276 (Tex. App.—Austin 2002, *no pet.*).
[31] *See* Skubal v. Skubal, 584 S.W.2d 45, 46 (Tex. Civ. App.—San Antonio 1979, *writ dism.*); Jones v. Jones, 60 Tex. 451 (1883). Traditionally, a wife's domicile usually depended on that of her husband. *Id.*

III. Domicile & Residency Deconstructed

Defining the terms "domicile" and "residency" that allow a person to divorce in the state of Texas is a complicated matter.[32] Of the two legal terms, residency is slightly less complex, so it merits first examination.

As a brief introduction to domicile and residency, domicile is an interesting concept under United States and Texas law; it requires physical presence and demands *intent to continue to remain* in the state.[33] For most Texans, these requirements of residency and domicile don't pose a much of a problem: citizens, and even permanent residents, almost always easily meet these requirements and can therefore get divorced in the great State of Texas. In addition to basic domicile and residency requirements, most states, including Texas, have durational residency and domicile requirements for divorce.[34] That is, the husband or the wife must have established domicile and residency in that state or county within the state for a certain period of time before the court will allow them to file a petition for divorce.[35]

However, for temporary visa holders and illegal immigrants, it may be a difficult feat to prove domicile's "intent to remain in Texas" requirement because of the legal constraints that require them to leave the country.[36] Each state has its own rules about domicile, and the full faith and credit clause of the United States Constitution requires that states recognize marriages and divorces in other states, so long as other state grants them validly.[37] Even though an individual may want to stay in Texas permanently, Texas' domicile and residency laws may require otherwise.

A. RESIDENCY

"Residency" requires physical presence in a state.[38] Or, given the Texas Family Code's requirement of residency in a *county* for 90 days prior to filing for divorce, residency depends on physical presence in a county.[39] For example, once a person crosses the Red River from Oklahoma into Texas, he can claim residency in the State of Texas.[40] *Black's Law Dictionary* offers the most clear-cut definitions of "residence" and "residency:"

> residence. (14c)
>
> 1. The act or fact of living in a given place for some time <a year's residence in New Jersey>. — Also termed *residency*.
>
> 2. The place where one actually lives, as distinguished from a domicile <she made her residence in Oregon>. • *Residence* usu. just means bodily presence as an inhabitant in a given

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[32] TEX. FAM. CODE § 6.301.

[33] 37 TEX. ADMIN. CODE § 16.8 (West 2012).

[34] *See, e.g.*, TEX. FAM. CODE § 6.301.

[35] In practice, the domicile and residency section of a Petition for Divorce in Texas appears as such, and proof of these facts can be shown by questioning during a hearing:

> Residence Requirement
> *[EITHER:]*
> 9. *[Petitioner/Respondent]* has been a domiciliary of this state for the preceding six-month period and a resident of this county for the preceding 90-day period.
> *[OR:]*
> 9. Petitioner is domiciled in another state or nation. Respondent has been a domiciliary of this state for at least the last six months and is domiciled in this county.
> *[OPTIONAL:* Long-arm Jurisdiction]
> 10. *Respondent is a nonresident of Texas. Petitioner is a resident or a domiciliary of this state at the commencement of this suit. The court may exercise personal jurisdiction over the Respondent because of the following:*
> *[SELECT ONE OR MORE:]*
> a. *This state is the last marital residence of the Petitioner and Respondent, and this suit is filed before the second anniversary of the date on which marital residence ended.*
> *[AND/OR:]*
> b. *[Identification of facts establishing personal jurisdiction].]* 16 WEST'S TEX. FORMS, FAMILY LAW § 3:30 (3d ed.).

[36] *See* Sosna v. Iowa, 419 U.S. 393 (1975).

[37] U.S. CONST. Art. IV, § 1; *see* Williams v. State of N.C., 325 U.S. 226, 268 (U.S.N.C. 1945).

[38] *Skubal*, 584 S.W.2d at 46 ("[r]esidence requires that a person be living and physically present in a particular locality").

[39] TEX. FAM. CODE § 6.301.

[40] *See id.*

> place; *domicile* usu. requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile. Sometimes, though, the two terms are used synonymously. Cf. domicile (2).
> 3. A house or other fixed abode; a dwelling <a three-story residence>.
> 4. The place where a corporation or other enterprise does business or is registered to do business <Pantheon Inc.'s principal residence is in Delaware>.[41]

Therefore, if a person is physically present in the state of Texas, he can claim legal residency in Texas.[42] Or, if he is physically present in a county—as the Texas Family Code requires for divorces—he can claim residency in that county.[43] Of course, he might have less difficulty proving residency if he owns a house or business in the state or county, but the simple terms of residency only require a person's physical presence under most conditions.[44]

Residency is a widely-discussed issue even outside of family law, especially for purposes of public universities determining in-state versus out-of-state student tuition.[45] For example, Texas universities require a student to live in Texas for 12 months prior to enrolling in a pubic Texas university for the purposes of in-state tuition.[46] But the strict definitions for residency for the purposes of divorce are different from that of university tuition residency determinations.[47] In comparison to university requirements, the Texas Family Code requires that a person must be a resident of the county in which they are filing for divorce for at least 90 days before filing for divorce.[48]

Another legal issue is whether a person may be a resident of more than one state. For example, a person may own homes in multiple states, visit each of these homes frequently, and file for divorce in a particular state as a matter of strategy and forum shopping. According to a Texas Attorney General opinion in 1990, a person may have multiple residences.[49] Therefore, when a person files for divorce in Texas, he may claim residency in more than one state in the United States or in more than one county in Texas.[50]

In the same way as obvious citizens and permanent residents, illegal immigrants can also prove residency relatively easily. If the illegal immigrant is physically present in the state for any period of time, it is possible to prove residence, i.e. where the person resides or lives. Even if the person resides there illegally, he or she is still a resident.

Even though a person may be a resident of a county, Texas still has a durational requirement before courts will divorces.[51] Under the Texas Family Code, a person must technically be a resident of the county in which the suit is filed for at least 90 days before his initial petition for divorce (though in practice, this may not be the case; they may claim their spouse's residency).[52] Texas' usual venue statute[53] does not have a durational requirement, but the Texas Family Code's 90-day residency durational requirement trumps the usual venue statute.[54]

Therefore, while the Texas Family Code's requirement of residency in the county is substantive, it is not difficult to prove for obvious citizens or even illegal immigrants. In comparison to domicile (to be discussed below),[55] residency creates less of a legal quandary.

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[41] Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
[42] *Id.*
[43] *Id.*; TEX. FAM. CODE § 6.301.
[44] *Id.*
[45] *See Rules and Regulations: Determining Residency Status*, Texas Higher Education Coordinating Board, *available at* http://www.thecb.state.tx.us/reports/pdf/0183.pdf.
[46] Texas Higher Education Coordinating Board, *Rules and Regulations: Determining Residence Status*, *available at* http://www.thecb.state.tx.us/reports/pdf/0183.pdf; 19 TEX. ADMIN. CODE § 21.24.
[47] *Id.*; TEX. FAM. CODE § 6.301.
[48] *Id.*
[49] Op. Tex. Att'y Gen. No. JM-1223 (1990).
[50] *See id.*
[51] TEX. FAM. CODE § 6.301.
[52] *Id.*
[53] TEX. CIV. PRAC. & REM. CODE § 15.002 (Vernon 2012).
[54] TEX. FAM. CODE § 6.301.
[55] *See* Section IIIB *infra.*

B. DOMICILE

Domicile is the crux of the legal question posed by this article. Because of the Texas Family Code's requirement of domicile to petition for a divorce in this state,[56] this article asks what implications domicile has on a person's ability to obtain a divorce in Texas. Some argue that legal citizenship constrains domicile, and, therefore, a person can only obtain a divorce in his state or country of citizenship;[57] however, the law in Texas and the United States proves otherwise.

To explain the basic legal definition of domicile, *Black's Law Dictionary* gives a broad legal perspective and defines "domicile" as:

> domicile (dom-<<schwa>>-sil), *n.* (15c) 1. The place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere. • A person has a settled connection with his or her domicile for legal purposes, either because that place is home or because the law has so designated that place.[58]

Black's Law Dictionary emphasizes domicile as a requirement that a person "intends to return and remain."[59] Interestingly, *Black's Law Dictionary* does not require residency or physical presence in order to establish domicile.[60]

Therefore, the definition of "domicile" depends on the meaning of the word "intent."[61] Further inquiry also shows that *Black's Law Dictionary* defines "intent" as: "intent. 1. The state of mind accompanying an act, esp. a forbidden act. • While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial."[62] According to this definition, intent focuses on "mental resolution or determination" to commit an act.[63]

Intent is primarily an internal decision, unbounded by the whims of chance or legal constraints prohibiting a person's intended act. For example, a person can *intend* to win a million dollars even though it is unlikely, just as a person can *intend* to commit murder, even though the law prohibits murder. Therefore, within these definitions of "intent" and "domicile," a person can establish domicile through sheer mental, internal intent to remain indefinitely, in spite of legal constraints. For example, under *Black's Law Dictionary*'s definition, an illegal immigrant can establish domicile in Texas through sheer intent to remain in Texas, regardless of the legal constraints forbidding him to remain in the United States. A person can also establish domicile in a town without even living there if he "enters the state headed for the town, but before reaching the town [he] dies."[64] In this hypothetical, the person *intended* to reach the town but never fulfilled this intention, but he still established domicile in the town because of this intent, combined with his purposeful steps to fulfill his intention to domicile himself in that town.[65]

Under Texas statute, the definition of "domicile" is essentially the same as that in *Black's Law Dictionary*. Various provisions of Texas law define "domicile."[66] For example, the Texas Administrative Code statute defines "domicile" as: "the state of domicile means the state where a person has the person's true, fixed, and permanent home and principal residence and to which the person intends to return whenever absent. A person may have only one state of domicile."[67] The Texas Transportation Code has a similar definition for "domicile:" "[d]omicile" means the place where a person has the person's true, fixed, and permanent home

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[56] TEX. FAM. CODE § 6.301.
[57] FAMILY LAW SECTION REPORT (State Bar of Texas), Volume 2012-3 (Summer), http://sbotfam.org, G.L.S. editor's note to *Aduli v. Aduli.*
[58] Black's Law Dictionary (9th ed. 2009), *available at* Westlaw BLACKS.
[59] *Id.*
[60] *See id.*
[61] *See id.*
[62] *Id.*
[63] *Id.*
[64] Russell J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS, 6th Ed. (2010) at 19, *citing* Winans v. Winans, 205 Mass. 388 (1910).
[65] *Id.* Note that a person can establish domicile in a nation, state, city, or even a particular house within a city. *Id.* at 17.
[66] *See, e.g.*, 37 TEX. ADMIN. CODE § 16.8.
[67] *Id.*

and principal residence and to which the person intends to return whenever absent.[68] Therefore, just like *Black's Law Dictionary*'s definition of "domicile," Texas law requires that a place be a person's "true, fixed, and permanent home" and that a person have an "intent to return" in order to for that person to establish domicile in Texas.[69]

The United States Supreme Court in *State of Texas v. State of Florida* reflected this idea of "intent to remain" in order to establish domicile.[70] The Court held that a person's domicile is determined by a person's "real attitude and intention with respect to it as disclosed by his entire course of conduct."[71] Therefore, if domicile depends on an individual's "attitude," "intention," and "entire course of conduct," an illegal immigrant who has spent his whole life in the United States can arguably establish domicile in Texas and obtain a divorce if that illegal immigrant's "entire course of conduct" and "attitude" indicates that he intends to stay in Texas indefinitely.[72]

Note that *State of Texas v. State of Florida* asserts that individuals can have more than one domicile, so it conflicts with the Texas statute cited and the Texas Attorney General Opinion that states an individual "may have as many residences as he may choose, but can have but one domicile."[73] A person could challenge Texas' one domicile rule under *State of Texas v. State of Florida*.[74]

Additionally, Texas law also allows non-residents and non-domiciliaries of Texas to sue for divorces in Texas if their spouses have been domiciled in the state for six months.[75] When filing for divorce, the non-resident spouse must sue in the county in which the domiciled spouse resides, but the Texas Family Code has no durational requirement for residence or domicile regarding the non-resident spouse.[76]

Aside from the conflicting views regarding multiple domiciles, the law is clear: domicile only requires "intent to remain," regardless of most legal constraints.[77] Why, then, do some individuals argue that legal constraints, such as citizenship, negate this "intent?" This conflict and confusion may originate English common law.[78] Dating back to the Roman Empire, English law defined domicile first by citizenship, then by origin, and then by place of permanent residency.[79] Modern English law has evolved in the same way as that in the United States, and the 19th Century English case *Moorehouse v. Lord* articulates the concept for domicile used by United States courts today:

> The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in contemplation some event upon the happening of which residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent.[80]

Interestingly, Lord Chelmsford made this decision in 1863, so this legal question of domicile should be thoroughly discussed, definite, and unquestioned by now: domicile is a matter of whether a person "has no other idea than to continue there without looking forward to any event…which might induce him to change his residence."[81] If a person intends to remain in a place, he may lawfully claim domicile there.[82]

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[68] TEX. TRANSP. CODE § 522.003 (West 2012).
[69] *Id.*
[70] State of Texas v. State of Florida, 306 U.S. 398 (1939). This case has been cited countless times in the past decades in situations in which two states want the estate tax from a testator with residences in both states. *See* California v. Texas, 457 U.S. 164 (1982).
[71] *State of Texas*, 306 U.S. 398.
[72] *Id.*
[73] 37 TEX. ADMIN. CODE § 16.8; Op. Tex. Att'y Gen. No. JM-1223 (1990).
[74] *State of Texas*, 306 U.S. 398.
[75] TEX. FAM. CODE § 6.302.
[76] *Id.*
[77] Note that there are some traditional legal constraints on a person's ability to establish domicile. For example, a person must have "sufficient mental capacity to choose the place that the person regards as home." Weintraub, *supra* note 63, at 23.
[78] Practical Law Company, UK, *Domicile*, http://uk.practicallaw.com/books/9781847667670/chapter08#BSRDUKT-s8_02.
[79] *Id.*
[80] *Id.*, *citing* Moorhouse v. Lord, 10 HL Cas 272, 285-286 (1863).
[81] *Id.*
[82] *See id.*

Texas case law reflects these English common law principles.[83] The Supreme Court of Texas case *Snyder v. Pitts* stated, "[t]he elements of the legal concept of domicile are: 1. An actual residence— 2. The intent to make it the permanent home."[84] *Snyder* further elaborated on the definition of "home" to mean that it signifies a "true, fixed and permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning."[85]

More recent Texas case law reflects these same principles.[86] The 2010 case *Fernandez v. Bustamante* emphasized two important factors in establishing domicile: first, that "the purpose to make the place of residence one's permanent home" and, second, that the "period of time that the decedent resided in the county is irrelevant so long as the act and the intention to acquire a domicile coexist."[87] Using this reasoning in *Fernandez*, a person could establish domicile by his physical presence in the state for only a few minutes but have the intention to remain there indefinitely as his permanent home.

Note that permanent intent and domicile, by definition, allow for the possibility of temporary absence with the intent to return.[88] For example, a person could leave a county or state temporarily for a vacation or for a work trip but could still maintain his domicile in that county or state.[89] Code and state laws have not defined the exact length of permitted absences, but short absences are customarily allowed.[90]

Of course, Texas law does not address the fickleness of human intention. Change of intent is always a possibility. However, present intent usually does not contain that possibility of change—that is, if a person is being honest about his intent—but present intent contains only the intent to remain indefinitely. *Black's Law Dictionary* discusses the different kinds of intent that a person can have and gives the further example of "intent:"

> The phrase 'with intent to,' or its equivalents, may mean any one of at least four different things: — (1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient if it is one of several concurrent intents; (3) that it must be the chief or dominant intent, any others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case.[91]

Intent is a fluid concept, so it is interesting that Texas law relies on such a changeable human mindset. However, even though intent may change and is likely to do so, current human intent to remain indefinitely fulfills the requirements to establish domicile.[92]

The question of domicile turns on intent to remain in the state or county for the foreseeable future, so those with intent to remain—but without legal permission to do so—may still establish domicile. If an illegal immigrant or temporary visa holder has been working for years in the Texas, has bought or rented a home here, and wishes to remain here, he can claim domicile under the definitions provided in Texas Statute, by Supreme Court of the United States case law, by Texas case law, and by historical interpretation of domicile dating back to the Roman Empire and English common law.

IV. Rights of Citizens and Permanent Residents to Divorce in Texas

Using the above-discussed definition of "intent" to determine domicile, this section will discuss who may obtain divorces in Texas: citizens and obvious domiciliaries, permanent residents, and non-citizens, including temporary visa holders (such as work and student visa holders), and illegal immigrants.[93]

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[83] Snyder v. Pitts, 241 S.W.2d 136 (Tex. 1951).
[84] *Id.*
[85] *Id.*, citing *Ex parte* Blumer, 27 Tex. 734 (Tex. 1865) and Switzerland Gen. Ins. Co. v. Gulf Ins. Co., 213 S.W.2d 161 (Tex. Civ. App.—Dallas 1948, *writ dism'd*).
[86] Fernandez v. Bustamante, 305 S.W.3d 333 (Tex. App.—Hous. [14th Dist.] 2010, *no pet.*). Note that estate law and probate law, rather than family law, have helped establish the definition of domicile. *See id.*
[87] *Id.* at 343.
[88] Wilson v. Wilson, 494 S.W.2d 609, 611 (Tex. Civ. App.—Hous. [14th Dist.] 1973).
[89] *Id.*
[90] *Id.*
[91] Black's Law Dictionary (9th ed. 2009), citing John Salmond, *Jurisprudence* 383–84 (Glanville L. Williams ed., 10th ed. 1947).
[92] *See Fernandez*, 305 S.W.3d 333.

A. CITIZENS AND OBVIOUS DOMICILIARIES

A person who is a citizen of the United States and a resident and domiciliary of Texas may obtain a divorce in Texas.[94] Even if the person's spouse is not a citizen of the United States or resides in another state or country, a Texas court has authority to grant the Texas resident and domiciliary a divorce.[95] For example, in the case *Dosamantes v. Dosamantes*, the wife, a citizen of the United States and a domiciliary and resident of Texas, sought a divorce from her husband, a citizen of Mexico and a Mexican resident at the time.[96] Notwithstanding the husband's objections that the Texas courts did not have jurisdiction over him, the Texas Court granted the wife a divorce.[97] In sum, whether the respondent spouse is subject to in personam jurisdiction is irrelevant. The Texas court has jurisdiction to dissolve the marital status of the parties when one spouse seeks a divorce under the terms of the Texas Family Code. The United States Supreme Court confirmed this position and stated, "it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent."[98]

B. PERMANENT RESIDENTS

A permanent resident—also known as a Green Card holder—is someone whom the United States has granted authorization to work permanently in the United States.[99] According to U.S. Citizenship and Immigration Services, a Green Card holder qualifies as the following:

> A Green Card holder (permanent resident) is someone who has been granted authorization to live and work in the United States on a permanent basis. As proof of that status, a person is granted a permanent resident card, commonly called a "Green Card." You can become a permanent resident several different ways. Most individuals are sponsored by a family member or employer in the United States. Other individuals may become permanent residents through refugee or asylee status or other humanitarian programs. In some cases, you may be eligible to file for yourself.[100]

The name and definition of a *permanent* resident obviously shows *permanency* and allows the permanent resident to legitimately claim that he or she intends to remain in the United States.[101] Because a Green Card holder has the legal authorization to remain in Texas, a permanent resident may therefore establish domicile and obtain a divorce in Texas.[102]

In a 1985 divorce case *Ismail v. Ismail*, a couple—both citizens of Egypt—obtained permanent residence status and lived in Houston, Texas.[103] The husband moved away from the United States, and the wife filed a suit for divorce in Houston because Egyptian law did not allow her—as a woman—the right to file for divorce in Egypt.[104] The wife had traveled in and out of Texas for the past few years, so her husband could have challenged her intent to remain in Texas and ability to establish Texas domicile, but the court granted her a divorce.[105] Impliedly because of her permanent resident status, she could claim intent to remain in Texas indefi-

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[93] TEX. FAM. CODE § 6.301.
[94] *See* Dosamantes v. Dosamantes, 500 S.W.2d 233, 238 (Tex. Civ. App.—Texarkana 1973, *writ dism'd*).
[95] *See id.*
[96] *Id.*
[97] *Id.*
[98] *Williams*, 317 U.S. 287.
[99] U.S. Citizenship and Immigration Services, *Green Card (Permanent Residence*), http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ae853ad15c673210VgnVCM100000082ca60aRCRD&vgnextchannel=ae853ad15c673210VgnVCM100000082ca60aRCRD.
[100] *Id.*
[101] *See id.*
[102] 37 TEX. ADMIN. CODE § 16.8.
[103] Ismail v. Ismail, 702 S.W.2d 216.
[104] *Id.* at 223.
[105] *Id.*

nitely and establish domicile.[106] Therefore, non-citizen permanent residents (aka Green Card holders), such as the wife in the *Ismal* case, can claim domicile and obtain divorces in Texas.[107]

IV. Rights of Illegal Aliens to Divorce in Texas

The legal issue of this article asks the question of whether non-citizens with temporary visas or no visa at all (i.e., illegal immigrants) may claim intent to remain in Texas and thereby establish domicile and obtain divorces. If an individual's visa does not allow him to remain in the United States but he wishes to do so, which element wins: his desire to stay or the legal barriers forbidding him to do so? Some might argue that an individual cannot have "intent to remain" if legal restrictions will not allow a person to remain—the "intent" is void without the requisite legal permission.[108] On the other hand, in order to establish domicile, Texas law does not require legal permission to remain before showing intent to remain.[109]

In spite of such legal conjecture, courts have repeatedly allowed temporary visa holders to obtain divorces in Texas.[110] For example, in the 2003 case of *Franyutti v. Franyutti*, the court allowed a wife to establish domicile and divorce her husband because the wife said she wanted to live in Texas "forever and ever," even though her visa would not allow her to remain in Texas indefinitely as she wished.[111] In this case, the husband objected to the wife's domicile in Texas because she entered Texas from Mexico on a temporary tourist visa that "required that she intend not to abandon her Mexican domicile."[112] In spite of the wife's statements to the Immigration and Naturalization Services regarding the issuance of her visa, the court held that the wife had the authority to decide her own intent to remain in Texas.[113]

Still, the *Franuytti* court acknowledged—though overruled—the husband's argument that his wife could not establish domicile because of her temporary visa.[114] The *Franyutti* opinion quoted another Court of Appeals case which stated, "a party should not be allowed to assert rights and privileges inconsistently with his previous positions…The theory of quasi-estoppel should apply where it would be unconscionable to allow someone to maintain a position inconsistent to one in which he acquired, or by which he accepted a benefit."[115] Nevertheless, even though the *Franyutti* court acknowledged the husband's argument to the contrary, the court decided that the wife could establish domicile in Texas and thereby obtain a divorce.[116]

Another controversial legal question is whether an illegal immigrant may establish domicile and therefore obtain a divorce in Texas—this argument is the basis upon which critics base their claims that illegal immigrants cannot establish domicile. In comparison to an individual with a temporary visa, federal law completely forbids an illegal immigrant from being in the United States, much less from intending to stay indefinitely.[117] Federal law defines an illegal immigrant as anyone who "enters or attempts to enter the United States at any time or place other than as designated by immigration officers."[118] Without getting into too many details, in the recent *Arizona v. United States* decision, the United States Supreme Court decided that immigration and deportation matters were *almost* the exclusive authority of the federal government.[119] Furthermore, in 1929, the Ninth Circuit explicitly stated, "[n]o domicile in the United States can be established by an immigrant whose original entry was unlawful."[120] If federal courts are actively establishing criteria for

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[106] *Id.*
[107] *Id.*
[108] FAMILY LAW SECTION REPORT (State Bar of Texas), Volume 2012-3 (Summer), http://sbotfam.org, G.L.S. editor's note to *Aduli v. Aduli.*
[109] TEX. FAM. CODE § 6.301.
[110] *See* Franyutti v. Franyutti, 2003 WL 22656879 (Tex. App.—San Antonio Nov. 12, 2003, no pet.) (mem. op.).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Duncan Land & Exploration, Inc. v. Littlepage, 984 S.W.2d 318, 330 (Tex. App.—Fort Worth 1998, pet. denied).
[116] *Franyutti*, 2003 WL 22656879.
[117] *See* 8 U.S.C.A. § 1325 (West 2012).
[118] *Id.*
[119] *See* Arizona v. United States, 132 S. Ct. 2492 (2012).
[120] Hurst v. Nagle, 30 F.2d 346, 347 (9th Cir. 1929) (denying a British seaman domicile because he entered the United States without permission).

or limiting state domicile, then federal case law directly conflicts with Texas code that requires only intent—not the Ninth Circuit's requirements of citizenship or lawful entry—in order for a person to establish domicile.[121]

Therefore, if illegal immigration is the under the purview of the federal government, the question remains of whether the state government of Texas—which has authority over family law matters and divorce—can use the power of the federal government to deny domicile and, as a result, deny illegal immigrants the right to divorce in Texas. Unfortunately, case law involving illegal immigrants who have entered the country illegally and have no legal basis to remain in the United States is nonexistent. Illegal immigrants likely do not seek divorces often in Texas for fear of alerting Immigration Naturalization Service (hereinafter "INS") of their existence and consequently being deported. Even though the chance of deportation may be uncertain, the possibility and fear of deportation remains and may explain why few illegal immigrants petition for divorce in Texas.[122] Therefore, the question of whether the law allows illegal immigrants to divorce in Texas—in spite of their hesitancy to do so because of INS and potential deportation—is still an important legal issue.

Even though illegal immigrants are not legally allowed to be in the United States, they can still *intend* to remain in the United States indefinitely. In Texas alone, there are an estimated 1,041,000 illegal immigrants, but very few are awaiting deportation at Texas border control stations.[123] Texas' count of illegal immigrants is second only to California, which has 2,209,000 illegal immigrants.[124] Presumably, these illegal immigrants did not intend to enter the country illegally only to leave shortly thereafter; on the contrary, many illegal immigrants stay in the United States for the rest of their lives and have jobs and raise families. Many of their children are United States citizens due to their births in the United States.[125] Therefore, these illegal immigrants arguably have an implied *intent to remain* in the United States, even if INS deports them.

Therefore, most illegal immigrants—even though they are not supposed to be in the United States under federal law—likely meet domicile's requirement of intent to remain. Consequently, a court may grant illegal immigrants divorces under the Texas Family Code.[126]

V. Other Policy Considerations

This article is more concerned with establishing *what* Texas law says in regards to domicile and divorce rather than *whether* Texas should allow these laws. Still, this paper's analysis would not be complete without some consideration of the policy questions surrounding the issues of divorce and domicile in Texas.

As discussed above, non-citizens, such as temporary visa holders and illegal immigrants, can establish domicile and obtain divorces under Texas law.[127] In spite of legal constraints that forbid them to remain, case law and the Texas Family Code support this proposition.[128] However, *should* this be the status of Texas law? Should illegal immigrants and temporary visa holders enjoy the rights and privileges that other laws might implicitly deny them?

First, there pragmatic concerns to consider: there is some fiscal effect to allow illegal aliens to divorce in Texas. As discussed above, the number of illegal immigrants in Texas is staggering—over one million![129]—and allowing them to take advantage of Texas' court system might be costly.

This financial burden on the court system might be compounded by the fact that many illegal immigrants work "off-the-books" and fail to pay full income tax, if any, because of their low yearly income. In the same

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[121] TEX. FAM. CODE § 6.301.
[122] *See* John Simanski and Lesley M. Sapp, *Immigration Enforcement Actions: 2011,* U.S. DEPARTMENT OF HOMELAND SECURITY, Annual Report (2011), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.
[123] *Id.*; Statemaster, *Estimated number of illegal immigrants (most recent) by state*, http://www.statemaster.com/graph/peo_est_num_of_ill_imm-people-estimated-number-illegal-immigrants.
[124] *Id.*
[125] *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (deeming a man who was born in the United States but whose parents were citizens of China to be a United States citizen).
[126] TEX. FAM. CODE § 6.301.
[127] *See* Section IV *supra.*
[128] *Id.*
[129] Statemaster, *Estimated number of illegal immigrants (most recent) by state*, http://www.statemaster.com/graph/peo_est_num_of_ill_imm-people-estimated-number-illegal-immigrants.

way, many temporary visas restrict the rights of visa holders to work. Some visa holders may work in the United States and are subsequently taxed for the income from this work, but others, such individuals with spousal or tourist visas, are often specifically not allowed to work during their tenure in the United States and, therefore, may not be fully paying taxes.

Granted, the cost of illegal immigrants' deportations would likely be greater than their costs to the court system. Furthermore, illegal immigrants also contribute to the economy by generally providing inexpensive labor. Illegal immigrants' contributions—in some areas—outweigh their costs to society. Still, illegal immigrants' potential financial burden on the divorce court system is worthy of consideration as a matter of public policy.

On the other hand, there may be other civil rights considerations for why Texas should allow temporary visa holders to obtain divorces. For example, Islamic law in some countries forbids women from filing for divorce.[130] Therefore, if Texas allows Islamic women with a temporary visas or with illegal immigrant status to obtain divorces in Texas, Texas could protect and promote their civil rights that their home countries might deny them. In the above-discussed case *Ismail v. Ismail*, the wife was under the same constraints of Egyptian law: Egyptian law prevented her—as a woman—from filing a divorce, but a Texas court granted her a divorce.[131] In that case, Texas promoted the *Ismail* wife's civil rights generally and her rights as a woman specifically, even though her domicile may have been questionable because of her temporary visa status. Allowing non-citizens to divorce in Texas may promote Texas's public policy to promote civil rights and to protect the rights of those who are disadvantaged. Therefore, allowing temporary visa holders and illegal immigrants to obtain divorces in Texas may actually promote Texas' promotion of civil rights.

Regardless of policy considerations, Texas law currently allows non-citizens who intend to remain in Texas the right to divorce, both in practice and by statute. While the law behind this policy may be controversial, Texas law and courts allow non-citizen illegal immigrants and temporary visa holders to obtain lawful divorces in Texas.

VI. Conclusion

Obtaining a divorce in Texas is not quite as easy as society may guess. Before obtaining a divorce, Texas law requires that a spouse establish domicile and residency.[132] Both requirements are durational: before filing for divorce, the petitioner or his spouse must be domiciled in Texas for six months and reside in the county in which he files for 90 days.[133] Residency is an easier pill to swallow—a person's physical presence is all that Texas law requires;[134] however, in order for a person to establish domicile, Texas law requires him to intend to remain for the foreseeable future.[135]

For obvious domiciliaries, such as citizens and permanent residents of Texas, domicile may be easy to establish. However, for others, such as temporary visa holders and illegal immigrants, their intent to remain in Texas—or even the United States—is questionable because their visas or illegal entrances into the country do not allow them to remain legally.

Though some may balk at the idea that illegal immigrants may use Texas family courts, Texas law allows it. Other critics may object to illegal immigrants' use of the court system: some taxpayers may protest at the fact that Texas law allows non-taxpayer illegal immigrants to use the Texas court system to obtain divorces. On the other hand, women's rights and civil rights activists may welcome the idea that oppressed groups, such as foreign women denied the right to divorce in their home countries, may use the Texas court system.

In both practice, such as the *Aduli* case,[136] and by provisions in the Texas Family Code,[137] Texas allows individuals with no legal bases to remain in the United States, such as temporary visa holders and illegal im-

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[130] Shabdita Gupta, *Muslim Women: Status and Divorce Rights Under Islamic Law*, Global Politician (May 3, 2008), *available at* http://www.globalpolitician.com/24674-islam-muslim.
[131] *See* *Ismail*, 702 S.W.2d 216.
[132] TEX. FAM. CODE § 6.301.
[133] *Id.*
[134] *Skubal*, 584 S.W.2d at 46.
[135] 37 TEX. ADMIN. CODE § 16.8.
[136] *Aduli*, 368 S.W.3d 805.
[137] TEX. FAM. CODE § 6.301.

migrants, to obtain divorces. Texas has no law that prohibits illegal immigrants or temporary visa holders from accessing Texas courts to obtain divorces. Even though critics may object to the practice, Texas law allows those with the intent to permanently stay in Texas—including illegal immigrants and temporary visa holders—to establish domicile in this state and Texas counties and, consequently, the right to obtain divorces in Texas.

Editor's Comment: *Although Ms. Ammons makes a good argument, I still believe that the case law is not settled in Texas as to "intent" as it applies to illegal immigrants or even visa holders that require the party to return to their home country or are premised solely on their spouse's visa, which requires the spouse's presence in the United States for the non-spouse to have a right to stay in the United States and whether if an appellate court was presented with something other than a "quasi-estoppel" argument as raised in Franyutti v. Franyutti, 2003 WL 22656879 (Tex. App.—San Antonio Nov. 12, 2003, no pet.) (mem. op.), it might rule differently. However, with the Texas Supreme Court's recent blessing of standard divorce forms, which do not use the word domicile (in the Petition, a party merely needs to reside in Texas for six months to obtain the right to a divorce), the justices may have already tipped their hands as to how they would rule on this issue were to be formally presented to the court. G.L.S.*

DIVORCED FROM REALITY:
Over-Optimism and Insuring Your Marriage

By: Marissa Daley[138]

I. Introduction

The last half-century in the United States has seen major increases in the rate of divorce. Divorce is expensive and emotionally taxing. People rarely expect to get divorced, despite knowing the national divorce statistics. In this article, I assume that divorce is a negative phenomenon because it generally decreases human welfare. If individuals prepared properly for the possibility of divorce, overall welfare would increase.

Based on an average American model, this article will refer to the lower-earning spouse and the most disadvantaged spouse as the "wife," and the higher-earning, most advantaged spouse as the "husband," purely for ease of language. The article will also ignore other common relationships (same-sex couples and cohabitating couples who are not married).

Now let's meet Hank and Whitney[139] – an adorable couple. They met in college where Hank was getting his degree in business and Whitney was finishing her degree in journalism. Hank and Whitney fell in love, each graduated, and got married. At the time of marriage, Hank had begun working for a software company making $40,000 per year. Living close to their families in Boston, Whitney was working for the local newspaper making $16 per hour.

In the first year of their marriage, Hank received another job offer – a big opportunity to be a project manager and make $55,000 per year, but the job was in Houston. Hank and Whitney decided to pack up and move to Houston, which meant Whitney had to quit her job and find a new one. After purchasing a pair of cowboy boots, Whitney began her job search. The best job she could find paid $25,000 per year.

Hank was doing well at his job and as the couple settled into married life in Texas, they decided to start a family. Whitney became pregnant and chose to work part time, leaving her time to raise their children and take care of the home.

Over the next nine years, Hank became very successful in his career, gradually climbing up his professional ladder, and making over $65,000 per year. He provided a comfortable life for Whitney and their now

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[139] Hank and Whitney are based on a collection of statistics in relation to the average American family. *See* Kreider, Rose M. and Renee Ellis, "Number, Timing, and Duration of Marriages and Divorces: 2009." *Current Population Reports*, P70-125, U.S. Census Bureau, Washington, DC, 2011. (http://www.census.gov/prod/2011pubs/p70-125.pdf).

two children. Whitney was a wonderful mother, a PTA leader, and she always kept the household under control.

Nevertheless, as in most Family Law articles, the love story ends all too quickly. Whitney and Hank decide to call it quits, and get divorced ten years into their marriage. At the time of divorce, Hank is making $75,000 annually and his resume looks great. He has job security, two beautiful kids, and an expectation that he will surely find a new (younger) wife. Whitney has gaps in her employment history and very little career progress, two beautiful kids, and an expectation that she probably will not get remarried.

Even in modern times where women seem to be treated (relatively) equal to men, a disparity in genders does exist: the husband works and the wife stays home to care for the children. In fact, in 19.2% of married couples, only the husband works, and in 53.2% of married couples, both spouses work, but the man contributes more than 60% of the total income.[140] The loss in earning capacity from the wife causes her to be put in a position where divorce becomes financially detrimental without a proper spousal maintenance system.

The cause for divorce may stem from our culture, our technology, changes in our socio-economic status or from a multitude of other factors. The purpose of this article is to examine one common cause of divorces and propose a potential legal solution. This article explores and discusses one specific cause of failing to plan for divorce, which has its origin in behavioral and cognitive science: over-optimism. After explaining over-optimism and how it interacts in emotional and romantic relationships in Section II, Section III discusses a possible way for the law to remedy the spike in divorce rates: divorce insurance for any couple hoping to get married. While this solution may seem silly, or perhaps even impossible, there are some core principles that make the idea of divorce insurance a worthwhile discussion topic. It may be true that this solution does not have a place in the immediate future, but perhaps its time is looming just around the corner.

II. Over-Optimism

One behavioral reason that we, as individuals, refuse to prepare for divorce is over-optimism. Over-optimism is pervasive in the relationship context; in fact, when a representative sample of individuals applying for marriage licenses were asked about their personal chances of getting divorced, the median response was 0%.[141] I will first explain what over-optimism is, the causes of it and some subcategories that further effect the problem of failing to prepare for the possibility of divorce.

A. What is Over-Optimism?

Over-optimism is our tendency "to believe that [our] own probability of facing a bad outcome is lower than it actually is."[142] That is, we underestimate risks and overestimate the likelihood of desirable events. Over-optimism can be the result of our "insufficient ability to process accurately the information [he] possesses insofar as that information bears on [his] own risks."[143] In general, we are poor judges of our own abilities, skills, and performance and inaccurately assess ourselves.[144] In fact, our personal "knowledge" of our skill is barely correlated with objective performance in many cases.[145] Correlations explain the relationship between two things, where a score of 1.0 would mean the two things are perfectly correlated, and a score of -1.0 would mean the things are perfectly inversely correlated. A score of 0 means that there is no relationship at all between the two things. For example, when students were asked to rank their own performance during their first year of college, those rankings correlated only .35 with the instructors' evaluations.[146] Additionally, "people's beliefs about their ability to detect lying among others correlate only .04 with their performance."[147]

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[140] Bureau of Labor Statistics, U.S. Department of Labor, *The Editor's Desk*, Both Spouses Work in Most Married-Couple Families; http://www.bls.gov/opub/ted/2001/apr/wk4/art02.htm; also see http://www.freemoneyfinance.com/2009/11/who-earns-more-in-your-marriage.html.

[141] Onstot, Ken (2011). Faith and Disappointment, (pp. 1).

[142] Jolls, C. and Sunstein, C. (2006). *Debiasing Through Law*, 35 J. Legal Studies 199, 204.

[143] Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 Stanford L. Rev. 1471, 1541–1542.

[144] Dunning, D., Heath, C., and Suls, J. (2004). *Flawed Self-Assessment: Implications for Health, Education, and the Workplace*, (pp. 72).

[145] Dunning, *supra* note 7, at 71.

[146] Chemers, M.M., Hu, L., & Garcia, B.F. (2001). Academic self-efficacy and first-year college student performance and adjustment, *Journal of Educational Psychology*, 93, 55–64.

[147] DePaulo, B.M., Charlton, K., Cooper, H., Lindsay, J.J.,& Muhlenbruck, L. (1997). The accuracy-confidence correlation in the de-

The latter of these two examples may be particularly startling in the marriage and divorce context since we may be especially susceptible to our potential spouses' lies. Although, the nature of an intimate relationship may give one partner a unique ability to detect lies, but this would probably only take our lie-detection ability from "awful" to "bad". Ultimately, our over-optimism with regard to our marriages is what may lead to our failure to plan for divorce. This lack of forethought can cause financial destruction as well as emotional – but the law is more suited to correct the financial effects.

B. Causes of Over-optimism

Over-optimism may have a basis in a lack of information; for example, if we had all the facts, we would adjust our outlook and have a more accurate assessment of the situation. Research has shown, however, that the over-optimism bias occurs even with a complete set of information.[148] But having information about our partner's self-perceived knowledge may also impact the quality and strength of our romantic relationships. As an illustration, the majority of couples in a certain study indicated that they were "extremely happy with the marriage and that they held their partner in the highest regard."[149] Generally, the spouses in the study were relatively accurate in understanding their partners' self-perceived traits and abilities.[150] So rather than being overly optimistic about how much actual knowledge we have about our spouses, this means that knowledge and experience overcame over-optimism perhaps due to the intimacy of romantic relationships. The study distinguishes between global and specific levels of abstraction when thinking about loving one's spouse. A global evaluation is something like, "my partner is the best," whereas a specific evaluation is, "my partner always helps with the chores."[151] The results of the study also indicated that while "couples were almost uniformly happy with each other at the level of their global perceptions, this positive global view of the partner was not grounded in an accurate view of the partner's specific attributes for all couples."[152] It turns out that when wives had a more accurate view of their husbands' specific qualities, their chances of divorce within the first four years decreased, proving that love at the global level is stronger, or at least more enduring, if it's based on the specific level accuracy.[153] Over-optimism is not wholly controlling in our relationships, but any decreases in accuracy (global or specific) regarding our spouses seem to effect relationships in a fundamental way.

The connection between knowledge, over-optimism, and relationship health is complex. It seems, however, that relationships are more successful (or at least more lasting) with actual knowledge of our partners. Global perceptions are more important to spouses[154] and this may be helpful in finding a workable solution.

> *Reader's Note: At this point in the article you may have noticed that this article has been using the first person. You may very well have been irritated by the blatant refusal to abide by the standard rules of academic and professional writing and felt as if the article was dragging you into the outlook of an average person. It should be noted that this ploy was deliberate. The author wanted to demonstrate the very phenomena she explains: that no one actually thinks he or she is "just" average. This trick is simply to allow the author and reader co-join the world of average, overly-optimistic people. For purposes of conformity with those aforementioned scholarly norms, this article will now allow you to enjoy your elite status, leaving the foolish, average individuals to themselves.*

C. Sub-categories of Over-optimism

There are several contributing factors to over-optimism, and this section will examine three of them: the

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tection of deception. *Personality and Social Psychology Review*, 1, 346–357.

[148] Babcock, L. and Loewenstein, G. (1997). Explaining the Bargaining Impasse: The Role of Self-Serving Biases, *Journal of Economic Perspectives*, 11, 109-126, 111.

[149] Neff, L. and Karney, B. (2005). To Know You Is to Love You: The Implications of Global Adoration and Specific Accuracy for Marital Relationships, *Journal of Personality and Social Psychology*, 3, 480–497 (pp. 489).

[150] Neff, *supra* note 12 at 489.

[151] Hampson, S. E., John, O. P., & Goldberg, L. R. (1986). Category Breadth and Hierarchical Structure in Personality: Studies of Asymmetries in Judgments of Trait Implications, *Journal of Personality and Social Psychology*, 51, 37–54; Neff, L. A., & Karney, B. R. (2002a). Judgments of a relationship partner: Specific accuracy but global enhancement. *Journal of Personality*, 70, 1079–1112.

[152] Neff, *supra* note 12.

[153] Neff, *supra* note 12.

[154] Neff, *supra* note 12.

above-average effect, the overconfidence effect, and the self-serving bias (which will be given special emphasis). These three cognitive phenomena are tangled together – they interact and cause each other to produce the overall effect of flawed self-assessments. This article will first define each, then explain how each relates to the others, and finally apply each in the context of marriage.

1. The Above-Average Effect

The above-average effect refers to the mathematical impossibility, on average, that far more than 50% of the population believes that they are above-average.[155] The above-average effect is pervasive in human thinking and it is not limited to specific age groups or tasks.[156] The effect is pervasive in fields of health, business, and even the ability to provide unbiased self-assessments.[157] Presumably individuals also think that they are above-average spouses since this is a vaguely defined term, and they believe that they have the utmost control in their own relationships.

2. The Overconfidence Effect

One reason that everyone seems to engage in the above-average effect is because individuals have a tendency to place too much confidence in the insightfulness of their own judgments.[158] This is specifically referred to as the overconfidence effect. Individuals regularly believe that their predictions about future events are based on accurate, present information and therefore are correct. The fact that most people believe that they are above-average when it comes to certain skills fuels the belief that each person's judgments are sound, and this causes an overestimation of abilities. If college students overestimate their ability to forecast future semester events, and CIA agents overestimate their ability to predict world events, and surgical trainees place too much confidence in their post-x-ray examination diagnoses,[159] then it seems virtually certain that we would see the future of our romantic relationships in the same way. First, people assume that the information on which they base their predictions is accurate. That information includes not only assessments of their partners, but also of themselves. Second, people assume that their prediction abilities are better than most. After examining this information, it is not surprising that the beginning of relationships seem so cheery and bright. With time comes experience, however, and eventually most people change their minds – not because they have come to terms with themselves and see that they are not actually above-average, but because they have found a better outside option.

3. The Self-Serving Bias, a.k.a. Egocentrism

In general, individuals believe that they are above-average spouses who have above-average relationships. This is not because we are stupid or delusional, necessarily, rather, it is caused by the brain's ability to protect its own ego. There are two ways that our brains do this: 1) self-selection of favorable definitions of vague terms;[160] and 2) a focus on personal abilities to the extent that comparisons to others are ignored.[161] The former is deeply connected to the self-serving bias, which will be discussed further. The latter notion, referred to as egocentrism, is a general phenomenon that permeates our self-assessments. Even when we are asked to compare our abilities to others, we do very little actual comparing, and instead we focus almost solely on ourselves.[162] Our focus lies on our own skills and we ignore peers' abilities, which causes severe over-optimism for easy tasks and over-pessimism for difficult ones.[163] For example, when asked if they are above-average bike-riders, people generally respond that they are – neglecting the fact that most people are good bike-riders.

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[155] Dunning, *supra* note 7, at 72. *See also* Keillor, Garrison. A Prairie Home Companion; *News from Lake Wobegon*, ("where all the women are strong, all the men are good looking, and all the children are above average."). http://prairiehome.publicradio.org/about/podcast/.
[156] Dunning, *supra* note 7 at 72.
[157] Dunning, *supra* note 7 at 72.
[158] Dunning, *supra* note 7, at 73.
[159] Dunning, *supra* note 7, at 73.
[160] Dunning, *supra* note 7, at 74.
[161] Kruger, J. (1999). Lake Wobegon Be Gone! The ''Below- Average Effect'' and the Egocentric Nature of Comparative Ability Judgments, *Journal of Personality and Social Psychology*, 77, 221–232.
[162] Dunning, et al. (2004), (pp. 75)
[163] Kruger, *supra* note 24, at 232.

In contrast, if you ask people about their juggling abilities, they rank themselves below average – neglecting the fact that most people are not good jugglers.[164] This type of thinking produces irrational behavior, for example, in poker. When the number of wildcards increases in a game, people have a tendency to increase the amount they bet, thinking that they have a better-looking hand, but forgetting that the other players do as well.[165] The irrationality does not stop with card games, however.

The concept of egocentrism also affects romantic relationships. Just as people believe they are above-average bike-riders because they have the ability to ride a bike, people believe that they are above-average spouses because they occasionally wash the dishes, or buy thoughtful birthday gifts for their spouses. But, like being a good bike-rider, *most* spouses find the time to help with the chores and purchase holiday presents for their partners. This complete neglect of recognition that, on average, people engage in truly average behavior, increases confidence that relationships will work, since each person sees himself better than most.

The self-serving bias occurs when people process information in a way that is most favorable to them. Indeed, each person actually sees things differently depending on who he is and what filter he passes information through.[166] Research has shown that when individuals come to conclusions about the fairness of a given situation, those conclusions generally tilt towards their own self-interests.[167] These divergent opinions of fairness occur because of vague moral scenarios producing a range of fair solutions to a given problem.[168] From that range, individuals chose from opposite ends depending on their needs and deciding on a fair solution that serves them best. This is similar to a close call in baseball: the offensive team sees clearly that the runner made it home well before the tag; for the third baseman's team, it's just as clear that he was out by a mile.

D. Interaction of Over-Optimism Effects

Although the self-serving bias and the above average effect refer to separate ideas, the former may lead to the latter. That is, the fact that we view the world in a self-serving way causes us to believe that we are better than most. One of the previously mentioned causes of the above average effect is the vagueness of terms. More specifically, when words have "wiggle room" in their definition, we choose to interpret the word in a way that is most favorable to ourselves.[169] For example, if we ask people how smart they are, those who were strongest in verbal skills, but weakest in math skills would discount the value of mathematics and increase the value of communication in an analysis of what "smart" means.[170] They select a definition that benefits their own abilities most, which leads to a belief that they are above average. In the same vein, the ingredients for a successful relationship are highly subjective and vague. The ambiguity presents a perfect opportunity for individuals to push evidence through a filter that gives greater weight to that which serves their interests and discounts that which contradicts it.

Many examples have been provided in the field of health, to tie together the issues within over-optimism. People believe that they are above-average in health and therefore less likely to have a heart attack. Part of the reason people believe this is because they subconsciously self-select specific instances of healthy behavior (taking the stairs and eating a salad) and choose to forget about the unhealthy behavior (skipping the gym and eating a cheeseburger). The perception of control exacerbates this problem. People think of themselves as superior to their peers when thinking about "controllable" traits, as opposed to "uncontrollable" ones.[171] "People consider themselves more cooperative and self-disciplined than others (all controllable qualities), but not necessarily more creative or lively."[172] Individuals think that they are less likely than others to be involved in au-

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[164] Kruger, *supra* note 24, at 232.
[165] Windschitl, P.D., Kruger, J., & Simms, E. (2003). The Influence of Egocentrism and Focalism on People's Optimism in Competitions, *Journal of Personality and Social Psychology*, 85, 389–408.
[166] Babcock, *supra* note 11, at 111.
[167] Babcock, *supra* note 11, at 111.
[168] Babcock, *supra* note 11, at 111.
[169] Dunning, *supra* note 7, at 75.
[170] Dunning, D., Meyerowitz, J.A., &Holzberg, A.D. (1989). Ambiguity and self-evaluation: The Role of Idiosyncratic Trait Definitions in Self Serving Assessments of Ability, *Journal of Personality and Social Psychology*, 57, 1082–1090.
[171] Alicke, M.D. (1985). Global Self-evaluation as Determined by the Desirability and Controllability of Trait Adjectives, *Journal of Personality and Social Psychology*, 49, 1621–1630.
[172] Dunning, *supra* note 7, at 75.

to accidents when they are the driver, but not when they are a passenger.[173] This phenomena has concrete consequences. Unrealistic optimism is a major problem for promoting good health – including the health of romantic relationships. Just as perceived vulnerability is an important motivator for people to do something about their health, perceived vulnerability is an important motivator for people to do something about their relationships.[174] So, people who are not worried about heart attacks do not seek out education or preventative measures, and people who are not worried about divorce do not seek out education or preventative measures.

We self-select in relationships much like in the health context – it is somehow easier to remember the moments that we took out the trash and bought flowers than the moments that we forgot an anniversary or left the bed unmade. Hindsight is 20/20, however, and post-divorce individuals certainly wish that they had been more adequately prepared, especially financially. The law can help guide our decisions when we are blinded by our own optimistic delusions.

III. Current State of the Law

The current law, Texas Family Code §§ 8.051–8.054 governs spousal maintenance awards in Texas. It took until 1995, for the Texas Legislature to pass a statute allowing for court-ordered maintenance.[175] The passage of this statute was a drastic change in Texas family law, but compared to the rest of the country (and compared to the reality of living a post-divorce lifestyle), Texas was still behind.[176] For example, the 1995 statute's marriage duration requirement of ten years in order to qualify for spousal maintenance is unique to Texas.[177] Another provision of the statute unique to Texas was its cap of monthly orders of no more than the lesser of $2,500.00 or 20% of the payor's income.[178] Further, spousal maintenance generally contained a time limit of three years, after which, the payments would end.[179]

In 2011, Texas amended the spousal maintenance statutes; making major changes. But this move only moved Texas from antiquated to outdated. In 2011 the Tex. Fam. Code Ann. § 8.054 expanded the general duration of maintenance from a limit of 3 years to a max of 10 years. Additionally, § 8.055 doubled the amount of maintenance from a limit of the lesser of $2,500 or 20% of the spouse's average monthly income to the lesser of $5,000 or 20% of the spouse's average monthly income. This percentage increase seems like a massive change, and, admittedly, the changes were proportionately significant. However, in order to address the regular needs of many divorced women, the change just isn't enough.

Given the Family Code knowledge base of an average layperson, in combination with pervasive over-optimism, these statutes can lead to financially debilitating circumstances for someone like, say, Whitney. In the case of maintenance awarded due to a spouse's reduced earning capacity, a statutory presumption against the award of spousal maintenance exists, but can be overcome by evidence that the spouse has diligently sought suitable employment or diligently attempted to develop the skills to become self-supporting.[180] Additionally, courts are to "limit the duration of a maintenance order to the shortest reasonable period that allows the spouse seeking maintenance to meet the spouse's minimum reasonable needs by obtaining appropriate employment or developing an appropriate skill."[181] If a spouse is eligible for maintenance, the court is directed to consider a number of standard factors to set the amount.[182] Statutory reform may be the most direct way to solve the problem of post-divorce financial hardship for wives who have forfeited their own careers on behalf of their husband's, but this solution in Texas seems far off in the distance, so, it is time to be creative.

Before diving into the nitty-gritty of divorce insurance, attention should be given to why Whitney would allow herself to be put in such a financially vulnerable position. In order to increase the net value of the mari-

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[173] McKenna, F.P. (1993). It won't happen to me: Unrealistic Optimism or Illusion of Control? *British Journal of Psychology*, 84, 39–50.
[174] Dunning, *supra* note 7, at 80.
[175] *See* Tex. Fam. Code Ann.
[176] James W. Paulsen, *The History of Alimony in Texas and the New "Spousal Maintenance" Statute*, 7 TEX. J. WOMEN & L. 151 (1998).
[177] Tex. Fam. Code Ann. § 8.051.
[178] Paulsen, *supra* note 39, at 156.
[179] Tex. Fam. Code Ann. § 8.054.
[180] *Id.* § 8.053(a).
[181] *Id.* § 8.052.
[182] *Id.*

tal unit, husbands and wives shift economic sacrifices to the spouse who earns the least. It is economically rational that when the husband makes more money than his wife, she would burden her career advancement with domestic responsibilities. So even if she retains some employment, the wife's position is then analogous to the traditional home-maker. Even without exiting the workplace completely, she has made sacrifices that have decreased her earning level and her earning capacity. Post-divorce, his enhanced income is solely her husband's and, without a change in the law (or the foresight for a prenuptial agreement), the husband receives a windfall from her investment in what she believed would be their future.[183] And of course, her over-optimism, his over-optimism, the wedding gifts and lovely honeymoon only made her more certain of her future with him. He, too, was sure they would last, but he never had to bet on it like she did. This seems unfair.

Given the fact that women have invested in their husbands' earning capacity so that they may share in the benefits of a higher-income lifestyle, the law should provide an income-sharing model for a certain period of time after divorce. This would allow the court to equalize the spouses' incomes based on the wife's contribution to the husband's income. One scholar sums up the rationale for this sort of statutory change as follows:

> Spouses' lives have been intertwined in ways that the logic of this rhetoric cannot fully capture. The extent of this interdependence is roughly a function of how long individuals are married. As a result, we might require that ex-spouses share the same standard of living for some period of time corresponding to the length of their marriage.[184]

This kind of change is intuitive from the perspective that wives have an ownership interest in their husbands' increased income, and marriage is a joint venture and partnership.

A robust system of rehabilitative alimony with income sharing after divorce would be a way to properly compensate wives for their drop in earning capacity over the length of their marriage. That is, if a wife's earning capacity is less than it would have been if she hadn't been the primary caretaker of the children or household. But Whitney should not hold her breath if she is waiting for statutory reform in Texas, and as peculiar as it may seem, mandatory divorce insurance may be more likely.

IV. Insurance Solution

First this section will discuss a recent business model for divorce insurance[185], then it will explain the inspiration and rational for the author's version of mandatory divorce insurance, and finally, it will combat the long list of counter-arguments to it.

A. Current Divorce Insurance Options

WedLock Divorce insurance offers more than just a kitschy name – it offers a safety net in a modern marriage, or at least the site claims.[186] Wedlock costs $15.99 per month for every unit of coverage, where a unit is worth $1,250.[187] The more units you purchase, the more coverage you have. In order to collect on their policy, couples must stay married for four years. They also add $250 each year you remain married after four years.[188] The payout if the insured is divorced is to cover litigation costs, attorney's fees, and money to get an individual back on his or her feet. Potentially skeptical and concerned parents could purchase divorce insurance for their son or daughter so long as that son or daughter is the beneficiary of the policy.

There are major problems with WedLock's policies, however. Most glaring is the math: even if a couple

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[183] Ira M. Ellman, (1989). The Theory of Alimony, 77 Cal. L. Rev. 1.
[184] Milton C. Regan, (1994). Spouses and Strangers: Divorce Obligations and Property Rhetoric, 82 Geo. L.J. 2303, 2389.
[185] At the time the article was written, the insurance discussed existed, but the epilogue to will further explain the ultimate dissolution of that company.
[186] *See* http://www.safeguardguaranty.com/.
[187] Shultz, J. (2010) Divorce Insurance (Yes, Divorce Insurance), *The New York Times*. http://bucks.blogs.nytimes.com/2010/08/06/divorce-insurance-yes-divorce-insurance/. *See also* http://www.time.com/time/magazine/article/0,9171,2015772,00.html; and http://www.huffingtonpost.com/2010/08/06/wedlock-startup-now-selli_n_673521.html.
[188] Shultz, *supra* note 49.

were to purchase ten units of divorce insurance and stay married for ten years then they would have paid $19,188 to the company. In return, they would receive a payout of only $27,500.[189] That hardly seems worth it, even if couples did have the money to pay. Presumably, the policies do not pay out because the type of people who choose to sign up for the service may be in a group that is more likely to divorce than the national average. If insurance were mandatory, however, the numbers should mirror the national average.

B. Inspiration for Mandatory Divorce Insurance

As previously mentioned, over-optimism is prevalent in areas where a person feels in control. A simple example is driving. At one time, people were so overly-optimistic about their odds of avoiding car accidents, that no one felt the need to purchase insurance. Eventually, the out-of-pocket costs for car accidents and the effects of uninsured drivers became such a problem that states chose to enforce mandatory car insurance. That is, if you want the right to drive, you must purchase minimum coverage insurance[190].

Arguably this fact pattern is analogous to marriage and divorce. We have millions of people who think that divorce (car accidents) would never happen to them, and therefore they do not need to prepare for it (purchase insurance). Voluntary divorce insurance already has been created, but hardly anyone thinks that he or she needs it. So, what should be done? Perhaps make every couple that wants the right to marry should be required to purchase divorce insurance.

Another way to adapt WedLock's business plan to a mandatory system may be is to treat the policy exactly like car insurance in that divorce is the only possible "wreck." Just like car owners pay their monthly premiums based on the type of car they drive and their risk of getting into an accident based on age, sex, zip code, etc.; individuals would pay their monthly premiums based on the couples' net worth and their probability of getting divorced. If the state adopted statutory reform involving a more robust system of spousal maintenance, then individuals would need less divorce coverage – just enough to cover the necessary costs of the actual divorce if it is not amicable. Just like car insurance, the state could provide guidelines for minimum coverage, which could be based it on a spouse's potential loss in earning capacity.

Just as car insurance premiums tend to decrease when a driver reaches the age of twenty-five, and spike when a driver reaches old age, the premiums for divorce insurance would mirror the "danger zones" of marriage.[191] Studies indicate that marriages are most likely to fail and end in divorce in the three and a half to five year range, as opposed to the infamous "seven-year itch" that is usually discussed.[192] The study goes on to show that marriages become vulnerable again at the ten-year mark and once more at years sixteen to twenty.[193] If a couple makes it past twenty, the pair can expect a level of satisfaction that leads to a lasting marriage (with the occasional outlier, of course).[194]

C. Arguments Against Divorce Insurance

There are problems (large ones, but not insurmountable ones) with the idea of divorce insurance in general. First, the car insurance analogy that I purposely breezed through isn't as great as it sounds on the surface. Generally, a state (Texas, for example) only requires that you get enough coverage to cover the costs for the other people or property you harm in an accident – it doesn't require that you protect yourself.[195] In fact, the Texas Transportation Code states that:

> (a-1) Effective January 1, 2011, the minimum amounts of motor vehicle liability insurance coverage required to establish financial responsibility under this chapter are:
>
> (1) $30,000 for bodily injury to or death of one person in one accident;

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[189] Luscombe, B. (2012). Divorce Insurance: Get Unhitched, Get a Payout, *Time Magazine, US.* http://www.time.com/time/magazine/article/0,9171,2015772,00.html.
[190] Tex. Ins. Code Ann. § 1952.001 (West 2011).
[191] How Age Effects Auto Insurance Rates; http://www.dmv.org/insurance/how-age-affects-auto-insurance-rates.php
[192] You Are Not Alone, (2012); http://www.cadivorce.com/news/you-are-not-alone/.
[193] *Supra* note 53.
[194] *Supra* note 53.
[195] Tex. Ins. Code Ann. § 1952.001 (West 2011).

(2) $60,000 for bodily injury to or death of two or more persons in one accident, subject to the amount provided by Subdivision (1) for bodily injury to or death of one of the persons; and
(3) $25,000 for damage to or destruction of property of others in one accident.

Divorce insurance, conversely, seems to force individuals to protect *themselves* from an inability to see a future as a divorcee. In fact, if divorce is analogous to the car wreck, and statistics show that women file for divorce two-thirds of the time,[196] then from outward appearance it would seem that women are causing the wreck and are therefore only required to protect those they may harm. First, placing blame on the individual who actually files is misguided. Many times a marriage is far beyond repair before formal divorce proceedings are filed. Second, because no-fault divorces are now the standard[197] usually neither party in a divorce is legally to blame. Therefore, it isn't as though the husband and wife got into an accident with each other at the intersection of Cheating Road and Neglect Ave. Instead, a meteor hit their car on their way up Wedded Bliss Boulevard and neither party could avoid the impact. The meteor (or divorce) was an event outside anyone's control, but one or both parties are somewhat at fault and someone needs to pay for the medical bills and car repairs.

Forcing couples to purchase divorce insurance might discourage high-risk marriages, but that would not necessarily be a negative effect. If a couple is young and poor and they realize that it would be difficult to afford their insurance payments, they may put marriage off for a few years. Similarly, if two people met through infidelity, their premiums may be assessed to be through the roof (given the relatively dismal chances of a successful, lasting relationship[198]) and perhaps they, too, would put off marriage for a certain savings period. This may act as a built-in waiting period for those in high-risk scenarios and prevent marriages that should not happen in the first place (thereby decreasing the divorce rate).

Some may also argue that divorce insurance encourages divorce for those who want their policy to pay out, contrary to traditional Texas public policy. This is different from a sham divorce, which would constitute insurance fraud and would be dealt with as such. This concern is that people would give up on their marriages too quickly because they would not have the financial worry that they would have without insurance. It seems unlikely that this would cause a major spike in divorces since the process of divorce would not change, and divorce insurance is not a "get-rich-quick" scheme. Additionally, on deeper consideration empowering women to feel un-stuck may not be unsupported at all; a marriage where one person feels stuck because she is not financially independent is not a value that public policy should support.

Another potential counterargument is that this is unfair to the half of the population that is in successful marriages. The entire reason we buy insurance, be it for personal property, life insurance, fire insurance, or anything else is to protect ourselves from bad things that *might* not happen. When a woman buys insurance on her brand new engagement ring, she does not get angry thirty years later when no one has ever stolen it. Insurance is peace of mind, not an investment. Some may still argue that there are some groups who "know" that they will not get divorced, for example, for religious reasons. Statistics show that even in the Catholic, Baptist, and Mormon faiths, divorce rates range from 21%-34%.[199]

Another problem may be that given the community property scheme of Texas family law, who pays for the policy?

In Texas, a spouse's separate property consists of:
(1) the property owned or claimed by the spouse before marriage;
(2) the property acquired by the spouse during marriage by gift, devise, or descent; and

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[196] Kelly McClure, *Top 10 Things Every Woman (and Her Husband) Should Know Before Filing for Divorce*, 49 The Advoc. (Texas) 55, 59 (2009) (citing John Tierney, *The Big City; A New Look at Realities of Divorce*, N.Y. Times, Jul. 11, 2000.

[197] This means that on the petition of either party, the court may grant a divorce on the basis that the marriage has "become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation." Tex. Fam. Code § 6.001 (West 2011).

[198] "The chance of a successful relationship born of infidelity is not even one in 100." http://www.drphil.com/articles/article/127.

[199] "A Biblical Worldview Has a Radical Effect on a Person's Life," Barna Research, 2003-DEC-01, at: http://www.barna.org/. *See also* http://www.religioustolerance.org/chr_dira.htm.

(3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage.[200]

Everything else is acquired during the marriage is community property.[201] If the premiums are paid with community property (say, the husband's wages), then there is no problem, since a judge can divide community property equitably at the time of dissolution. If, however, a husband paid into the policy with his separate funds, (say, from an inheritance) then a judge could not distribute separate property and tracing would allow him to claim the insurance payout for himself, instead of sharing the policy with his wife. Tracing is the "process of establishing that property, whether separate or community has retained its character during marriage though it has changed in form."[202] It would allow the husband to use separate funds to purchase the insurance, unbeknownst to his wife, and then collect on the policy after divorce.

This would have the exact opposite effect as we hoped. It would create an investment opportunity for the spouse who has capital and forethought. This problem could be solved with an exception to the tracing rule: regardless of the status of the money (separate or community property) used to buy the policy, the policy will cover divorce costs for both the husband and wife in whatever distribution the judge sees as equitable. That is, when mandatory divorce insurance is put into play, there is a clause that indicates that the payor of the policy is irrelevant to the payout.

A further problem still is how we keep couples paying their divorce insurance bills. That is, do we force couples to get divorced if they refuse to, or are unable to, pay the bills? Forcing divorce is surely against Texas public policy, and therefore not a reasonable solution. Instead, refusal to pay the divorce insurance premiums would be similar to if you refuse to pay another insurance bill: if you failed to pay premiums, you lack coverage and must pay out of pocket. But again, the analogy needs help to stretch in order to cover this scenario. Any time a driver is pulled over for speeding, or a broken tail light, or any other driving offense, the officer asks for proof of insurance, and if that insurance is not current or sufficient, the officer could issue an additional ticket. No one polices marriages in quite the same way, but there are a couple of safeguards that could be put in place. For example, any couple filing a joint tax return could be required to provide proof of insurance. Other benefits (estate, medical, employment) ordinarily given to married couples could also require proof of insurance, in order to encourage couples to continue paying their premiums.

Lastly, and perhaps most intuitively, the right to drive a car just feels different than the right to marry. The cause of this conclusion may be because the Supreme Court has been explicit in calling the right to marry a "fundamental right."[203] More likely, however, is probably that it *just feels* different. Taking away someone's right to drive a car based on their economic status doesn't leave the same sting in our hearts as when we apply it to getting married. When someone has a car, we have the luxury of assuming they can afford the car itself, the gas to put in it – and insurance is just another expense. When it comes to marriage, however, all you need is love. Insurance is dry and technical and never gives someone warm or fuzzy thoughts, and perhaps that is enough of a reason to not apply it to marriage.

Convinced? Then you have been entranced by the song of the over-optimism sirens, and you've crashed into the rocks and died.[204] Marriage is not a utopian state, as evidenced by the fact that it is not sustainable for perhaps one-half of the people who try it. Hank and Whitney sure aren't feeling warm or fuzzy as they fight over who gets the frequent flyer miles, and no doubt they *both* would prefer to have an insurance company covering the costs of their attorneys. Not to mention, contrary to the claim that love is all you need, Texas charges for a marriage license,[205] in addition to several other marital requirements. If we really believed that all people (or even just all heterosexual couples) should be allowed to marry because the power of love should not be impeded, then perhaps charging for marriage licenses, having minimum age requirements, and prohibi-

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[200] Texas Family Code § 3.001 (West 2011).
[201] Id. § 3.002.
[202] Chavez, L., Community Property: the Concept of Tracing Ownership. (pp. 51).
[203] "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 1824, 18 L. Ed. 2d 1010 (1967).
[204] Homer. *The Odyssey*. Trans. Robert Fagles. New York: Viking, 1996, Book 12, 41-58. Admittedly, the sirens in the original text were not "over-optimism sirens."
[205] How much is a marriage license? "$31 - $71 cash, so don't leave home without it! The fees may vary from Texas county to county." http://www.usmarriagelaws.com/search/united_states/texas/marriage_licenses/travis_county_clerk.shtml.

tions against cousins to marrying should be questioned. Ultimately, these requirements are acceptable to our public policy, and divorce insurance should be no different.

V. Conclusion

Psychology and behavioral science may offer some degree of predictability in human behavior, but the difficulty is not in making predictions. Rather, it lies in altering the law in a way that guides individuals towards better choices. Over-optimism is a powerful bias, but not so powerful that it cannot be overcome to some degree. Over-optimism, and the near-delusional effects it produces, become all too clear when we look at Hank and Whitney in the wake of divorce battles leaving ex-wives low on cash, self-esteem and marriage marketability. In some ways, over-optimism is almost romantic – and perhaps it is what we are really feeling when we try to describe feelings of love and infatuation. Scientists also point out that over-optimism is something of a survival mechanism (studies proving that optimistic cancer patients have a greater chance of survival than pessimistic ones).[206] But given the hardship that an unexpected divorce can cause, our minds' own insistence that "divorce just won't happen to me" certainly will not help Whitney. Combining our knowledge of the human psyche with the power of the law may give us an opportunity to increase human welfare when it comes to divorce.

Family law is complicated and emotional, and the suggested solutions will not change that. Divorce insurance would take some of the weight off of family law judges and offer some degree of a safety net for some of those spouses whose lives would otherwise be financially impaired by divorce. The law has an opportunity to correct and guide individual choices in order to maximize happiness, and that opportunity should be seized.

VI. Epilogue

Less than two months after completing this article the author discovered that Wedlock Divorce Insurance had gone out of business. The website now directs users to a parent company and states,

> WedLock[sm] policies are not currently available, but we are actively looking for underwriting relationships that will help us relaunch and move to the next phase which will also provide for a long term 'Successful Marriage Benefit' for those policy holders that do not divorce, thereby financially incenting them to stay married.[207]

Perhaps the world is not yet ready for private divorce insurance, but this does not change the argument that making policies mandatory would create a viable business model.

Finally, the author was engaged throughout the writing of this article and less than one month after completing it, she got married. To be sure, she did not look into purchasing divorce insurance, because, of course, she does not need it. Further, if divorce insurance were mandatory, she would resent such a paternalistic law. Her marriage is different than all those other fools' marriages, which so often end in divorce. It is certain that she and her husband will live happily ever after.

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[206] Onstot, Ken, *supra* note 4.
[207] http://www.safeguardguaranty.com/Learn_more.html

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.*), Sallyee Smyth (*S.S.S.)*

DIVORCE
STANDING AND PROCEDURE

DIVORCE ACTION COULD NOT BE TRANSFERRED BECAUSE TFC REQUIRES DIVORCE AND SAPCR TO BE JOINED IN THE COUNTY WHERE VENUE FOR DIVORCE WAS PROPER

¶13-2-01. ***In re Hurley,*** -- S.W.3d --, 05-13-00001-CV, 2013 WL ####### (Tex. App.—Dallas 2013, orig. proceeding) (02/13/13).

Facts: Husband filed a SAPCR and petition for divorce in Grayson County. At the time, no other court had continuing jurisdiction over the Children, and Husband had lived in the county for more than 90 days, making venue in Grayson County proper. Wife filed a motion to transfer venue to Cameron County, where she lived with the Children. Trial court granted her motion to transfer, and Husband's motion for reconsideration was denied.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: Wife argued that the divorce could be transferred under either TFC 155.202(b), which permits transfers of a SAPCR for convenience of the parties, or Tex. Civ. Prac. & Rem. Code 15.002. However, venue provisions of TCPRC do not apply to cases governed by TFC 6.406. Further, TFC 6.406 requires joinder of a SAPCR with a divorce proceeding unless another court has continuing jurisdiction over the children, and under TFC 103.001(a), venue for a SAPCR is in a county where the Child resides *unless* venue is fixed by a divorce proceeding. Husband and Wife both agreed that venue was proper in Grayson County. Because TFC requires that the divorce and SAPCR, having been properly filed, must proceed together in the county of Husband's choosing, trial court abused its discretion in transferring the case.

DIVORCE
DIVISION OF PROPERTY

AN ORDER PROVIDING ONLY FOR THE DIVISION OF THE PROCEEDS FROM THE SALE OF A HOUSE DID NOT "DISPOSE" OF THE PROPERTY; TRIAL COURT HAD NOT DIVIDED THE OWNERSHIP RIGHTS OF THE PROPERTY, AND THEREFORE TRIAL COURT IMPROPERLY DISMISSED WIFE'S SUIT FOR PARTITION

¶13-2-02. ***Otto v. Otto,*** -- S.W.3d --, 2012 WL 6582558 (Tex. App.—Eastland 2012, no pet. h.) (12/13/12).

Facts: Husband and Wife divorced. The divorce decree contained provisions regarding a piece of property owned by Husband and Wife, stating that the parties agreed to sell the home and Husband agreed to pay Wife specific amounts depending upon the final sale price. Husband and Wife agreed not to sell the property for less than $2400 per acre unless they mutually agreed in writing. The property could not be sold for more than the agreed-upon price, but Husband and Wife could not agree on a lower price. Wife filed suit for partition of

the property, claiming that the trial court did not divide the property in the divorce decree. Husband filed a plea to the jurisdiction requesting that Wife's claim be dismissed because the property had been divided and therefore the trial court lacked jurisdiction to hear Wife's suit. The trial court dismissed Wife's claim. Wife appealed.

Holding: Reversed and Remanded

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. But if, in its divorce decree, a trial court fails to divide community property, the husband and wife become tenants in common or joint owners of that property. Post-divorce partition is appropriate to address an undivided or overlooked asset. Res judicata does not bar such a suit for partition if the trial court did not divide the property made the subject of partition. Here, except for the right to proceeds of the sale, no other rights of ownership were divided by trial court, such as who had the right to possess the property, who was responsible for repairs or mortgage payments pending sale, and what relief the parties were entitled to if the property did not sell. Additionally, the property was not listed in either section of the decree entitled "Property to Husband" or "Property to Wife." The evidence showed that trial court did not divide ownership of the property, and therefore had jurisdiction to hear Wife's partition suit.

Editor's Comment: *It's natural to focus on the terms regarding the sale of the home, but don't forget to actually award the house that's on the market to one party or the other, or at least award a one-half undivided interest in to each party! R.T.*

Editor's Comment: *This case is an example of the importance that real property be divided even if the parties are going to sell the property. The divorce decree should order that the parties continue to own the real property as tenants-in-common with undivided interests It also emphasizes that it is critical that a real estate agent be agreed upon or appointed and that the parties be ordered to follow the recommendations of the agent/broker regarding the beginning listing price for the property, the timing and amount of reduction of listing price for the property and the final sales price and terms of the sale of the property. J.A.V.*

LIEN ON HUSBAND'S SEPARATE PROPERTY HOME TO SECURE MONEY JUDGMENT FOR WIFE WAS A DERIVATIVE OF MONEY JUDGMENT OWED TO WIFE FROM FIRST DIVORCE FROM HUSBAND AND WAS AN IMPLIED PURCHASE MONEY LIEN

¶13-2-03. ***Barras v. Barras,*** -- S.W.3d --, 2013 WL 266250 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (1/24/13).

Facts: Husband and Wife divorced. They agreed that Husband would pay Wife $150,000 in yearly $25,000 installments, and that once Husband had paid Wife the full amount, Wife would transfer her community interest in their home (the "Sunset property") to Husband. They also agreed that if Husband defaulted, the Sunset property would be sold, and the balance due on the $150,000 payments would go to Wife. Husband only made one $25,000 installment payment, but Wife did not enforce the sale of the house. Two years later, Husband and Wife reconciled. Wife released her lien on the Sunset property and sold it, applying the proceeds toward the purchase of the couple's new home (the "Glenwood property"). The deed to the Glenwood property was solely in Husband's name. The parties refinanced the mortgage on the Glenwood property and applied a joint tax refund toward repairs on the property. Eight years later, the parties again filed for divorce. Husband requested that trial court confirm his separate property, award him a disproportionate share of the community estate, and order his separate estate reimbursed from the community estate and from Wife's separate estate. Trial court awarded Wife $125,000, as her sole and separate property, payable by Husband and secured by a deed of trust against the Glenwood property, specifically finding that the award was "a derivative of the mon-

ies awarded to [Wife]" in the parties' first divorce. Trial court also found that the community estate was entitled to reimbursement from Husband's estate for principal reduction and repairs made to the Glenwood property. Husband appealed.

Holding: Affirmed

Majority Opinion (J. Christopher, J. Jamison): 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. Husband claimed that the lien imposed against the Glenwood property to secure the money judgment awarded to Wife was constitutionally impermissible. However, the lien was not imposed to achieve a "just and right" division of the marital property, but was an implied purchase money lien. Wife was entitled to $150,000 from the prior divorce, but was only paid $25,000. Proceeds from the sale of the Sunset property went toward the purchase of the Glenwood property, even though Wife was still owed $125,000. Therefore, the lien on the Glenwood property in favor of Wife was a derivative of the debt owed to Wife from the first divorce.

Husband argued that Wife's pleadings were deficient and that she did not specify that she was seeking to enforce the prior divorce decree. However, the record showed that both parties testified regarding the prior judgment, that Wife was owed $150,000 but only received $25,000, and that Wife released her lien on the Sunset property because the money was going toward their new family home. Therefore, the issue was tried by consent. Further, the record indicated that Wife did not intend to release the underlying debt when she released the lien on the Sunset property.

Husband further argued that trial court in ordering the community estate to be reimbursed from Husband's separate estate. Reimbursement is an equitable right that arises when the funds or assets of one estate are used to benefit and enhance another estate without itself receiving some benefit. A trial court's discretion in evaluating a claim for reimbursement is equally as broad as that discretion exercised by a trial court in making a just and right division of the community estate. Husband argued that trial court issued an improper "dollar for dollar" reimbursement on the reduction of principal, without considering any tax or community benefits. However, he presented no evidence tending to show the existence of, and his separate estate's entitlement to, any such offsets.

Concurring Opinion (J. Frost): Husband did not raise his complaint that trial court committed fundamental error by imposing a lien on Husband's separate-property homestead to secure a money judgment for Wife in trial. Therefore, Husband did not preserve the error for appeal. Husband asserted that the error was "fundamental error," and therefore he was entitled to raise the issue for the first time on appeal. The fundamental-error doctrine applies in the following situations: (1) when the record shows on its face that the court rendering the judgment lacked jurisdiction; (2) when the alleged error occurred in a juvenile delinquency case and falls within a category of error as to which preservation of error is not required; and (3) when the error directly and adversely affects the interest of the public generally, as that interest is declared by a Texas statute or the Texas Constitution. The first two situations were not applicable to this case. Husband's private interests in his separate property homestead were affected, but the interest of the public generally was not directly and adversely affected.

Editor's Comment: *This case includes a thorough discussion of purchase-money liens and reimbursement law. But did the court in the first divorce case actually divide the parties' interest in the Sunset property? See Otto v. Otto, supra. J.V.*

Editor's Comment: *This is a long and somewhat complex opinion but it has great explanation of purchase money liens and the fundamental error doctrine. Definitely one to save and refer back to. R.T.*

WIFE WAS ENTITLED TO WASTE JUDGMENT, WHEN HUSBAND DID NOT DISCLOSE ALL OF HIS BANK ACCOUNTS AND COULD NOT ACCOUNT FOR OVER $300,000 OF HIS INCOME DURING PENDENCY OF DIVORCE PROCEEDINGS

¶13-2-04. ***Puntarelli v. Peterson,*** -- S.W.3d --, 2013 WL 561484 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (02/14/13).

Facts: Husband and Wife divorced, after a trial in which a jury determined they were common-law married. Husband filed a request for jury trial. A bench trial proceeded to determine custody, visitation, and property division issues. Trial court entered temporary orders obligating Wife to maintain all of the parties' properties and expenses, except those related to the townhome where Husband lived. During the next five years, after taking into account rent received on various properties, Wife's expenses exceeded income by about $600,000. Husband did not contribute to the real estate, assets, or other expenses during this period, but did pay child support. Husband testified that his income ranged from $200,000 to $250,000 per year. Husband introduced one year of bank statements that showed transfers from an undisclosed bank account, and Husband acknowledged that his paycheck was deposited directly into the undisclosed account. Husband also testified to having $2,000 per month in excess net income, and said he had liquefied his retirement account during the parties' separation, but he could not account for any of this money. Wife said she calculated the amount of waste using Husband's testimony regarding his income and expenses, and her calculation of wasted funds amounted to over $325,000. Trial court awarded a waste judgment of $160,000 to Wife. Husband appealed, arguing that the district court "erred by predicating its division of the parties' marital estate on an erroneous valuation of the parties' community estate."

Holding: Affirmed

Opinion: Husband challenged the amount of trial court's waste judgment in favor of Wife. A presumption of "constructive fraud," i.e., waste, arises when one spouse disposes of the other spouse's interest in community property without the other's knowledge or consent. A waste judgment can be sustained by evidence of community funds unaccounted for by the spouse in control of those funds. Husband failed to disclose at least one bank account containing community funds into which his income was deposited and failed to account for or explain the depletion of the community funds in his control over the five-year pendency of the divorce proceedings spent without Wife's consent. Husband failed to establish the fairness of his use of community funds, and therefore Wife was entitled to the waste judgment, which was well within trial court's discretion, considering that the actual amount of wasted funds was over $325,000.

Editor's Comment: *This case reminds us that to make a prima facie case of waste, all one must do is show that the other spouse disposed of community property without the first spouse's consent. No dishonesty of purpose or intent to deceive need be proved. Once the prima facie case is made, the burden shifts to the other spouse to prove the "fairness" of the disposition of the community property. J.V.*

Editor's Comment: *This case doesn't sit well with me. I really wish the husband would have challenged the trial court's waste judgment more broadly and specifically including the amount of the judgment because from my vantage point the evidence at trial looked shaky. R.T.*

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DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

WIFE NOT BARRED BY RES JUDICATA IN SEEKING ENFORCEMENT OF DECREE RATHER THAN A NEW TRIAL AND RELITIGATION OF PROPERTY DIVISION.

¶13-2-05. ***In re Marriage of Bivins,*** -- S.W.3d --, 2012 WL 6099066 (Tex. App.—Waco 2012, no pet.) (12/06/12).

Facts: While divorced pending, temporary orders were entered giving Husband exclusive possession of the residence and barred Wife from access to the residence. Subsequently, parties signed an MSA that resolved all issues and in which Husband agreed to vacate the residence by April 1, 2006. On August 4, 2006, decree entered based upon MSA. At some point in time, the agreements fell apart and both parties filed multiple motions to enforce were filed. After a hearing on one such motion, Husband was ordered to vacate the residence on August 18, 2006. On August 19, Wife took possession of a "demolished home." In December 2006, Mother filed a suit for damages for repairs to make the home livable and for attorney's fees. The divorce decree had provided in part: "Larry Don Bivins is ORDERED to vacate the [residence] on or before April 1, 2006, and represents that all improvements are in workmanlike state of repair at the time of signing this Decree, and will be of same or better repair on date of delivery."After trial, the court awarded Wife a money judgment for cost of repairs and attorney's fees. On appeal, asserted that Wife's claims were barred by res judicata.

Holding: Affirmed

Opinion: Husband argues that Wife's claim for damages should have been decided during the divorce, and that at the time Wife took possession of the residence the trial court still had plenary power. Therefore, Wife should have sought a new trial rather than wait until after trial court lost plenary power to sue for damages.

Wife did not challenge the property division in the decree. By the time Wife took possession of the residence, the property had already been divided. She had to choose between to re-litigate the property division or seek damages for Husband's failure to comply with the property division. She choose to seek damages under TFC 9.010 (a), which states that "If a party fails to comply with a decree of divorce or annulment and delivery of property awarded in the decree is no longer an adequate remedy, the court may render a money judgment for the damages caused by that failure to comply."The issues involved in the divorce are not the same as in a suit for damages. Therefore *res judicata* does not apply.

WIFE DEEDED AN UNDIVIDED ONE-HALF INTEREST IN HER SEPARATE PROPERTY TO HUSBAND, AND THEREFORE TRIAL COURT WAS ENTITLED TO PARTITION THE PROPERTY AS PART OF THE DIVORCE DECREE; TRIAL COURT WAS ENTITLED TO CONSIDER HUSBAND'S USE OF HIS SEPARATE PROPERTY RETIREMENT ACCOUNT IN IMPROVING COMMUNITY PROPERTY WHEN DIVIDING ASSETS

¶13-2-06. ***Motley v. Motley,*** -- S.W.3d --, 2012 WL 6569273 (Tex. App.—Dallas 2012, no pet.) (12/13/12).

Facts: Husband and Wife divorced. Before Husband and Wife married, Wife owned real property in Farmersville as her separate property. After Husband and Wife married, Wife unsuccessfully attempted to refinance the property. Husband agreed to sign the note, and as part of the transaction, Wife signed a deed that gifted an undivided one-half interest of the property to Husband. The couple lived on the Farmersville property during their marriage, although they purchased another property in Merit, on which they operated a farm.

When Husband and Wife divorced, they reached a Rule 11 agreement, which stated that the Farmersville property would be listed for sale. Wife later moved to set aside the agreement, but trial court denied her motion. After a trial, trial court signed a divorce decree that included an order for the sale of both the Farmersville and Merit properties. Net proceeds from the Farmersville were to be split by awarding 65% to Wife and 35% to Husband, and net proceeds from the Merit property were to be split evenly. Trial court awarded to Husband all accounts, annuities, pensions and life insurance benefits in his name. Trial court found that although community contributions had been made to Husband's retirement account, Husband had withdrawn over $50,000 to use for improvements on the Merit property and that applying the community-out-first presumption, there were no community funds remaining in his account. Wife appealed, claiming trial court erred by ordering the sale of property that was her separate property, ordering that proceeds be used to pay community debtors, undervaluing Husband's retirement account and awarding him the entire community interest, and awarding Husband a reimbursement claim for a down payment on property purchased by the couple during marriage.

Holding: Affirmed

Opinion: When reviewing an alleged property characterization error, we must determine whether the trial court's finding is supported by clear and convincing evidence. A deed for property from one spouse as grantor to the other spouse as grantee creates a presumption that the grantee spouse received the property as separate property by gift. The presumption may be rebutted by Proof the deed was procured by fraud, accident, or mistake. Here, Wife admitted signing the deed for the Farmersville property, but denied knowing that the deed transferred an undivided one-half interest to Husband at the time. Wife claimed that had she known the deed would convey this interest to Husband, she never would have signed it. However, trial court was free to disbelieve her testimony and conclude that Wife made a gift of one-half of the property to Husband, and therefore characterizing the property as each party's separate property.

Wife also claimed that because she revoked her consent to the Rule 11 agreement, and she did not otherwise agree or consent, the trial court had no authority to order the sale, because the community had no interest in the property. However, at trial, Wife only argued that trial court could not order the sale because it was entirely her separate property. Wife's lack of specificity in objecting to the sale did not preserve this issue for appeal. Even if the issue were preserved, trial court still did not err in ordering the sale of the property. A partitioning of separate property may be done concurrently with a divorce proceeding.

Wife argued that trial court erred in valuing the community interest of Husband's retirement account at $14,484, and that the community interest was in fact $50,000. However, trial court found that Husband had withdrawn over $50,000 from the account to use for improvements on the couple's property. Husband also sold community assets without Wife's consent. Trial court was entitled to take that evidence into account when dividing any remaining community interest in the account.

Editor's Comment: *Why is a divorce court ordering the sale of realty held 50/50 as the parties' separate property? That property was not, and could not be, part of the divorce. But the court did decide the disputed characterization issue. Moreover, why make the parties return to court in another suit to litigate whether the court should order the property sold? As the court said, "Although a partitioning of separate property is not part of a divorce proceeding, it can be done concurrently with the divorce proceeding." J.V.*

SAPCR
STANDING AND PROCEDURE

UNDER TFC 153.434, A GRANDPARENT WHO REQUESTS ACCESS TO GRANDCHILDREN IN THE ALTERNATIVE TO ADOPTING THE GRANDCHILDREN LOSES STANDING TO REQUEST ACCESS ONCE THE GRANDCHILDREN ARE ADOPTED BY A PERSON WHO IS NOT A STEPPARENT

¶13-2-07. ***Martinez v. Estrada,***-- S.W.3d --, 2012 WL 6028990 (Tex. App.—San Antonio 2012, no pet. h.) (12/05/12).

Facts: Paternal Grandmother and both Maternal Grandparents of the Children petitioned to adopt the Child. The parental rights of the Children's parents had been previously terminated. Grandmother also sought possession and access to the Children in the alternative. Grandparents moved to dismiss Grandmother's petition. Trial court denied Grandparents' motion to dismiss but granted their request for adoption, effectively denying Grandmother's request for adoption. Trial court also signed an order allowing Grandmother possession and access to the Children. Grandparents appealed, stating the trial court did not have subject matter jurisdiction because Grandmother lacked standing to bring suit or request relief.

Holding: Reversed and Rendered

Opinion: Standing is a component of subject-matter jurisdiction and must be established in order to maintain a lawsuit under Texas law. Grandparents must meet specific standing requirements to pursue a claim seeking access or possession. TFC 153.434 states that "A biological or adoptive grandparent may not request possession of or access to a grandchild if: (1) each of the biological parents of the grandchild has: (A) died; (B) had the person's parental rights terminated; or (C) executed an affidavit of waiver of interest in the child ...; and (2) the grandchild has been adopted ... by a person other than the child's stepparent." Here, the rights of both biological parents had been terminated, and the Children were adopted by "a person other than the child's stepparent." Grandmother lost standing to request access once Grandparents' request to adopt the Grandchildren had been granted.

FAILURE TO MAKE A RECORD OF IN-CHAMBERS INTERVIEW IS GENERALLY ERROR; HOWEVER, FAILURE TO RECORD THE IN-CHAMBERS INTERVIEW OF A CHILD INVOLVED IN A CUSTODY DISPUTE LIKELY MADE NO DIFFERENCE IN THE OUTCOME OF THE PROCEEDINGS

¶13-2-08. ***In re A.C.,*** -- S.W.3d --, 2012 WL 6054803 (Tex. App.—Texarkana 2012, no pet. h.) (12/06/12).

Facts: Mother and Father both filed motions to modify the custody order.Throughout the subsequent trial, the judge mentioned the multiple prior appearances by both parties before him regarding their custody dispute. The judge stated he was convinced that the conflict continued because both parties were "totally, absolutely, completely not making any effort at all to resolve any of the issues that arise regarding your child." Both parties requested the Child be interviewed by the trial court in chambers with only the amicus attorney present at the conclusion of the presentation of evidence and arguments pertaining to the parties' motions to modify. The trial court granted the request in open court and neither party requested that a record be made. Father's earlier written motion for the trial court to conduct an in-chambers interview did not include a request that a record be made. Section 153.009(f) requires that a record be made if the child is 12 years old or older upon

the motion of any party. Father's request that he be appointed the child's primary conservator was denied. Father appealed.

Holding: Affirmed

Opinion: Father asserted trial court erred in not making a record of its interview with the child. Generally, a complaint about a failure to make a record of an in-chambers interview is not preserved when no request for a record is made. It could not be clearly determined whether Father had an opportunity to object to the failure to record the interview. Therefore, the court of appeals assumed arguendo that the failure to make a record was error. It then noted that the information that would have been obtained in the interview was strictly supplemental to the evidence taken in court, the purpose of the interview being to aid the court in making its determination. Therefore, the court determined that the failure to record the interview would have caused a different outcome in the proceedings.

Editor's Comment: *The court noted that the trial court has discretion to interview a child alone and "that the information obtained by the trial court in such an interview is strictly supplemental to the evidence taken in court. . . . Nothing in the statute indicates that the child in such an interview is to be sworn and nothing reflects that anything resembling the Texas Rules of Evidence should apply during the interview." J.V.*

Editor's Comment: *Harmless error rule strikes again. Doesn't matter what the law says. If it doesn't change the outcome of the case, it's not going to cause reversal. M.M.O.*

PRETRIAL TESTIMONY REGARDING MOTHER'S INCOME MUST HAVE BEEN AUTHENTICATED AND PROPERLY ADMITTED INTO EVIDENCE BEFORE TRIAL COURT COULD CONSIDER IT IN ORDERING MOTHER TO PAY CHILD SUPPORT. REQUIRED LITIGATION DEPOSIT NOT AGAINST PUBLIC POLICY.

¶13-2-09. ***In re C.H.C.,*** -- S.W.3d --, 2013 WL 600204 (Tex. App.—Dallas 2012, no pet. h.) (01/03/13).

Facts: Mother and Father had two Children before they divorced in 2004. The divorce decree named Mother and Father JMCs and ordered Father to pay $500 per month in child support. The decree also ordered each parent to pay half of the Children's school tuition in 2004 and that $75,000 from one of Father's investment accounts be used to establish an educational fund for the Children. Two years later, a judge ordered that Father's possession of the Children be reduced and gave Mother the right to designate the Children's primary residence with no geographic restrictions. The order also increased Father's child support to $2,000 per month, ordered Father to pay $27,000 in additional child support accumulated while the modification order was pending, ordered Father to pay $30,000 yearly into the Children's educational account, and to pay Mother's attorney's fees of more than $400,000. Three years later, Father filed a motion to modify the parent-child relationship. The presiding judge recused herself, and another Judge was appointed to the case. Mother and Father signed an MSA, naming them JMCs, agreeing that the Children would reside in Dallas County or contiguous counties, agreeing that Father would pay all expenses for the Children to attend Fairhill School in Plano, and that Father and his current Wife would pay Mother $250,000. Mother and Father agreed that Father's prior debts to Mother would be extinguished by the terms of the MSA. They also agreed that if either parent filed a new suit against the other, the suing parent would post $100,000, half of which would immediately go to the non-suing parent. They further agreed that a specific judge would be the binding arbiter of any disputes regarding the MSA. The presiding Judge approved the MSA and signed the final order, providing that Father would have the right to designate the Children's primary residence, dividing possession between Mother and Father, ordering Mother to pay monthly child support of $1,333.20, and entering judgment against Father for the agreed $250,000 debt to Mother at 5% interest. The Judge then recused himself, and another judge was appointed to hear any further matters. Mother appealed, arguing that the Judge had no authority to sign orders, that the MSA was not a valid contract and that its litigation-deposit requirement of

$100,000 was against public policy, that the final order deviated from the MSA, and that the monthly child support obligation was imposed without any evidence of Mother's income.

Holding: Affirmed in Part, Reversed and Remanded in Part as to amount of child support

Opinion: Mother argued that the Judge's orders were void because there was no order assigning the Judge to hear the case on file. Mother also argued that the assignment order was only valid for one day, and therefore any orders signed after that day were void. However, there is no statutory requirement that an assignment order be filed in the papers of the court, or that an original or copy of the assignment order be maintained by anyone. A faxed copy of the order was received by Mother's counsel during the proceedings, and a faxed copy of lost or destroyed records may be substituted for the originals. The copy was filed with the court clerk as a supplemental record, and therefore was part of the official record of the proceedings. Additionally, interpreting the order assigning the Judge as only being valid for one day would have made it impossible for the Judge to hear any matters in the case. The order gave the Judge authority to "complete trial of any case" and to "pass on motions for new trial and all other matters growing out of" the assigned case. Under TRCP 245, the court must give parties as least 45 days' notice of a trial setting. Father had filed his petition to modify only 39 days before the Judge was assigned to the case. The only motion pending when the Judge was assigned was Father's motion to ask the presiding judge to reconsider her order recusing herself and that motion had not been pending for three days prior to the Judge's appointment, per TRCP 21. There were no motions the Judge could have heard on the day he was assigned. Considering the order as a whole and the context in which it was issued, the Judge had authority to sign orders after the date specified in the assignment order.

Mother argued the MSA could not be upheld because it lacked consideration, any consideration failed, the agreement was ambiguous and lacked essential terms, there was an underlying mutual mistake, and there was no meeting of the minds between the parties. Mother argued that the agreement lacked consideration because she gained nothing from the agreement. However, the agreement ordered Father's Wife to pay Mother $250,000, since Father had no assets at the time. Mother further asserted that the order to pay her $250,000 failed because Father and Wife testified they no longer had that money immediately available. However, Father testified he could make monthly payments, if he were not required to pay Mother's substantial attorney's fees. The final order did not award attorney's fees to either side, and entered judgment against Father for the $250,000 at 5 percent interest. The MSA provided that the terms of payment of the debt would be "negotiated in a subsequent agreement." There was no subsequent agreement, so the debt was not immediately due to Mother when the final order was signed, and there was no evidence Father could not make the monthly payments he promised to make. Mother also argued that there was mutual mistake because the trial court did not clarify whether Father's prior judgment debts would be extinguished upon full payment, partial payment, or as long as Father made monthly payments. But Mother did not show that Father mistakenly expected trial court to make that determination. Mother further argued that there was no "meeting of the minds" regarding the provision that Father and Wife would pay Mother $250,000, because judgment was not entered against Wife in the case. Wife was not a party to the case, so trial court could not enter judgment against her. Mother argued that because certain terms of the MSA were left open for future negotiations that the MSA was not enforceable. Mother and Father expressly agreed that the trial court would provide the missing terms, and therefore impliedly agreed that the undecided terms were not material to enforcement of the terms on which they did not agree.

Additionally, Mother argued the litigation-deposit requirement violated public policy because it discouraged the parties from "filing suit where the safety or welfare and best interest of the children were at issue. However, the deposit did not apply to "an emergency suit alleging imminent danger of a child." Further, TFC provisions permitting trial court to award costs and attorney's fees have never been held to violate public policy, even if they discourage parties from bringing suit. Finally, Mother did not show the requirement would discourage her or Father from bringing suit where the safety, welfare or best interest of the Children were at issue.

Mother also argued that the terms of payment of the $250,000 judgment for her and the terms of the Children's enrollment in school, rendering the MSA unenforceable. A mediator clarified that payment of the $250,000 would extinguish Father's prior debts to Mother, which was reflected in the final order. The media-

tor also clarified that the Children were to remain in their school until "further order of the court or further agreement of the parties," which was reflected in trial court's final order. Mother did not challenge the mediator's authority to make these determinations.

A court may not judicially notice testimony from a prior hearing on a temporary order unless such testimony is properly admitted into evidence. At trial, Mother testified that she was self-employed, but there was no evidence of Mother's income or net worth. Father testified that at a pretrial hearing, Mother testified that she made "[about] 100,000 a year." However, the transcript of Mother's testimony at the pretrial hearing was not authenticated and offered into evidence, and accordingly could not be considered by the court for ordering Mother to pay child support.

Editor's Comment: *Why couldn't a trial court admit one party's testimony about what the other party testified to in a prior hearing? Wouldn't that be an admission by a party-opponent under Tex. R. Evid. 801(e)(2)? J.V.*

Editor's Comment: *In highly contested custody cases it is common to have multiple hearings before final trial. However, it is imperative to admit into evidence transcripts of those prior hearings because, otherwise, the appellate court won't likely consider anything that happened in those other hearings. R.T.*

Editor's Comment: *An interesting aspect of this case is the litigation-deposit requirement. I have used a form of the litigation-deposit requirement a few times. It is critical to include a provision that it not apply to an emergency suit alleging imminent danger to the child. J.A.V.*

SAPCR
PARENTAGE

PARENTAGE SUIT BROUGHT BY MOTHER OF 36 YEAR OLD ADULT DISABLED CHILD NOT BARRED BY STATUTE OF LIMITATIONS

¶13-2-10. ***Gribble v. Layton,*** -- S.W.3d --, 2012 WL 6055678 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (12/06/12).

Facts: Mother and Father had one Child. The Child was sick when he was born, and when he was four or five months old, he was diagnosed with mild mental retardation. The Child also suffered from epilepsy and had to have brain surgery to reduce the frequency of his seizures. Mother cared for the Child his entire life. When the Child was 36 years old, Mother brought suit, as the Child's guardian, against Father seeking to determine that he was the Child's biological Father and to request child support and medical support for the Child. In response, Father argued that Mother's action was barred by the statute of limitations. At a hearing before the trial court, Mother described the Child's medical history, and testified that the Child was incapable of supporting or taking care of himself. Father said that Mother did not tell him about the Child until the Child was nearly 20 years old and that he did not believe he was the Child's biological Father. Trial court granted Father's motion to dismiss, saying that Mother's suit was barred by the statute of limitation incorporated within former Tex. Fam. Code § 13.01(a), as enacted in 1983. Mother appealed.

Holding: Reversed and Remanded

Opinion: Under Tex. Fam. Code §160.602, an action to adjudicate parentage may be maintained by the child and other specifically enumerated persons, but once the child becomes an adult, only the adult child may maintain the action. However, there is no evidence that the legislature intended to divest a mentally disabled child of the ability to maintain an action to adjudicate parentage through a court-appointed guardian upon

reaching adulthood. Read in conjunction with Tex. Fam. Code § 160.606, which provides that an action to adjudicate parentage of a child having no presumed, acknowledged, or adjudicated father may be brought at any time and which was the limitations statute in effect at time Mother filed suit, Tex. Fam. Code § 160.602 does not preclude a mentally disabled adult child from maintaining an action to determine parentage through a court-appointed guardian.

Father argued that Tex. Fam. Code § 160.606 was unconstitutionally retroactive and that the appropriate statute of limitations in this case was TFC 13.01, as amended in 1983. The 1983 amendment to the statute provided that suits to establish paternity could be brought up until two years after the child became an adult. Father argued that unlike earlier versions of section 13.01, the 1983 version was expressly made retroactive and thus applicable to all persons under twenty years of age by providing that it applied to causes of action that were barred before its effective date. The plain language of the 1983 version of section 13.01, however, is made retroactive only to "claims that were barred before its enactment." Mother testified that the Child had been under the legal disability of unsound mind since his birth and offered testimonial evidence to support that claim. Under Tex. Civ. Prac.& Rem. Code 16.001, "[i]f a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period." Because the Child had been under a disability from birth, the statute of limitations period was tolled indefinitely, and Mother's suit was not barred before the 1983 enactment of TFC 13.01.

SAPCR
CONSERVATORSHIP

★★★TEXAS SUPREME COURT ★★★

UCCJEA DOES NOT VIOLATE SEPARATION OF POWERS DOCTRINE, OPEN COURTS PROVISION OF TEXAS CONSTITUTION, TEXAS EQUAL RIGHTS AMENDMENT, OR EQUAL PROTECTION CLAUSE OF 14TH AMENDMENT OF U.S. CONSTIUTION

¶13-2-11. ***In re Dean,*** -- S.W.3d --, 2012 WL 6634067 (Tex. 2012) (orig. proceeding) (12/21/12).

Facts: Mother and Father married in Texas, but separated a few weeks later. Mother, who was two months pregnant with Father's Child, moved to New Mexico without notifying Father. Father filed for divorce in Dallas County, and Mother was served with process in New Mexico. Mother delivered the Child in New Mexico, and when Father learned of the Child's birth, he amended his petition to request shared custody and to compel Mother's return to Dallas with the Child. Mother petitioned a New Mexico court to adjudicate custody according to New Mexico's Child Custody Jurisdiction and Enforcement Act, alleging that New Mexico was the Child's home state because he had lived there since birth, and requested that the Texas proceedings be dismissed. The Texas and New Mexico courts conferred. Although New Mexico found that New Mexico was the Child's home state, and determined that New Mexico was not an inconvenient forum, nor that either party had engaged in unjustifiable conduct, the court deferred to Texas to "make the first call." A Texas judge concluded that although New Mexico had jurisdiction and was the Child's home state, Texas had jurisdiction over the case because Father had filed the petition in Texas first. New Mexico subsequently dismissed Mother's suit without prejudice, even though the court believed New Mexico had jurisdiction and was the Child's home state. The New Mexico court stated that Mother's case could be refiled if in fact "it was discovered that Texas doesn't have jurisdiction." The Texas court appointed Mother and Father temporary managing conservators, granted Mother the right to establish the Child's residence in either Dallas or Albuquerque during appeals, and set guidelines for each parent's access to the Child. Mother appealed the New Mexico court's dismissal, and a New Mexico court of appeals had preliminarily determined that the New Mexico trial court had improperly deferred jurisdiction, but that appeal was still pending. Mother petitioned for mandamus relief

from the court of appeals in Texas while her New Mexico appeal was pending. COA denied her petition. Mother petitioned the Texas Supreme Court for mandamus relief.

Holding: Petition For Writ of Mandamus Conditionally Granted

Majority Opinion (C.J. Jefferson): Texas and New Mexico have both adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which provides guidance on how to determine which state has jurisdiction over child custody proceedings. Texas codified the UCCJEA in TFC chapter 152. The Act makes the child's "home state" the primary factor in determining which state has jurisdiction, and establish clear bases for a court to "take jurisdiction and …discourage[s] competing child custody orders" among different states. Jurisdiction over custody determinations is governed by the Act, regardless of whether there is an ongoing divorce. Unless a court finds it has jurisdiction under one of the four enumerated grounds in TFC 152.201(a), it cannot exercise jurisdiction over a child custody determination. The fact that the divorce action was filed first is irrelevant in determining jurisdiction over custody matters. The Child was born in New Mexico and had lived there since birth. Therefore, New Mexico was the Child's home state. When the Texas and New Mexico courts conferred, they should have more closely examined which state had jurisdiction under the Act to decide custody issues.

Father argued that if TFC chapter 152 gave New Mexico exclusive jurisdiction, it violated the separation of powers doctrine, the open courts provision of the Texas Constitution, the Texas Equal Rights Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The separation of powers doctrine is only violated when "the functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches." By codifying the Act in TFC chapter 152, the legislature did not prevent Texas courts from interpreting laws or determining whether the court had jurisdiction. The legislature merely subjected the courts' determinations to rational policy that considers the complexity of multi-state child custody disputes. Additionally Father argued that TFC 152.201(a) violated the open courts provision of the Texas Constitution, which provides that "[a]ll courts shall be open, and every person for an injury done to him…shall have remedy by due course of law." To establish a violation, Father had to show that he had a well-established common-law course of action that was restricted, and that the restriction was unreasonable and arbitrary when balances against the statute's basis and purpose. Even if Father could have established the first requirement, he did not show that the restriction was unreasonable or arbitrary. Father argued that if New Mexico was the Child's home state, the Act deprived Father of a remedy in Texas. However, the Act preserved the reasonable alternative for Father to pursue his custody claim in New Mexico, and Father did not plead or prove that New Mexico was an inadequate forum.

Father further argued that "home state jurisdiction" under the Act unconstitutionally deprived Father of immediate post-birth involvement, since Mother controlled where she lived prior to giving birth. To determine whether the Texas Equal Rights Amendment or the Fourteenth Amendment was violated, a court applies a three-step evaluation. First, it considers whether equality under the law was denied. If it was, a court determines whether equality was denied *because of* a person's membership in a protected class. If so, "the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest." Father was not denied equality under the law because of his gender. Residence is the determinative factor under the Act, and residence does not favor a particular gender.

Because the New Mexico court did not decline jurisdiction based on inconvenient forum or unjustifiable conduct by either party, the only grounds appropriate for deferring jurisdiction in a child custody determination under the Act, the New Mexico court improperly dismissed the case. The Texas trial court was ordered to confer with the New Mexico court and dismiss the child custody portion of the Texas proceedings.

Concurring Opinion (J. Lehrmann): A New Mexico court may decline jurisdiction if it determines that New Mexico is an inconvenient forum. Texas had personal jurisdiction over both parties. Because the divorce suit was pending in Texas, child support and custody matters may be litigated in Texas, even if New Mexico has jurisdiction over custody matters. A New Mexico court may lack jurisdiction over Father for support and property matters, which would make New Mexico an inconvenient forum, since the divorce and the custody issues would then be litigated in two states. When that is the case, a New Mexico court may decline jurisdiction under the Act.

SAPCR
POSSESSION AND ACCESS

TFC 153.010(A) ALLOWED TRIAL COURT TO ORDER FATHER TO ATTEND COUNSELING BEFORE HAVING UNSUPERVISED VISITATION WITH CHILDREN

¶13-2-12. ***Acosta v. Soto,*** -- S.W.3d --, 2012 WL 6608526 (Tex. App.—El Paso 2012, no pet. h.) (12/19/12).

Facts: Mother and Father divorced. Initially, because there was a pending criminal matter alleging indecency with a child (his Stepdaughter), Father was not allowed to visit his Children. During a hearing, Father said the charges had been dismissed. But Mother told the court that Father had failed to complete the counseling required in an agreed protective order and that the court had previously denied supervised visitation because Father had failed to comply with the counseling requirement. Father admitted he had not completed the counseling, and Mother expressed concern with Father's visiting the Children without a therapist present. The trial court found the presence of a therapist would be in the Children's best interest. The decree ordered Father to attend therapeutic family counseling for six months before he would be allowed supervised visitation with his children. Father appealed.

Holding: Affirmed

Opinion: Under TFC 153.010(a), a court may order a party to attend counseling with a mental health professional "[i]f the court finds at the time of a hearing that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child...." Father admitted he failed to comply with previous court-ordered family counseling stemming from a protective order involving his Stepdaughter. Although the charges were ultimately dismissed, both the trial court and Father acknowledged the event was traumatic for the Children. In light of the allegations of abuse, the protective order, Father's failure to comply with prior counseling experience, and Father's own acknowledgement that the experience was traumatic for the Children, trial court's order of therapeutic visitation was not an abuse of discretion.

MOTHER'S RIGHT TO HAVE POSSESSION OF CHILDREN EVERY SUNDAY FOR RELIGIOUS INSTRUCTION DID NOT VIOLATE ESTABLISHMENT CLAUSE

¶13-2-13. ***Roberts v. Roberts,*** -- S.W.3d --, 2012 WL 6604487 (Tex. App.—San Antonio 2012, no pet. h.) (12/19/12).

Facts: Mother and Father divorced. In the divorce decree, the trial court ordered that Mother had right to take the Children to church on Sunday mornings during Father's periods of possession. Father appealed asserting that this provision violated the Establishment Clause of the United States Constitution.

Holding: Affirmed In Part (possession), Reversed and Remanded in part (property division)

Opinion: Establishment clause not violated because Father's possession was extended to compensate for the time Children were at church with Mother.

MOTHER'S IRRATIONAL BEHAVIOR AND DESIRE TO TAKE HER CHILDREN TO HONG KONG WITH HER SUPPORTED GRANTING FATHER CONTROL OVER CHILDREN'S INTERNATIONAL TRAVEL, BUT DID NOT SUPPORT TRIAL COURT'S ORDER REQUIRING MOTHER TO NOTIFY STATE DEPARTMENT AND EMBASSY OF HER TRAVEL RESTRICTIONS

¶13-2-14. ***Messier v. Messier,*** -- S.W.3d --, 2012 WL 6725642 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (12/28/12).

Facts: Mother and Father divorced. Mother was from Hong Kong and Father was from Canada, though both lived in Houston for several years. In Father's first amended petition for divorce, Father asked the court to determine "whether there is a risk of international abduction of the children by [Mother] and to take such measures as are necessary to protected the children." During the jury trial, evidence was introduced regarding Mother's erratic behavior, suicide threats, and threats of harm to the Children if Father did not let her take them to Hong Kong. Additional evidence showed Mother's desire to return to Hong Kong with the Children. Father testified regarding some of these events, but other testimony included that of mental health professions, audio and video recordings, and documentary evidence. The jury named Father sole managing conservator of the Children. Trial court enjoined Mother from removing the Children from Texas or the country without Father's written consent, applying on behalf of the children for new or replacement passports or internationals visas, interfering with Father's possession of the Children or hiding the Children from him, and discussing the case with the Children or in their presence. Trial court ordered Mother to surrender and passports she had for the Children, and to provide the U.S State Department and the Hong Kong embassy or consulate written notice of the order's travel and passport restrictions. Trial court also stated that it was "unable to find that credible evidence has been presented indicated a potential risk of the international abduction of the children by the parent…however, the court does find that certain injunctions and conditions regarding international travel are in the best interest of the children…." Mother appealed, claiming trial court erred because Father did not plead for such injunctive relief, the evidence was insufficient to support the injunctions, and the court's order failed to comply with the requirements for issuing a permanent injunction.

Holding: Affirmed As Modified

Majority Opinion (J. Jamison, J. Boyce): Mother argued that Father's pleadings did not support the injunctive relief ordered. In child custody cases, where the best interests of the child are the paramount concern, technical pleading rules are of reduced significance. Father's live pleadings raised the issue of international travel with the Children and alleged a risk of international abduction. Father requested general relief by asking that the court "take such measures as are necessary to protect the children," a clear request for nonmonetary relief and an apparent reference to TFC 153.503, "Abduction Prevention Measures." Father's pleadings sufficiently supported injunctive relief.

Mother further argued that the evidence did not support trial court's granting of the permanent injunctions, arguing there was no evidence of any imminent harm or abduction of the Children, nor that she had ever interfered with Father's possession of the Children or hidden them from him. At trial, evidence showed that Mother at times acted irrationally, had anger issues, and wanted to return to Hong Kong with the Children. This evidence supported the conclusion that it was in the Children's best interest to limit Mother's control over international travel with the Children. However, requiring Mother to notify the State Department and Hong Kong embassy of her restrictions went beyond providing Father with control over the Children's international travel. Such injunctions put a greater burden on Mother than the law allows.

Concurring Opinion (J. Christopher): The challenged injunctions were placed at issue by Mother's live pleadings. Two months after temporary orders were signed Mother filed her second amended petition, asking that the court "make all temporary injunctions permanent." By asking the court to make the temporary relief permanent, Mother placed the challenged injunctions at issue before the court. Further, when issues not raised by the pleadings are tried by express or implied consent, the issues are treated as though they had been raised by the pleadings. On the first day of trial, Father's counsel proposed jury charges asking the jury to determine whether there was a risk of international abduction. Mother's counsel argued that injunctions were a question

for the judge and were subsumed "in the questions of the jury deciding whether or not to appoint [Father] as sole managing conservator." Mother's counsel took the position that if the jury found Father should be sole managing conservator, then the trial court should determine whether injunctions or restraints were appropriate. Therefore, the issue of injunctions was tried by consent.

Editor's Comment: *Requiring a parent to give notice of court-ordered travel restrictions, a copy of the decree, and proof of the parent's agreement to the travel restrictions to the State Department are part of the "Abduction Prevention Measures" of Tex. Fam. Code § 153.503. "They are designed to prevent international abduction, i.e., a failure to return the children from overseas." J.V.*

SAPCR
GRANDPARENT POSSESSION AND ACCESS

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING VISITATION WITH GRANDPARENTS AFTER CHILD WAS REMOVED FROM PARENTS; TRIAL COURT IS NOT LIMITED TO GRANTING POSSESSION ONLY TO PARTIES AFFIRMATIVELY SEEKING POSSESSION OR ACCESS

¶13-2-15. ***In re Roberts,*** -- S.W.3d --, 2012 WL 6013223 (Tex. App.—Amarillo 2012, orig. proceeding) (12/03/12).

Facts: Mother and Father divorced. The divorce decree named Mother and Father JMCs of the Child and granted Mother the right to designate where the Child lived. A few years later, the Child reported to the Department that Mother was abusing her. The Department was named temporary managing conservator and placed the Child with her paternal grandparents. The Department intervened in a pending SAPCR and requested that both Mother's and Father's parental rights be terminated. After a hearing, trial court found that the Child had been placed in danger by the Parents, the Child should be removed from the home for her protection, and there was a substantial risk of continued danger if the Child were returned home. The Department was named temporary managing conservator with the right of "physical possession, the right to designate her primary residence, and the duty of care, control and protection." At a permanency hearing, a Department worker suggested a visitation arrangement between Mother and Child at the home of the Child's maternal Grandparents, and trial court ordered such visitation. Father filed his petition for writ of mandamus, claiming that trial court abused its discretion by granting condition access by Grandparents because Grandparents were not parties to the suit and did not have a prior order granting them access or visitation.

Holding: Petition for Writ of Mandamus Denied

Opinion: Because the Department intervened and became the Child's temporary managing conservator, the Department's duties included securing a safe alternative placement, if at all possible outside the foster care system. TFC Chapters 262 and 263 govern the Department's responsibility to protect the health and safety of the Child. Nothing in either Chapter suggests that the Department must place the Child with a relative who is affirmatively seeking judicial possession or access to the Child. Trial court was required to "evaluate the [Department's] efforts to identify relatives who could provide the child with a safe environment, if the child is not returned to a parent…" Trial court determined that reunification was not in the best interest of the Child and found a way to meet the Child's needs that included visitation with her Grandparents. Trial court did not abuse its discretion by permitting weekend visitation by Grandparents who have not intervened in the proceeding.

DENYING ACCESS TO GRANDPARENTS WHO HAVE A CLOSE RELATIONSHIP TO A GRANDCHILD IS NOT AN ABUSE OF DISCRETION WHEN GRANDPARENTS CANNOT SHOW THAT THE CHILD'S HEALTH OR WELL-BEING WOULD SUFFER WITHOUT ACCESS TO GRANDPARENTS

¶13-2-16. ***In re Kelly,*** -- S.W.3d --, 2012 WL 6186342 (Tex. App.—San Antonio 2012, orig. proceeding) (12/12/12).

Facts: Grandparents filed a petition seeking access to the Child, shortly after the Child's Father died. Trial court held a hearing, at which both Mother and Grandparents testified. Grandparents testified that it would not be in the Child's best interest to have no access to Grandparents and that the Child would benefit from a continued relationship with Grandparents. Trial court granted Grandparents supervised access. Mother filed a petition for writ of mandamus.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: A trial court abuses its discretion when it grants access to a grandparent who has not met the standard set out in TFC 153.433. Furthermore, a parent lacks an adequate remedy by appeal when a trial court errs in awarding grandparent access. In part, TFC 153.433(a) requires that the grandparent requesting possession of or access to the child overcome "the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." Here, Grandparents testified to their close relationship with the Child, but presented no evidence that denying Grandparents access to the Child would impair the Child's health or well-being.

Grandparents further argued that Mother waived her right to mandamus relief by delaying her filing of the petition. While Mother offered no excuse for the four months between receiving a transcript from the court of the underlying proceedings and her filing of the petition, Grandparents did not show any resulting harm from the delay.

Editor's Comment: *This case is much like In re Derzapf, 219 S.W.3d 327 (Tex. 2007, orig. proceeding), which it cites extensively. In Derzapf, an expert "noted the children's 'sadness' at being unable to see their grandparents," but he conceded that the feelings of sadness "did not rise to the level of a significant emotional impairment." J.V.*

SAPCR
CHILD SUPPORT

ADULT CHILD SUPPORT WAS NOT NECESSARY FOR A LEGALLY BLIND CHILD WHO HAD PREVIOUSLY SUPPORTED HIMSELF USING SSDI AND INCOME FROM A PART-TIME JOB; EVIDENCE DID NOT SHOW THE CHILD NEEDED "SUBSTANTIAL CARE AND PERSONAL SUPERVISION," BECAUSE THE CHILD SHOWED HE WAS CAPABLE OF SUPPORTING HIMSELF

¶13-2-17. ***In re J.M.C.,*** -- S.W.3d --, 2013 WL 646237 (Tex. App.—Tyler 2013, no pet. h.) (02/13/13).

Facts: Mother and Father had one Child, who was born legally blind. In 2001, at age 19, the Child began working as a kennel assistant for his Father, who was a veterinarian. The Child's Supervisor described the Child as having a "talent for animals" and that Jeffrey's work was comparable to that of other workers with-

out disabilities. The Child's income came from his kennel job and SSDI, and he was able to maintain his own apartment, keep it clean, buy groceries, and prepare his own meals, with only occasional assistance from Father. In 2004, the Child moved to Indiana to be closer to Mother and his Grandfather. The Child could not find a job at an animal kennel and eventually took a job at a grocery store. Mother testified that she had to transport the Child to "many of the places he needs to go" and that she helped him clean his house, pay his bills, and handle his checkbook. Mother filed a petition seeking child support form Father, alleging that the Child needed substantial care and personal supervision. Trial court denied her petition. Mother appealed.

Holding: Affirmed

Opinion: Under TFC 154.302, child support may be ordered for a disabled child after the child has reached the age of eighteen if "1) the child, whether institutionalized or not, requires substantial care and personal supervision because of a mental or physical disability and will not be capable of self-support; and (2) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child." Circumstances may exist after a disabled child turns eighteen that could entirely relieve a parent of the duty to pay adult child support. Here, trial court was required to consider all the circumstances since the Child's 18th birthday, not just his time living in Indiana. For three years before moving to Indiana, the Child supported himself from his own income and SSDI, kept his apartment clean, and prepared his own meals. He also was able to get around on his own using his seeing-eye dog. The evidence supported that the Child had the ability to support himself and did not necessarily require "substantial care and personal supervision," even though his circumstances in Indiana were not as good as when he lived in Texas.

SAPCR
MODIFICATION

TRIAL COURT DID NOT ERR IN CONSIDERING HUSBAND'S REDUCED RETIREMENT INCOME, INSTEAD OF HIS POTENTIAL EARNINGS FROM A SECOND CAREER, WHEN CLARIFYING THE CHILD SUPPORT ORDER TO LOWER HUSBAND'S CHILD SUPPORT OBLIGATION

¶13-2-18. ***In re N.T.P.,*** -- S.W.3d --, 2012 WL 6743551 (Tex. App.—San Antonio 2012, no pet. h.) (12/31/12).

Facts: Husband and Wife divorced. Prior to the divorce, the couple and their two Children lived in San Antonio, where Husband was stationed with the U.S. Air Force. Wife and the Children went to Missouri to live shortly before Husband was transferred to England. Wife filed for divorce in Texas. The divorce decree ordered Husband to pay $1,500 per month in child support, 100% of all travel expenses, and 60% of the Children's private school tuition. Husband filed a petition to modify the decree, because he was retiring from the Air Force, and his income would be substantially reduced. A few months later, Husband relocated back to England, married again, and retired from the Air Force. After a hearing, trial court issued an order reducing Husband's monthly child support to $1,087 and ordered Wife to pay half of the travel expenses. Wife appealed.

Holding: Affirmed

Majority Opinion (J. Marion, J. Simmons)

Wife argued that the portion of the order changing the travel expense portion of the divorce decree actually modified "custody, possession, and access," rather than child support, because travel expenses were dis-

cussed in the section of the decree entitled "Possession and Access." Consequently, Wife argued, because neither she nor the Children lived in Texas, trial court did not have jurisdiction to enter the modification. However, travel expenses do not involve possession or access, but rather a monetary obligation. Therefore, trial court retained jurisdiction to enter the modification.

Under Texas Family Code § 156.401(a)(1)(A), a court may modify an order that provides for the support of a child if "the circumstances of the child or a person affected by the order have materially and substantially changed since . . . the date of the order's rendition." To determine whether there has been a substantial and material change, the court must compare the financial circumstances of the child and the affected parties at the time the order was entered with their financial circumstances at the time of the hearing on the modification. If a circumstance was contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but is instead an anticipated circumstance that cannot be evidence of a material or substantial change of circumstances. Husband's petition for modification specifically referenced his upcoming change of circumstances, his retirement, which he asserted would substantially reduce his income. Neither Husband's retirement four years after the divorce nor his move to England were specifically contemplated by the order, which said little about Husband's eventual retirement. The order only directed Husband to "apply for retirement as soon as he is eligible, and it is administratively feasible." Evidence established that Husband's income was reduced by nearly one-third after his retirement, which constituted a material and substantial change in Husband's circumstances.

Wife argued that because Husband was voluntarily unemployed, trial court should have considered Husband's earning potential as a nurse in the private sector, instead of Husband's actual earnings under his retirement plan. Husband testified that his disabilities prevented him from returning to a long-term career as a nurse and that if he had returned to work, he would not have been able to spend as much time with his Children. COA was evaluating trial court's modification of the order under an abuse of discretion standard, and COA did not find that trial court acted "arbitrarily or unreasonably" by considering Husband's actual earnings versus his potential earnings.

Concurring and Dissenting Opinion (J. Stone): Trial court abused its discretion in modifying the child support and travel expenses monetary obligation. Husband voluntarily retired and testified that various ailments prevented him from earning his optimum potential income in the private sector. However, no evidence established that Husband was unable to work at all. Husband was free to retire, but his right to retire "does not excuse his intentional decision to remain completely unemployed in the face of expenses related to his two minor children." Husband chose to move to England, which did not support his contention that if he went back to work, he could not spend as much time with his Children, who lived in Missouri. Trial court's order placed no limitations on the number of trips Children could take to England, which could result in Mother having to spend her entire monthly child support sum on travel expenses for the Children. Trial court did not properly balance Husband's decision to remain unemployed against his duty to provide for his Children.

Editor's Comment: *This case recites the familiar rule that if a change in circumstances was contemplated at the time of an original agreement, the occurrence of the anticipated eventuality is not a changed circumstance. The Fourth District applied this rule by stating that a decision to retire from the military four years after divorce was not contemplated by the decree. But this familiar rule is dangerous. Could the court not just as easily have held that military retirement is not a change of circumstances? After all, military retirement inevitably will occur if one serves long enough. J.V.*

TRIAL COURT ERRED IN MODIFYING CHILD SUPPORT OBLIGATION AND POSSESSION ORDER BECAUSE FATHER FAILED TO PROVIDE SPECIFIC EVIDENCE OF A CHANGE IN HIS FINANCIAL CIRCUMSTANCES OR IN HIS ABILITY TO VISIT WITH THE CHILD DURING ESTABLISHED PERIODS OF POSSESSION

¶13-2-19. ***In re C.H.C.,*** -- S.W.3d --, 2013 WL 455168 (Tex. App.—Dallas 2013, no pet. h.) (02/06/13).

Facts: COA withdrew its prior opinion issued in July 2012 and substituted this opinion. In September 1998, Mother filed an original petition for voluntary paternity of the Child. Through genetic testing, Father was determined to be the Child's biological father. Mother and Father have never been married. Since the paternity testing, the parties engaged in hundreds of filings regarding custody, possession, and enforcement of the trial court's orders. In 2007, Mother filed a petition to modify the 2004 SAPCR order and a motion for enforcement of the order citing numerous violations by Father. Hearings on the motions were continued more than once. Father filed his own petition to modify and motion for enforcement against Mother. Trial court held a hearing on September 9, 2008, at which Father argued his $1200 a month in child support should be reduced because his income since 2004 had "substantially" decreased due to the housing crash (Father worked at an engineering survey firm). Trial court determined a material and substantial change had occurred since 2004 and reduced Father's monthly child support payment to $966.84. Trial court found Mother in contempt for two separate instances in which she did not give Father possession of the Child in accordance with the 2004 SAPCR order. The court ordered her to pay $250.00 for each separate violation and sentenced her to 90 days' confinement days for each violation. Her commitment was suspended, and she was placed on community supervision for thirty-six months. Mother argued the trial court abused its discretion in finding a material and substantial change in Father's circumstances because the evidence is insufficient to support the modification. Mother also challenged the contempt orders as void since her community supervision had expired.

Holding: Reversed and Rendered

Opinion: A child support order may be modified in the circumstances of the child or a person affected by the order have materially and substantially changed since the date the order was rendered. The court must compare the financial circumstances of the affected party at the time the order was entered with the circumstances at the time of the proposed modification. Here, Father did not provide any evidence in 2004 of his income. At the modification hearing, he testified generally that in 2004 "business was good" and he was "making a good amount of money." Further, Father only provided general estimates of his income in 2008, when he sought modification of the child support order. Father offered into evidence an unsigned, unfiled copy of his 2007 tax return. Without more specific testimony from Father, the court could not make the requisite comparison of his financial circumstances between the time of the requested modification and the time of the original order.

Merely desiring to spend more time with a child is not a material and substantial change that will allow modification of possession rights. Here, Father, failed to provide any evidence that his ability to spend time with the Child during the summer had changed. Father did not argue that his desire to spend more time with the Child was based on the Child's ability to engage in more activities that they previously could not do together due to the Child's age. Therefore, trial court should not have modified the 2004 order to give Father more summer visitation with the Child.

Editor's Comment: *This opinion is interesting because it seems to distinguish between the standard of proof necessary to modify child support (change in financial circumstances) versus the standard of proof to modify other orders regarding a child. M.M.O.*

UNDER TEXAS FAMILY CODE § 156.102(A), GRANDPARENTS WERE REQUIRED TO FILE AFFIDAVIT ALONG WITH THEIR REQUEST TO MODIFY DEPARTMENT'S CONSERVATORSHIP OF A CHILD

¶13-2-20. ***In re N.A.D.,*** -- S.W.3d --, 2013 WL 519326 (Tex. App.—San Antonio 2013, no pet. h.) (02/13/13).

Facts: When the Child was one year old, the Department moved to terminate the parental rights of the Child's Parents. The Parents signed affidavits of relinquishment, and trial court terminated their parental rights and named the Department as managing conservator. Grandparents filed a petition to modify trial court's conservatorship order and asked that they be named managing conservators and as "the person who has the right to designate the primary residency of the child as managing conservatorship and all rights and duties normally afforded a parent of the child." The Department moved to dismiss the petition on the grounds that Grandparents failed to file an affidavit required by Texas Family Code § 156.102(a). Trial court granted the motion to dismiss. Grandparents appealed.

Holding: Affirmed

Opinion: Texas Family Code § 156.102(a) states that "If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child is filed not later than one year after the earlier of the date of the rendition of the order ..., the person filing the suit shall execute and attach an affidavit" which must contain one of three allegations: "(1) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development; (2) that the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or (3) that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child." Grandparents did not file this affidavit, but asserted they were not required to file it because they were not the Child's parents, they were not parties to the termination suit, and the provisions of Texas Family Code § 156.102 apply only to divorcing parents and not to children in the Department's care. However, the legislative intent does not reflect that Texas Family Code § 156.102 is limited solely to divorced parents or persons who were parties to an underlying termination suit.

ONE PARTY'S ALLEGATION OF CHANGED CIRCUMSTANCES OF THE PARTIES CONSTITUTES A JUDICIAL ADMISSION OF THE COMMON ELEMENT OF CHANGED CIRCUMSTANCES OF THE PARTIES IN THE OTHER PARTY'S SIMILAR PLEADINGS ALTHOUGH DIFFERENT RELIEF BEING REQUESTED.

¶13-2-21. ***In re L.C.L.,*** -- S.W.3d --, 05-11-00337-CV, 2013 WL ####### (Tex. App.—Dallas 2013, no pet. h.) (02/28/13).

Facts: Mother and Father divorced, and were named JMCs of their Child. Ten years later, Father filed a motion to modify the parent-child relationship and sought appointment as SMC generally alleging a material and substantial change in circumstances. Mother filed a counter-petition seeking to be named the parent with exclusive right to designate the Child's primary residence and seeking equal access to the Child and also generally alleged a material and substantial change in circumstances. At trial, a doctor testified that Mother had hurt the Child by grabbing the Child's lips and arms with her fingernails, and that the Child would be in danger if left alone with Mother. Another doctor also testified that Mother pulled the Child by the lips, scratched the Child on the back, and "directed [the Child] by the chin aggressively." Trial court found that a history of family violence existed, named Father SMC of the Child, and ordered that Mother's possession and access be limited and supervised by a professional supervisor. Mother appealed, claiming in part that the evidence was insufficient to support the trial court's finding of a material and substantial change in circumstances.

Holding: Affirmed

Opinion: Mother argued that trial court erred by basing its ruling on evidence and testimony from prior hearings that had not been offered or admitted into evidence. However, the record showed that trial court took judicial notice of "the entire file" and did not indicate that trial court relied on any of the evidence within to support his finding that there was a pattern or history of family violence.

Mother also argued that there was insufficient evidence to support a finding of a material and substantial change in circumstances. To demonstrate that a material and substantial change of circumstances has occurred, the evidence must show what conditions existed at the time of the entry of the prior order as compared to the circumstances existing at the time of the hearing on the motion to modify. One party's allegation of changed circumstances of the parties constitutes a judicial admission of the common element of changed circumstances of the parties in the other party's similar pleading. *See Delaney v. Scheer*, No. 03-02-00273-CV, 2003 WL 110, at (Tex. App.—Austin Feb. 3, 2003, no pet.) (mem. op.). Admissions in trial pleadings are regarded as judicial admissions in the case that pleading was filed, require no proof of the admitted fact, and authorize the introduction of no evidence to the contrary. Although Mother and Father sought different relief in their petitions to modify, they had a common element—each required proof of a material and substantial change of circumstances of the child, a conservator, or other party effected by to order to be modified. Mother's allegation of changed circumstances constituted a judicial admission of that same essential element in Father's claim for modification even though Mother did not request the same relief.

Editor's Comment: *Unlike the holding in In re C.H.C., -- S.W.3d --, 2012 WL 600204 (Tex. App.—Dallas 2013, no pet. h.), which held that child support could not be based upon evidence admitted solely at a temporary order hearing, the transcript of which was not introduced into evidence, here there was other evidence introduced at trial to support the final ruling of family violence. G.L.S.*

Editor's Comment: *I think the COA gets this one wrong. When one party files a modification suit, it is often the case that the adverse party files a counter motion seeking their own, but different relief. Although the COA opinion gives no examples, surely they could not have intended that a counter petition seeking to modify child support (which requires proof of a material and substantial change) judicially admits to the existence of a material and substantial change justifying a change in custody. Even so, the opinion (not denoted memorandum) stands. S.S.S.*

Editor's Comment: *This case would bother me more if one party only sought a change of conservatorship and the other party only sought a change in the amount of child support. J.A.V.*

SAPCR
ENFORCEMENT

ATTACHING A PRIOR CONTEMPT ORDER, WHICH SPECIFIED PUNISHMENT AND LENGTH OF CONFINEMENT TO A SUBSEQUENT REVOCATION ORDER OF SUSPENDED COMMITMENT GAVE SUFFICIENT NOTICE TO RELATOR OF THE RELIEF GRANTED BY THE COURT; A REVOCATION ORDER OF A SUSPENDED COMMITMENT ORDER NEED NOT SATISFY ALL TECHNICAL REQUIREMENTS OF AN INITIAL ENFORCEMENT ORDER

¶13-2-22. ***In re Fountain,*** -- S.W.3d --, 2012 WL 6754173 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (12/28/12).

Facts: Mother previously sought a motion to dismiss her underlying SAPCR, but the motion was denied. Mother agreed to an order naming her SMC and naming another woman as the Child's nonparent possessory Conservator. The order also stipulated that within 30 days each party would "permit the other conservator to obtain health-care information regarding the child" and authorize the disclosure of "protected health information to the other conservator." The parties were required to notify each other of any changes in contact information, and any changes in residency 60 days in advance of the change or within five days of a residency change if 60 days' notice was not possible. Several months after the agreed order, Conservator moved to enforce the order for Mother's failure to comply. Trial court found that Mother failed to comply by failing to execute releases necessary for Conservator to obtain Child's health-care information. At a hearing, trial court ordered Mother to notify the Child's school that Conservator could eat lunch with the Child at school, attend school activities and receive all school notices normally sent to parents, within four days of the hearing, but the order was not signed until May 24. In the May 24 order, Mother was found in contempt and ordered to serve 60 days in jail. The jail time was suspended on the condition that Mother comply with the prior agreed order, as well as the new obligations requiring her to provide certain notices to the Child's school. Both parties were also obligated to exchange information regarding changes in periods of possession or the Child's extracurricular activities via a website. One month later, Conservator moved to revoke Mother's suspended commitment, alleging Mother had violated the initial agreed orders and the May 24 modified orders. Conservator alleged Mother failed to timely notify her of a change in the Child's residence, had failed to provide the Child's school with the required notices, and had failed to communicate changes regarding possession schedules. Trial court revoked Mother's suspended commitment, ordered that Mother be committed, and attached the May 24 order, which specified that Mother was to be committed for 60 days for violating the provisions of the order. Mother filed a petition for writ of habeas corpus

Holding: Petition for Writ of Habeas Corpus Denied

Opinion: A final order for possession of or access to a child may be enforced by means of a motion for enforcement as provided by chapter 157 of the Family Code. A motion for enforcement must provide "in ordinary and concise language," including identification of "the provision of the order allegedly violated and sought to be enforced," "the manner of the respondent's alleged noncompliance," and "the relief requested by the movant." Mother argued that the revocation order was void because it did not clearly state the punishment imposed. Although Mother challenged the July 31 revocation order, the actual enforcement order at issue was the May 24 contempt order. Mother conceded that the contempt order identified "the relief granted by the court," but complained that the relief was not expressly stated in the revocation order, and that referencing the May 24 contempt order and attaching it to the revocation order was the equivalent of not including it at all. However, the record was clear that Mother was sentenced to a 60-day jail sentence in the May 24 contempt order, that the sentence was suspended on the condition of her future compliance with the court's orders, and

that the trial court found that such orders had been violated and accordingly revoked the suspension of the previously entered 60-day sentence.

Mother further argued that the motion for enforcement failed to satisfy several procedural standard of TFC chapter 157, including listing incorrect dates and titles of documents, and ordering that certain information be provided by a date prior to the date the order was actually entered. Mother wrongly assumed that the motion to revoke and the trial court's revocation order must satisfy all of the procedural safeguards for an enforcement motion under subchapter D of chapter 157, as if a separate allegation, finding, and sentence for contempt of court were at issue. However, although Conservator alleged and the trial court found that Mother had violated the conditions of the suspension of her commitment, Conservator did not request and the trial court did not enter additional findings of contempt. Trial court was merely enforcing the provisions of its own suspended commitment order. Mother violated the provisions of the suspended commitment order by not timely notifying the other Conservator of her intended change of residential address when the evidence showed that Mother knew of the move well in advance.

Dissenting Opinion: The revocation motion and order were void because they did not precisely state the manner of Mother's noncompliance and were subject to multiple interpretations. In one example, trial court found that Mother had not provided the "required notice" of her intended move with Child, but the May 24 modification order stated that each party was required to inform the other of changes to the Child's address "within sixty days or within five days of learning of a change of address if the party did not know of the change in enough time to meet the sixty-day requirement." This does not specify whether Mother violated prior orders by failing to notify Conservator within sixty days, or by failing to notify Conservator within five days of learning of a change of address. "The contempt order must spell out exactly what duties and obligations are imposed and what the contemnor can do to purge the contempt."

The majority asserted that chapter 157's procedural requirements were inapplicable because when the trial court revoked the suspension of Mother's commitment, it "did not enter additional findings of contempt," but instead it imposed the "original sentence" for the "original, admitted episodes of contempt." The May 24 contempt order found Mother in contempt for violating the prior agreed order, and imposed new obligations on Mother as a condition for suspending Mother's commitment. When Mother's suspended commitment was revoked, she was found to have violated these additional obligations. These identifications of additional violations, without specifying precisely how Mother failed to comply, rendered the commitment order ambiguous and unclear, and therefore void.

Even if the order were clear and unambiguous, it would still be void for finding Mother in contempt for actions on a date before the court order was even signed. Trial court issued orders on May 24 ordering Mother to provide certain notices to the Child's school, but had orally ordered Mother to comply with these obligations by a date before the order was written and officially entered.

CONTEMPT ORDER ONLY REVIEWABLE BY MANDAMUS OR WRIT OF HABEAS CORPUS

¶13-2-23. ***In re C.H.C.,*** -- S.W.3d --, 2013 WL 455168 (Tex. App.—Dallas 2013, no pet. h.) (02/06/13).

Facts: COA withdrew its prior opinion issued in July 2012 and substituted this opinion. In September 1998, Mother filed an original petition for voluntary paternity of the Child. Through genetic testing, Father was determined to be the Child's biological father. Mother and Father have never been married. Since the paternity testing, the parties engaged in hundreds of filings regarding custody, possession, and enforcement of the trial court's orders. In 2007, Mother filed a petition to modify the 2004 SAPCR order and a motion for enforcement of the order citing numerous violations by Father. Hearings on the motions were continued more than once. Father filed his own petition to modify and motion for enforcement against Mother. Trial court found Mother in contempt for two separate instances in which she did not give Father possession of the Child in accordance with the 2004 SAPCR order. The court ordered her to pay $250.00 for each separate violation and sentenced her to 90 days' confinement days for each violation. Her commitment was suspended, and she was

placed on community supervision for thirty-six months. Mother challenged the contempt orders as void since her community supervision had expired.

Holding: Reversed and Rendered on other grounds.

Opinion: Contempt orders are only subject to review by writ of habeas corpus or writ of mandamus, and not by direct appeal. Therefore, COA dismissed Mother's challenge of the contempt orders for want of jurisdiction.

TRIAL COURT VIOLATED DUE PROCESS BY NOT ISSUING A WRITTEN CONTEMPT AND CONFINEMENT ORDER UNTIL SIX DAYS AFTER RELATOR HAD BEEN HELD IN CONTEMPT AND ORDERED CONFINED

¶13-2-24. ***In re Clark,*** -- S.W.3d --, 05-13-0065-CV, 2013 WL 653217 (Tex. App.—Dallas 2013, orig. proceeding) (02/14/13).

Facts: Trial court found Relator in contempt for failure to pay child support and ordered him confined in the county jail for 180 days. Relator was immediately taken into custody, and filed a writ of habeas corpus the next day. Six days after his confinement, trial court entered a written order of contempt and ordering Relator's confinement.

Holding: Writ of Habeas Corpus Granted

Opinion: An arrest without a written commitment made for the purpose of enforcing a contempt judgment is an illegal restraint from which the prisoner is entitled to be relieved. A person may be held for a short and reasonable time while the judgment of contempt and order of commitment are being prepared. However, Relator was restrained for six days before any order was signed. This was a violation of due process, and Relator was entitled to be immediately released from custody.

Editor's Comment: *How many ways can we say "take orders to court with you" for a contempt hearing? Really! If you think the opposing party is really going to jail, take an order with you or have someone standing by to do an order immediately, meaning today… now… within hours of the commitment. NOT DAYS! M.M.O.*

TRIAL COURT COULD NOT MODIFY PROVISION IN DIVORCE AGREE REQUIRING HUSBAND TO PAY FOR CHILDREN'S EDUCATION AFTER HIGH SCHOOL, BECAUSE THE PROVISION WAS A CONTRACTUAL AGREEMENT BETWEEN THE PARTIES AND THEREFORE NOT MODIFIABLE BY A COURT, EXCEPT IN CASES OF FRAUD, ACCIDENT, OR MUTUAL MISTAKE OF FACT.

¶13-2-25. ***In re M.E.M.,*** No. 09-11-00657-CV, 2013 WL 772837 (Tex. App.—Beaumont 2013, no pet. h.) (mem. op.) (02/28/13).

Facts: Husband and Wife had two Children before they divorced. Both parties agreed to include a provision in the decree requiring Husband to pay increased child support if either Child pursued higher education after high school. Three years later in 1999, both parties agreed to modify the original decree and require Husband to pay increased child support only until the Children's 18th birthdays, or their graduation from high school. The agreed modification order stipulated "that all other terms and provisions of the Agreed Final Decree of Divorce signed February 9, 1996, including, but not limited to all obligations identified as additional child support shall remain in full force and effect." Husband filed a petition to modify and sought a finding that the provision ordering child support beyond the Children's 18th birthdays or high school graduations was unenforceable. Husband also sought declaratory judgment. Trial court entered an order titled, "Order Terminating

Child Support Beyond Eighteen and Graduation from High School." Wife filed a motion for new trial, which was denied. Wife appealed, alleging trial court abused its discretion in granting Husband's petition to modify and request for declaratory judgment.

Holding: Reversed and Rendered

Opinion: Husband did not attack the decree by direct appeal, writ of error, or bill of review. Husband's argument that the decree was unenforceable based on trial court's erroneous application of substantive law would only render the decree voidable, not void, and therefore was an impermissible collateral attack.

When an order modifies a prior child support order, it only supersedes the prior order "to the extent a modification is ordered." The 1999 modification order only modified the amount of Husband's monthly child support obligation and did not modify any other provision in the original decree of divorce, specifically the provisions the parties put in place to pay for their children's education after they graduated from high school or turned 18. TFC 156.001 limits a trial court's authority to modify a final decree by providing that "[a] court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child." The provision at issue was a contractual agreement between Husband and Wife and dealt solely with Husband's obligation to provide for the college education of the Children. Because the provision did not deal with conservatorship, support, possession or access, trial court had no authority to modify the provision once the agreed judgment became final. Without the consent of the parties, the trial court cannot modify or set aside a provision of the agreement except for fraud, accident, or mutual mistake of fact.

Editor's Comment: *Remember back in law school, we took that class called Remedies? I hated that class personally, but the purpose of the class was to distinguish one remedy, like a contractual remedy, from another. In family law, we sometimes reach contractual agreements that exceed the bounds of the court's authority to award or enforce or modify. Those agreements are judged under contract law, which says that contractual agreements are not unilaterally modifiable. So, they can only be modified by agreement. If there is an agreement to modify, then the agreement better be very very specific in its terms that the contract is being modified. So, modifying a child support agreement, without specifically stating otherwise, does not also modify the contractual terms of post-emancipation secondary school expenses. M.M.O.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

APPEALING A PRIOR TERMINATION ORDER DOES NOT SUSPEND THE ORDER'S EFFECT, AND THE PRIOR ORDER MAY BE USED IN A SUBSEQUENT TERMINATION PROCEEDING

¶13-2-26. ***In re A.C.,*** -- S.W.3d --, 2012 WL 6204285 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (12/13/12).

Facts: Mother tested positive for cocaine when she was four months pregnant. Two months later, the school that her three older Children attended alerted the Department that the Children appeared dirty, malnourished, and potentially abused and neglected. The Department removed the three Children. Shortly after, Mother again tested positive for cocaine. When Mother gave birth to the youngest Child, both Mother and Child tested positive for cocaine and the Department removed the Child and placed her with her Grandmother. However, concerns were raised about the Child's placement with the Grandmother, and the Department moved the Child to a foster home. Mother had completed a substance abuse program but again tested positive for cocaine. Mother's positive test violated the terms of her probation from a prior bank fraud charge, and Mother

was sent to jail. Mother's parental rights to her three older Children were terminated under TFC 161.001(1)(D), (E), and (O). A few months later, Mother once again tested positive for cocaine. The Department sought termination of Mother's parental rights to the youngest Child, under TFC 161.001(1)(E), (M), (N), and (O), and trial court terminated her rights.

Holding: Affirmed

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). To establish the ground for termination described in section 161.001(1)(M), the Department offered into evidence the decree terminating the mother's parent-child relationship with her other children. Paragraph (M) applies when the parent "had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E)." The prior termination decree in this case contained a finding that the mother had endangered her children both by placing them in unsafe conditions under 161.001(1)(D) and by engaging in endangering conduct under 161.001(1)(E). Mother argued the prior termination could not be used because the decree, and therefore the termination, was being appealed and was therefore not final. However, although the case may not have been final, the judgment on the decree was. Appealing the prior termination decree did not suspend the effect of the decree. Further, Mother admitted to using cocaine during and after her pregnancy and after having completed a court-ordered substance abuse program, which violated the terms of her probation. Mother failed to complete family service programs or twelve-step programs. Mother and Father were homeless until shortly before the termination trial, and Mother continued to stay with Father, whom she admitted had a drinking problem. The Child had bonded with the foster parents, who intended to adopt her. All of this evidence supported trial court's finding that termination was in the best interest of the Child.

TFC 161.001(L) ONLY REQUIRES SERIOUS INJURY TO A CHILD TO SUPPORT TERMINATION, RATHER THAN REQUIRING SERIOUS BODILY INJURY AS DEFINED IN THE PENAL CODE; BURNS COVERING A CHILD'S LEGS UP TO HER KNEES FROM BEING FORCED TO STAND IN BOILING WATER SATSIFIED THE SERIOUS INJURY REQUIREMENT AND SUPPORTED TERMINATION OF PARENTAL RIGHTS

¶13-2-27. ***In re A.L.,*** -- S.W.3d --, 2012 WL 6586601 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) (12/18/12).

Facts: The Child lived with her two sisters, Aunt, Aunt's boyfriend, and Aunt's three Children. A Relative visiting the Child noticed burns on her legs and took the Child to the emergency room. A doctor said the Child's burns, which covered both legs up to the knees, were extremely serious and looked like they were caused by someone forcing the Child to stand in boiling water. The burns were approximately one month old and had become infected. That night, the Department took all six Children into custody. Aunt gave inconsistent stories about how the Child became burned and said she did not bring the Child to the doctor because she was afraid the Children would be taken away. She said she treated the burns with Neosporin, but the burns became infected and destroyed the pigmentation in the Child's legs. The Department filed a petition for protection of the Children and for termination of the parent-child-relationship. Aunt signed a family service plan, which notified her that if she did not provide her Children with a safe environment within a reasonable time, her parental rights might be terminated. One year later, Aunt was convicted of reckless injury to a child and sentenced to two years of imprisonment. She had not visited the Children in the year between their removal and her conviction. A bench trial was held regarding Aunt's parental rights, but Aunt had been deported to Mexico and did not appear. Trial court terminated Aunt's parental rights under TFC 161.001(1)(D), (E), and (L)(ix), and found that termination was in the best interest of the Children. Mother appealed.

Holding: Affirmed

Opinion: In a proceeding to terminate the parent-child relationship brought under TFC 161.001(L) permits termination when clear and convincing evidence shows that the parent has "been convicted ... for being criminally responsible for the ... ***serious injury*** of a child under ... [certain] sections of the Penal Code." Penal Code 22.04 says a person commits an offense if she "intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child ... serious bodily injury ... or ... bodily injury." Mother argued that since the Texas Family Code does not define "serious injury," the appropriate standard for termination under subsection (L) is the definition of "serious bodily injury" under the Penal Code. However, "serious injury" in subsection (L) modifies all the offenses listed in that subsection, and not all the offenses require bodily injury. Therefore, demonstrating "serious injury" to a child under subsection (L) does not require showing "serious bodily injury" as defined in the Penal Code. The Child's burns were described by the doctor as "extremely serious," were infected when the Child was taken to the emergency room, and destroyed the pigmentation in the Child's legs. These burns resulted in dangerous consequences for the Child, satisfying the "serious injury" requirement under subsection (L).

In its analysis of whether termination was in the Children's best interest, COA weighed factors including the desires of the Children, Aunt'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. Aunt disciplined the Child by forcing her to stand in scalding hot water and did not take her to the doctor to seek treatment, demonstrating her lack of parenting skills. Aunt did not visit her Children while they were in Department custody and did not attempt to comply with the family service plan. This evidence supports the conclusion that termination of her parental rights was in the Children's best interest.

TERMINATION UNDER TFC 161.001(1)(D) AND (E) SUPPORTED BY EVIDENCE OF FATHER'S CRIMINAL CONVICTIONS AND UPCOMING INCARCERATION, LACK OF CONTACT WITH THE CHILD, AND KNOWLEDGE OF MOTHER'S DRUG USE

¶13-2-28. ***A.S. v. DFPS,*** -- S.W.3d --, 2012 WL 6643806 (Tex. App.—El Paso 2012, no pet. h.) (12/21/12).

Facts: Mother had three Children. When the Youngest Child was born, both Mother and the Child tested positive for marijuana and cocaine. All three Children were placed in foster care because of Mother's neglectful supervision and lack of medical attention for the Youngest Child. When the Department informed the Youngest Child's biological Father that the Department had temporary conservatorship of the Child, Father wanted a paternity test because he alleged that Mother had relationships with many men. Father did not ask where the Youngest Child was or request visitation. Father alleged he did not know that Mother was pregnant with the Youngest Child until Mother was seven months pregnant. Father saw the Youngest Child once approximately two-and-one-half months after birth, but after that Father never saw, visited, or spoke to the Child. When the Child was born, Father was employed as a truck driver and said that his lack of visitation and contact were due to being "on the road most of the time." Father stated that his family did not want him close to Mother's family because "they're nothing but drug users and alcoholics." Father provided no financial support for the Youngest Child. Father had been convicted of assaulting prior girlfriends and was sentenced to two separate seven-year jail terms. While in jail, Father suggested that the Youngest Child be placed with a woman Father claimed was his common-law Wife. Wife was one of the women Father was jailed for assaulting. The Department sought termination of Father's parental rights under TFC 161.001(1)(D), (E), (N), (O), and (Q). Trial court terminated Father's parental rights and found that termination was in the best interest of the Youngest Child. Father appealed, arguing the evidence was factually and legally insufficient to support termination under 161.001(1)(D) and (E) because there was no evidence he knew or could have known that the Youngest Child was being medically neglected.

Holding: Affirmed

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). Under TFC 161.001(1)(D) and (E), a court may order termination if the court finds by clear and convincing evidence that the parent has "(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; [or] (E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." The focus of subsections (D) and (E) is the conduct of the parent, and therefore evidence of criminal conduct, convictions, or imprisonment is relevant. Knowledge of paternity is a prerequisite to proving the parent knowingly placed the child in an endangering environment under subsection (D). Subsection (E) requires a "conscious course of conduct" by the parent, instead of a single act or omission as required by subsection (D). Father admitted he knew Mother was pregnant with the Youngest Child and that he was purportedly the biological father. Yet he saw the Child only once after his birth and never attempted to see or contact him again. Father knew Mother used drugs. Father did not challenge any of the evidence presented regarding his prior criminal convictions or incarceration, and did not present any evidence that he had attempted to improve his parenting skills or resolve his self-admitted anger management issues. The evidence supported termination under TFC 161.001(1)(D) and (E).

In its analysis of whether termination was in the Children's best interest, COA weighed factors including the desires of the Child, Father's parenting abilities, his 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. There was virtually no bond between Father and the Child because Father had spent almost no time with the Child. Father's prior criminal record and future incarceration suggested that Father would be unable to appropriately care for the Child's emotional or physical needs. Father suggested placing the Child with a woman Father had been convicted of assaulting and who had never met the Child. Finally, Father knew that Mother used drugs and alcohol, yet never sought custody or conservatorship of the Child. Trial court found that based on the evidence, termination of Father's parental rights was in the Child's best interest.

FATHER COULD NOT HAVE KNOWN HIS CHILDREN WERE ENDANGERED BY MOTHER'S DRUG ADDICTION AND POOR LIVING CONDITIONS BECAUSE FATHER WAS IMPRISONED BEFORE MOTHER BECAME A DRUG ADDICT, AND FATHER DID NOT KNOW WHERE CHILDREN WERE LIVING; INSUFFICIENT EVIDENCE SUPPORTED TERMINATION DUE TO FATHER'S CONVICTION FOR INTOXICATED MANSLAUGHTER, BECAUSE NO EVIDENCE SHOWED THAT FATHER KNOWINGLY DROVE DRUNK

¶13-2-29. ***In re C.D.E.,*** -- S.W.3d --, 2012 WL 6632800 (Tex. App.—Fort Worth 2012, no pet. h.) (12/21/12).

Facts: Father was arrested for intoxication manslaughter after a driving accident that resulted in the deaths of two teenagers. At trial, Father admitted that on the day of the accident, he had consumed "a full bottle of Seagrams 7." Father denied ever consuming hard liquor prior to that day and said that he did not drink regularly. Father had been incarcerated since the day of the accident, which occurred nine years before the termination proceedings. Mother became the sole provider for their three Children after Father's imprisonment. While Father was in prison, Mother became a drug addict and frequently moved the Children to new living locations. The Children described their last home as "dirty and cluttered" with "needles on the floor," and said the toilets did not always work and that they did not always have running water. Mother voluntarily allowed the Children to stay with Aunt and Uncle, but they ultimately could not care for the Children and placed them in foster care. Father wrote to the Children frequently from prison, and the Children testified that they enjoyed receiving his letters. Father frequently inquired with the Department's caseworker about the Children. At the termination trial, the Department introduced evidence about Father's criminal history, which included one conviction for the class A misdemeanor offense of criminal trespass-entry. The trespass occurred before the birth of Father's first Child. Father had also been arrested twice for domestic violence against Mother and a

previous girlfriend, but those charges were both dismissed because he had been the victim in both instances. The Department also introduced ten prior CPS referrals concerning the Children. Nine of the referrals were against Mother, and eight occurred after Father's imprisonment. Only one mentioned Father, and occurred when one Child wandered through an apartment complex by herself. Trial court found that termination of Father's parental rights was proper under TFC 161.001(1)(D), (E), (L), and (Q).

Holding: Affirmed In Part, Reversed and Rendered 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). Under subsection (D), the environment itself and not the parent's conduct must cause the child's physical or emotional well-being to be endangered, and there must be proof that the parent was aware of the potential for danger to the child and disregarded that risk. In a suit to involuntarily terminate the rights of an imprisoned parent under subsection (E), mere imprisonment will not, standing alone, constitute engaging in conduct that endangers the emotional or physical well-being of the children. Here, there was no evidence Father was aware of Mother's drug problem or the condition of Mother's home. Mother moved frequently, and some of Father's letters to the Children were returned, showing that Father did not know where they were living, much less the conditions of their various homes. Further, only one of the 10 CPS referrals involved Father, and Father's misdemeanor conviction occurred before any of the Children were born, which did not show a course of conduct that endangered the Children.

Father also argued there was insufficient evidence to support termination under TFC 161.001(1)(Q), which states that a court may terminate parental rights if the parent "knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; and (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition[.]" Father argued the evidence failed to show that he *knowingly* engaged in the criminal conduct (intoxication manslaughter) that resulted in his conviction and confinement. Intoxication manslaughter requires no proof of a culpable mental state; it is, by statute, a strict-liability crime. Thus, Father's mere conviction for the strict-liability offense of intoxication manslaughter could not automatically supply the knowing element required by subsection (Q). Given its common and ordinary meaning, the term "knowingly" means "in a knowing manner" and "with awareness, deliberateness or intention." At trial, the Department offered little evidence regarding Father's intoxication manslaughter conviction, even though the Department argued that "trial court was entitled to find that [Father] knew he was drunk…[and] knowingly drove while intoxicated." However, little evidence existed regarding the size of the bottle of alcohol, how long it took Father to drink the bottle, what time of day the accident occurred, whether Father was speeding, or any other information that could support the finding that Father *knowingly*, as opposed to negligently, engaged in criminal conduct.

MOTHER'S FIGHT WITH HER PIMP, STATUS AS A PROSTITUTE, AND RECENT TERMINATION OF PARENTAL RIGHTS TO HER FIRST CHILD DID NOT CONSTITUTE ABUSE OR NEGLECT OF HER UNBORN CHILD; MERE ENDANGERMENT OF A CHILD, OR PROOF OF ABUSE AND NEGLECT OF A DIFFERENT CHILD, DOES NOT SATISFY REQUIREMENTS FOR REMOVAL UNDER TFC 161.001(1)(O)

¶13-2-30. ***In re K.N.D.,*** -- S.W.3d --, 2012 WL 6721047 (Tex. App.—Houston [1st Dist.] 2012, no pet. h.) (12/21/12).

Facts: Mother was 37 weeks pregnant with her second Child when she had a fight with her roommate. An ambulance took her to the hospital, where she delivered the Child. A report of "Neglectful Supervision" was referred to the Department, who initiated an investigation. The Department discovered several conflicting reports of what happened during the fight, including that Mother "felt dizzy and fell down," and that Mother's male roommate chased her and caused her to fall. A Caseworker familiar with Mother from a case involving Mother's first Child advised the Department that Mother was a "flight risk" with untreated "mental health

issues" whose history included incidents of medical neglect and neglectful supervision of her first Child. The Caseworker also relayed that Mother's parental rights to her first Child had recently been terminated. Trial court entered an order for protection of the Child and appointed a guardian ad litem, and the Department filed its permanency plan, indicating that the Child's foster parents wanted to adopt her. Mother appeared at trial through her attorney. At trial, the Caseworker testified that a woman claiming to be a prostitute came to the hospital while Mother was giving birth and claimed they had gotten into a fight with their pimp, Mother's male roommate. Caseworker also testified that Mother's apartment manager saw Mother's male roommate chase her and "stomp" on her. The Caseworker testified that Mother was unable to support the Child because she could not maintain employment and that Mother's fight with the male roommate endangered the Child. The Caseworker did concede that the Child was not injured by Mother's actions. The Department moved to terminate Mother's parental rights, urging that termination was proper under TFC 161.001(1)(D), (E), and (O) and was in the best interest of the Child. Trial court found that termination was proper under TFC 161.001(1)(O), but did not make any findings regarding the other sections urged by the Department. Trial court appointed the Department as sole managing conservator. Mother filed a motion for new trial, attaching an affidavit alleging that she was employed, had obtained housing, took a parenting class, submitted herself to the Mental Health and Retardation Authority, and visited the Child. Trial court denied the motion. 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, and to support the appointment of the Department as sole managing conservator.

Holding: Affirmed In Part, Reversed and Remanded In Part

Majority Opinion (J. Massengale, J. Brown): 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 was removed as a result of abuse or neglect of that child. Evidence of "endangerment" prior to removal of the child, without more, is not sufficient to satisfy section (O). Evidence of abuse or neglect of children other than the removed Child is irrelevant for purposes of section (O). Here, there was no evidence that Mother's living arrangement, status as a prostitute, or personal relationships exposed the Child to a substantial risk of harm rising to the level of neglect. There was no evidence that Mother instigated or was responsible for the violence she encountered, such that she would bear any blame for exposing the unborn Child to a substantial risk of harm.

Mother also argued that the evidence did not support trial court's appointment of the Department as the Child's sole managing conservator. The court's primary concern in issues of conservatorship is the best interest of the child. A rebuttable presumption exists that it is in the child's best interest to have his parents be named joint managing conservators. However, the court may appoint someone other than the parent when the evidence indicates that appointment of the parent would significantly impair the child's physical or emotional development. The evidence showed that Mother's first Child was removed from her custody due to medical neglect and neglectful supervision. Mother lived with two roommates, one of whom chased and assaulted her. Mother's other roommate worked as a prostitute with Mother. Mother's evidence of employment was merely an "intent to hire" letter and a paystub for $40 from a home healthcare service, and Mother had to rely on roommates and friends for money. This evidence was sufficient to rebut the parental presumption and support trial court's naming of the Department as sole managing conservator.

Dissenting Opinion (J. Keyes): The majority misconstrued the plain language of the Family Code, misapplied the standard of proof, and erroneously refused to consider major portions of the record evidence material to the proper disposition of this case. TFC 161.001(1)(O) states only that a parent's rights may be terminated if the parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary manag-

ing conservatorship of the [DFPS] for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child." Mother did not dispute that the Child was in the Department's conservatorship for nine months nor did she dispute that she had failed to comply with the provisions of her service plan. The majority added a new requirement to TFC 161.001(1)(O) that the parent must have directed specific acts of abuse or neglect at the specific child at issue at the time of the initial removal that justified removal under Chapter 262.

The majority erroneously stated that, although Chapter 262 authorizes the involuntary removal of a child when "there is an immediate danger to the physical health or safety of the child," the trial court's findings justifying involuntary removal "do not necessarily imply that the removed child was subjected to abuse or neglect" or "that any particular parent was responsible for such abuse or neglect." However, according to the statutory scheme and the requirements for removal proceedings under Chapter 262, the Department cannot remove a Child from a parent without specific findings from the trial court that the Child was in immediate danger. In determining whether the Child was in immediate danger, the trial court may consider abuse or neglect directed at another Child. "Abuse" and "neglect" are defined through statutes and case law. Abuse includes "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning" and "the genuine threat of substantial harm from physical injury to the child." Neglect includes "the leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm, without arranging for necessary care for the child." Child endangerment, as defined through case law, means "to expose to loss or injury [or] to jeopardize"; the conduct need not directed at the Child, and the Child need not actually suffer injury.

Here, it is clear that the Child was removed from Mother due to immediate danger to the Child's physical health or safety, and the trial court made findings and entered orders in accordance with the requirements of the Family Code. The Department filed a petition for protection of the Child and included an appropriately sworn affidavit detailing the violence that let to Mother's hospitalization and the Child's birth. The trial court entered an emergency order, specifically finding that there was "a continuing danger to the physical health and safety of [the Child] if returned to [Mother]…" The trial court held the necessary adversary hearing as required by TFC 262.201 and entered an order the same day, finding that "there was a danger to the physical health or safety of the Child" which necessitated the Child's removal from Mother's possession.

The Code provides that proof be made at the time of the initial removal that removal was necessary because of the parent's abuse or neglect of the child and that it is in the child's best interest that she remain in the custody of the Department for her own safety and protection. Requiring this to be proved again at the termination hearing defies the plain language of the Code. At trial, the Department presented evidence that Mother was involved in prostitution. A parent's criminal conduct exposes a child to substantial risk of harm. In addition to the evidence cited by the majority, the Department also showed at trial that Mother's older Child had had "an emergency condition and abscess…that required surgery on the brain." Mother was not available to give consent because she "had gone to Florida in 2009 and didn't come back until sometime in 2010." This evidence showed that Mother had an ongoing pattern of abusive or neglectful behavior that endangered her Children. The result of the majority's holding will prevent children from being removed at birth unless that child was actually abused or neglected directly, and the court is allowed to define what "abuse" and "neglect" mean, rather than relying on established statutory definitions or case law precedent.

PROVIDING INCARCERATED FATHER WITH FAMILY SERVICE PLAN 34 DAYS BEFORE TERMINATION HEARING WAS NOT ENOUGH TIME FOR FATHER TO COMPLY WITH THE PLAN, AND THEREFORE INSUFFICIENT TO SUPPORT TERMINATION OF HIS PARENTAL RIGHTS

¶13-2-31. ***In re A.Q.W.,*** -- S.W.3d --, 2013 WL 240288 (Tex. App.—San Antonio 2013, no pet. h.) (01/23/13).

Facts: While Father was incarcerated, the Child was born and tested positive for opiates. The Department was granted temporary managing conservatorship of the Child. The Department's petition named Father as the

"alleged" father of the Child because Father was not named on the birth certificate, and Mother was married to another man. A family service plan for Father was filed, and included requirements that, among other things, Father submit to random drug tests, complete parenting classes, complete counseling, and obtain and maintain employment and housing. The Department ordered DNA testing, which showed that Father was the Child's biological father. Three months after the service plan was filed, the Department's Caseworker visited Father in jail and explained the service plan to him. Thirty-four days after Father received the service plan, the termination hearing commenced. At the hearing, the Caseworker testified that she had mailed the service plan to Father before she visited him in jail, but it was returned to her. The Caseworker also testified that Father had not made any efforts to support the Child, and that Father had not demonstrated he was willing or able to care for the Child. Trial court terminated Father's parental rights under TFC sections 161.001(1)(N) and (P). Father appealed, claiming the evidence was insufficient to support termination.

Holding: Reversed and Remanded

Opinion: Implementation of a family service plan by the Department is ordinarily considered a reasonable effort to return a child to its parent; however, it may be inapplicable when the parent is incarcerated. Here, the record showed that other than one visit from the Caseworker, Father had no contact with the Caseworker or anyone else with the Department regarding the service plan. The service plan was explained to Father only 34 days before the termination proceedings, during which time Father remained incarcerated. There was no evidence to show that Father was provided with a reasonable opportunity to enroll in, much less complete, any of the requirements he could have complied with while incarcerated.

TFC 161.001(1)(O) permits termination if the court finds that the parent "used a controlled substance, as defined by Chapter 481, Health and Safety Code, in a manner that endangered the health or safety of the child…" Father was incarcerated for the six months from the Child's birth until the termination hearing, and therefore could not have "used a controlled substance…in a manner that endangered the health or safety of the child." The Department argued that Father's drug use was a "course of conduct" that endangered the Child's health and safety. However, there was no evidence that Father had been jailed repeatedly or been in and out of drug treatment.

Editor's Comment: *Really. The Department filed a family service plan for an incarcerated parent that included submitting to random drug tests, completing parenting classes, completing counseling, and obtaining and maintaining employment and housing. The COA correctly recognized that a family service plan may be inapplicable when the parent is incarcerated. J.A.V.*

ALLOWING TWO CHILDREN TO REMAIN IN A HOME WITH A SEXUALLY ABUSIVE FAMILY MEMBER CONSTITUTED NEGLECTFUL SUPERVISION UNDER TFC 161.001(1)(O)

¶13-2-32. ***In re D.R.J.,*** -- S.W.3d -- , 2013 WL 452154 (Tex. App.—Fort Worth 2013, no pet. h.) (02/07/13).

Facts: The Department received a referral regarding allegations of sexual abuse of the Child, her Sister, and her Cousins by the Child's older Brother. The Child had her first baby when she was 14 years old, and had a second baby one year later. The Child and the Mother also had apparently had a fight during which Mother slapped the Child with a board and a weapon, and the Child threatened Mother with a knife before jumping out a window. During a meeting with the Department Investigator, the Child expressed no concerns about her two children being in Mother's care. The Department removed all the Children from Mother's home due to ongoing concerns of sexual abuse by the Brother. The Child was placed in foster care and eventually her two Children lived with her, but after an incident in which the Child threw hot water on one of her Children, she was placed in psychiatric care, and eventually moved back in with Mother. At trial, the Child testified that Brother had sexually abused her since she was 12 years old and was the father of her two Children. The Child testified that she moved back in with Mother despite knowing she would not get her Children back, and acknowledged that she had squandered opportunities for counseling and family therapy. The jury found by clear and convincing evidence that termination of the parent-child relationship between the Child and her two

Children was proper under Texas Family Code 161.001(1)(O) and that termination was in the children's best interests. The Child appealed, alleging that the evidence was insufficient to show that her two Children were abused or neglected by her.

Holding: Affirmed

Majority Opinion (J. McCoy, J. Meier): A court may terminate a parent's rights if it finds by clear and convincing evidence that the parent committed one of the enumerated acts under Texas Family Code 161.001(1)(O) and that termination was in the child's best interest. Termination under Section (O) is proper if the parent "failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the 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.*" However, Subsection (O) does not require that the parent who failed to comply with a court order be the same person whose abuse or neglect of the child warranted the child's removal. The Child testified that her Brother has sexually abused nearly every child living in Mother's house, and it appeared that Mother knew of the incestuous relationship but did nothing to stop it. The Child's lack of concern about leaving her Children in the house with the Brother was sufficient to show neglectful supervision.

Concurring Opinion (J. Gardner): The Child's sole issue should be overruled because her Children were removed due to neglectful supervision by the Child's Mother, rather than by the Child herself. The Child was only 16 years old when she and all the Children were removed from Mother's home. During the interview with the Department Investigator, the Child was reluctant to discuss the abuse occurring in the home, which included her Brother's sexual abuse and her Mother's physical abuse. The Child's reluctance to talk should be viewed in light of her status as a sexual abuse victim, rather than a mother displaying no concern for her children's safety.

EVIDENCE SUPPORTED TERMINATION OF MOTHER'S PARENTAL RIGHTS AFTER FATHER ABUSED AND KILLED BABY, AND HAD REPEATEDLY ABUSED MOTHER WHILE THEIR CHILDREN WERE IN THE HOME; WITNESS TESTIMONY WAS NOT AN UNFAIR SURPRISE WHEN MOTHER'S ATTORNEY AND ONE WITNESS HAD BEEN IN CONTACT PRIOR TO TRIAL, AND THE OTHER WITNESS' TESTIMONY WAS NOT AVAILABLE UNTIL ONE DAY BEFORE HE TESTIFIED

¶13-2-33. ***Spurck v. TDFPS,*** -- S.W.3d --, 2013 WL 490938 (Tex. App.—Austin 2013, no pet. h.) (02/08/13).

Facts: Mother had two Children. The second child, a Baby, died at ten weeks old, and the autopsy revealed a fractured skull and blunt force trauma caused by the repeated pounding of a fist to the abdomen. Father initially claimed to a Police Officer that he and Mother were outside smoking a cigarette, and when they returned, the Baby was lifeless. Mother and Father were both arrested, and Mother admitted to the Police Officer she knew that Father had a temper and drug and alcohol abuse problems, and that he had choked her while she was pregnant. Father eventually admitted he had hit the Baby, but denied causing the fractured skull. The Department filed for protection and conservatorship of the Children, for termination of both parents' parental rights, and placed the older Child in foster care. The foster parents immediately took the Child to the emergency room because he had a diaper rash, scars and abrasions on his body, and was exhibiting troubling behavior. The foster parents noted that L.G. was cursing, hitting dolls in the abdomen, and then placing his finger over the doll's mouth and saying "shhhh." The physician was unable to determine the cause of the Child's injuries. The Department created a family service plan so Mother could work toward reuniting with the Child, but after hearing of the Child's injuries from the foster parents, the Department sought to terminate Mother's parental rights and have the Child adopted by the foster parents. At trial, the Police Officer testified regarding his investigation into the Baby's death. Mother testified that on the night of the Baby's death, she took a

shower while Father cared for the Baby, and when she came out the Baby was not breathing normally, but she attributed this to congestion. She admitted that Father had previously assaulted her, and admitted some knowledge of Father's prior arrest, but was not sure what the arrest was for. The Department also had a Sergeant testify that before the Baby's death, Sergeant had informed Mother of Father's prior arrest for injury to a child. Mother's attorney objected to Sergeant's testimony, but trial court admitted it to rebut Mother's testimony that she had not known of Father's prior injury to a child charge. A jury found that Mother's parental rights should be terminated under TFC 161.001(1)(D) and (E). Mother appealed, objecting to the admission of witness testimony and the sufficiency of the evidence for termination

Holding: Affirmed

Opinion: A trial court may terminate parental rights if it finds by clear and convincing evidence that the parent has committed one of the enumerated acts in Texas Family Code 161.001(1) and that termination is in the best interest of the child. Under subsection (D), a jury must find by clear and convincing evidence that a parent "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." Subsection (E) requires a jury to find by clear and convincing evidence that a parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional wellbeing of the child." Mother admitted that her Children lived with her while Father physically assaulted her, and at least one assault occurred in front of one of the Children. Mother denied knowing about Father's prior injury to a child charge, but Sergeant's testimony contradicted that. Further, Mother at one point suspected that Father was responsible for an injury to the Baby's head, but did not report it for fear of implicating Father. Mother had participated in parenting classes, but during supervised visits with the Child she was unable to apply the lessons she had learned. Mother was apparently abused as a child, expressed a desire to turn her life around, and expressed deep love for the Child, but this was insufficient to support allowing her to retain parental rights in light of the continued abuse in the home.

Mother objected that the Police Officer's and Sergeant's testimonies were erroneously admitted because the Department failed to respond to her discovery request for the names of witness. The Police Officer and Mother's attorney had communicated before trial; he had provided transcripts of his conversations with Mother and Father to the attorney, and had expressed that he assumed he would be testifying. Therefore, his testimony at trial was not an "unfair surprise." The Department stated they learned about the Sergeant's two-year-old conversation with Mother only the day before he was called as a witness, and that they promptly informed Mother's counsel of his likely testimony. There was no evidence indicating that the Department could or should have known of Sergeant's conversation with Mother prior to trial. A party cannot reasonably be expected to disclose the identity of a witness when the party is unaware of the witness's existence. Thus, when a party learns about the existence of witness during trial, the party may have good cause for failing to disclose the witness's identity to opposing counsel before trial. With regard to the best interest of the child, "[i]t is in the court's primary interest to have as much evidence before it as possible."

PARENTS WERE STATUTORILY BARRED FROM CHALLENGING THE VALIDITY OF AFFIDAVITS RELINQUISHING PARENTAL RIGHTS MORE THAN SIX MONTHS AFTER TERMINATION ORDER WAS SIGNED, EVEN THOUGH THEY ARGUED THE AFFIDAVITS WERE VOID

¶13-2-34. ***Moore v. Brown,*** -- S.W.3d --, 2013 WL 692455 (Tex. App.—Austin 2013, no pet. h.) (02/22/13).

Facts: Mother and Father had one Child in Virginia. Parents agreed before birth that they would allow Father's family friend, whom he called his Aunt, and her husband (Adoptive Parents) to adopt the Child. Forty-seven hours after the Child was born, Parents executed an "Entrustment Agreement and Power of Attorney," which allowed Adoptive Parents to take the Child from the hospital and treat the Child as their own. Parents and adoptive parents agreed to exchange addresses regularly until custody and adoption were finalized. Parents also executed affidavits relinquishing their parental rights and waiving notice and process on any further

matters concerning the Child. Adoptive Parents returned to their home state of Texas and filed a petition to terminate Parents' parental rights and to adopt the Child. However, Parents filed a motion to terminate the adoption proceedings. Parents did not attend the hearing on the motion, and trial court terminated their parental rights, finding that Parents have each "executed an irrevocable affidavit of relinquishment of parental rights as provided in [Texas Family Code § 161.111]" and that termination of parental rights was in [the Child's] best interest." Trial court subsequently signed the adoption order. Parents appealed the termination order, but the deadline for perfecting appeal had passed and the appeal was dismissed. Parents then filed a petition for bill of review, asserting that trial court's termination order and adoption order were void, because the affidavits relinquishing parental rights were not compliant with Texas Family Code § 161.111, and trial court lacked jurisdiction. Parents testified that they did not intend to give the Child up for adoption and thought they were only agreeing to custodial visitation with Adoptive Parents.

Holding: Affirmed

Opinion: Texas Family Code § 161.111(a) states that " the validity of an order terminating the parental rights of a person ... who has executed an affidavit of relinquishment of parental rights ... is not subject to collateral or direct attack after the sixth month after the date the order was signed." Although trial court previously found that Parents had executed irrevocable affidavits, Parents argued on appeal that their affidavits relinquishing parental rights were not executed more than 48 hours after the birth of the Child, and therefore, the affidavits were not statutorily compliant and were void. Trial court's order was binding, unless Parents could set it aside through collateral attack. Under section (a), Parents' argument failed because Parents challenged the validity of the order terminating parental rights more than six months after it was signed. Subsection (c) restricts direct or collateral attacks on termination orders based on unrevoked affidavits of relinquishment of parental rights except in instances "relating to fraud, duress, or coercion in the execution of the affidavit." The evidence did not show that Parents' executing their affidavits was due to fraud, duress, or coercion.

MISCELLANEOUS

FATHER'S DESCRIPTION OF DOCTOR'S EXCLUDED TESTIMONY WAS INSUFFICIENT TO ALLOW COA TO DETERMINE WHETHER TRIAL COURT ERRED IN EXCLUDING TESTIMONY; AN OFFER OF PROOF OF EXCLUDED TESTIMONY MUST SPECIFY THE CONTENTS OF THE TESTIMONY, NOT BE A MERE GENERALIZATION

¶13-2-35. ***Watts v. Oliver,*** -- S.W.3d --, 2013 WL 266050 (Tex. App.—Houston [14th. Dist.] 2013, no pet. h.) (01/24/13).

Facts: Mother and Father had one Child before they divorced. About a year after the divorce, Mother made plans to remarry and move from Houston to Cypress, Texas. Mother notified Father of her intent to move and to place the Child in a new school. Father filed suit requesting to change primary custody of the Child, and Mother filed a counter-petition to modify. During the trial, Father attempted to offer testimony from a Doctor who had provided Father with counseling and therapy. Father stated that Doctor's anticipated testimony would discuss Father's efforts to co-parent with Mother and the effects of Mother's actions on the Child. Trial court ordered that the Doctor's testimony be limited to discussing only therapy that Father had received. After an eight-day trial court denied Father's request to change primary custody and signed a final order. Father filed a motion for new trial, which was denied. Father appealed.

Holding: Affirmed as Modified

Opinion: Father argued that trial court erred in limiting the Doctor's testimony to discussing only the therapy he had provided to Father, rather than allowing the Doctor to discuss other issues that Father thought were relevant to the best interest of the Child. At trial, Father's counsel provided a description of the Doctor's anticipated testimony, but after trial court limited the Doctor's testimony, Father did not make an offer of proof regarding the substance of the excluded testimony. Counsel's description of the Doctor's anticipated testimony was not specific enough to enable COA to determine its admissibility, because it did not describe the actual contents of the Doctor's excluded testimony. Further, Father did not demonstrate that the evidence would have been material to the trial court's decision, or that its exclusion was harmful.

Editor's Comment: *An offer of proof by counsel "must describe the actual content of the testimony and not merely comment on the reasons for it." J.V.*

¶13-2-36. ***Ford Motor Company v. Stewart, Cox, and Hatcher, P.C.***, -- S.W.3d --, 2013 WL 275988 (Tex. 2013) (01/25/13).

Facts: The Child and his Father were in a car accident; Child was severely injured, and Father was killed. Mother sued Ford Motor Company and Bridgestone/Firestone North American Tire as the Child's Next Friend. Mother and Firestone reached a settlement agreement in 2003, and a judge approved the settlement. The judge determined no guardian ad litem was necessary because there was no conflict of interest between Mother and the Child. In 2009, Ford and Mother presented a partial settlement agreement to a pretrial judge, who appointed a Guardian Ad Litem to represent the Child's interests. Mother filed a motion to reconsider the appointment, which included her affidavit opposing the appointment testifying that she had no conflict of interest. Guardian Ad Litem responded that he had ""inadequate information" to determine whether there was a conflict because Mother had not provided all the information he had requested. Trial judge approved the Ford settlement, "reapproved" the 2003 settlement with reduced attorney's fees, and awarded Guardian Ad Litem $40,000 in fees and expenses. COA affirmed the pretrial judge's appointment of Guardian Ad Litem, finding that Mother's obligation to pay Child's medical expenses coupled with her desire to pay the medical bills with proceeds from the settlement constituted the conflict necessitating the appointment of Guardian Ad Litem. Ford appealed, claiming trial court abused its discretion by appointing a guardian ad litem when there was no apparent conflict of interest between Mother and Child.

Holding: Reversed In Part and Remanded

Opinion: A trial court must appoint a guardian ad litem pursuant to TRCP 173 when there appears to be a conflict of interest between the minor and next friend. The guardian ad litem's initial role is to "determine and advise the court whether a party's next friend ... has an interest adverse to the party." The trial court should remove the guardian ad litem when the evidence presented fails to confirm that a conflict of interest exists. The trial court has no discretion to award a guardian ad litem compensation for services rendered after it has become clear that no conflict of interest exists, because such services would no longer be necessary under Rule 173.

Here, Mother testified in her affidavit that she was not involved in the accident, she was not asserting any claims in this lawsuit on her own behalf, she was not an heir or representative of the estate of Child's Father, she had no financial interest in that estate's recovery, and she understood and agreed that she had no right to the proceeds of any settlement of the litigation. Guardian Ad Litem initially took issue with the prior settlement and the amount of attorney's fees awarded, but these issues had no bearing on whether Mother's interests were adverse to the Child's. Therefore, Guardian Ad Litem should have been removed, and trial court should not have awarded Guardian Ad Litem any compensation for work performed after Mother's motion to reconsider and Guardian Ad Litem's response was heard.

TRIAL COURT ERRED IN ORDERING HUSBAND TO PAY ATTORNEY'S FEES UNDER TEXAS FAMILY CODE § 9.014(9)(A) FOR REQUESTING ENFORCEMENT OF AN INJUNCTION AGAINST WIFE'S SPEECH REGARDING HUSBAND'S MEDICAL ISSUES; TFC 9.014(9)(A) APPLIES TO ENFORCEMENT OF PROPERTY DIVISIONS, NOT INJUNCTIONS AGAINST SPEECH

¶13-2-37. ***Shilling v. Gough,*** -- S.W.3d --, 2013 WL 428624 (Tex. App.—Dallas 2013, no pet. h.) (02/05/13).

Facts: Husband and Wife divorced. Their decree included a permanent injunction forbidding Wife from disclosing "any information about [Husband's] past or current medical history." Three years later, Husband filed a petition for enforcement, claiming that Wife had violated the injunction by disclosing information to the Texas Medical Board, Wife's friend, and Wife's new husband. Trial court concluded that Wife had not violated the injunction, because the injunction did not forbid "discussion" of medical history with those who already knew the history, as Wife's husband and friend did. Husband was denied all relief, and Wife was awarded nearly $100,000 in attorney's fees. Husband appealed, alleging that trial court erred in awarding attorney's fees without statutory authority.

Holding: Reversed and Rendered

Opinion: Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party's fees. The trial court specifically found "it had statutory authority to make the attorney's fees award pursuant to Texas Family Code § 9.014. Texas Family Code § 9.014(9)(A) begins with a description of who may seek enforcement: "A party affected by a decree of divorce or annulment providing for a division of property as provided by Chapter 7 may request enforcement of that decree by filing a suit to enforce as provided by this chapter in the court that rendered the decree." The remainder of the subchapter makes clear that the Legislature contemplated only an enforcement action dealing with property issues when enacting this section. Husband's petition for enforcement of an injunction against speech was not governed by TFC 9.014(9)(A). Trial court also found that "it had statutory authority to award attorney's fees as sanctions." However, the record contained neither a motion for sanctions nor a notice of any kind to Husband indicating that sanctions were being sought against him.

Tex. Civ. Prac. & Rem. Code 10 can provide statutory authority for a sanction based upon a party's filing suit for improper purposes. Trial court found that Husband failed to make reasonable inquiry into the facts he alleged before filing his enforcement action. But there is no indication that Husband ever knew before trial court's judgment that there was a possibility he could be sanctioned. Trial court did not ensure Husband received notice, Husband had no opportunity to defend against specific violations, and no sanctions order referenced TCRP 10. Additionally, TRCP 13 allows sanctions for suits that are "groundless and brought in bad faith" or "groundless and brought for the purpose of harassment." Wife alleged Husband's suit was groundless, but COA disagreed, stating that they could not say "Husband's argument that the injunction forbade such conversations had no basis in law or fact."

Finally, the award of sanctions lacked due process safeguards, since Wife's statements that Husband's lawsuit was "frivolous" and "brought for purposes of harassment" seemed to be the only basis on which sanctions were awarded.

JUDICIAL ETHICS OPINION 296 (2013)

Because several counties use associate judges and on occasion an attorney may sit for those associate judges on a part-time basis, I have included this Ethics Opinion in the report this month. These opinions are not binding, but I think that attorneys acting in these rolls need to be aware that this opinion has been issued and that if might be applicable under those circumstances.

PRACTICE OF LAW BY PART-TIME JUDGE

FACTS: An attorney has been appointed as a part-time family law associate judge by the district judge. The associate judge continues to represent family law clients before other district courts of that county and before courts in other surrounding counties.

QUESTIONS:

May a part-time family law associate judge, appointed by a court, represent family law clients before any of the other courts

1. in that county?
2. in surrounding counties?

ANSWER:

The committee answers Question 1 "No."
The committee answers Question 2 with a qualified "No."

DISCUSSION: A part-time associate judge appointed by a court is governed by the Code of Judicial Conduct. Canon 6D. As stated in Canon 6D(1), certain portions of the Code of Judicial Conduct do not apply to part-time judges, including the prohibition set out in Canon 4G that a judge may not practice law. However, the following provisions of the Code do apply to a part-time judge, and are relevant to the stated inquiry:

- Canon 6D(2) states that a part-time judge "should not practice law in the court which he or she serves or in any court subject to the appellate jurisdiction of the court which he or she serves, or act as a lawyer in a proceeding in which he or she has served as a commissioner, master, magistrate, or referee, or in any other proceeding related thereto."
- Canon 2A provides that "a judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
- Canon 2B provides that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge…."
- Canon 4A provides that "a judge shall conduct all of the judge's extra-judicial activities so that they do not (1) cast reasonable doubt on the judge's capacity to act impartially as a judge…."
- Canon 4D(1) provides, "A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of the judicial duties, exploit his or her judicial position, or involve the judge in frequent transactions with lawyers or person likely to come before the court on which the judge serves…."

The committee believes that it is inconsistent with Canons 6D(2), 2A, 2B, 4A and 4D(1) for a part-time family law associate judge, appointed by a court, to represent clients before any court of the county in which he or she is appointed and before courts in the counties surrounding the county in which he or she is appointed,

provided that those courts are "subject to the appellate jurisdiction of the court which he or she serves". If a part-time judge chooses to practice before any other court, the judge must be aware of the obligations under the Code of Judicial Conduct, and practice consistent with these obligations, especially Canons 2A, 2B, 4A and 4D(1).

The roles of advocate and impartial judge are in opposition to each other, and a judge may not use the authority of judicial position to advance one's private interests as an advocate. As stated in Opinion 288 (2003), A built-in dilemma exists in our justice system when a part-time judge also maintains a law practice. Under the Texas Disciplinary Rules of Professional Responsibility a lawyer has an obligation to zealously represent his client within the bounds of the law. When that lawyer also serves as a judge, however, his [or her] duty as a judge is to be impartial and to promote public confidence in the integrity and impartiality of the judiciary. The Committee stresses to all part-time judges to keep this conflict in mind when choosing to accept representation.

SUPREME COURT WATCH

Following are some of the cases that are related to family which are currently being considered by the Texas Supreme Court. Review has been granted and oral argument has been heard on some of these cases. The remainder of the cases are still somewhere in the briefing phase of consideration. The briefs that have been filed in these cases can be found on the Texas Supreme Court website, along with the oral arguments that have been presented.

***In re Lee*, 11-0732** (oral argument held on February 28, 2012) (Tex. App.—Houston [14th Dist.], orig. proceeding) (Harris County) (amicus brief filed by the Family Law Council).

The issues before the Court was whether a trial court has a ministerial duty to enter judgment on an MSA it believes is not in the child's best interest and are MSAs now subject to a best interest review.

***Tedder v. Gardner Aldrich, LLP*, 11-0767** (oral argument held on November 7, 2012) (Tex. App.—Fort Worth 2011) (Tarrant County).

The principal issues before the supreme court are (1) whether Family Code 3.201's two instances making a spouse liable for the other's debts establish the exclusive means to hold a spouse personally liable for the other spouse's debts; (2) whether the attorney fees for the spouse sued for divorce were necessities; and, if so, (3) whether the other spouse failed to discharge his support duty to make him personally liable for the fees.

***Texas Office of Attorney General v. Richard Lynn Scholer*, 11-0796** (oral argument held on December 6, 2012) (Tex. App.—Fort Worth) (Clay County).

In this child-support action brought by the state, a principal issue is whether estoppel may be a defense for a father who signed an affidavit terminating his parental rights that he assumed was filed but never was. Sued over as much as $80.000 in unpaid child support, Scholer defended himself by contending he signed the affidavit his ex-wife's attorney prepared in answer Scholer's offer to terminate his rights in a dispute over his access to the child. The affidavit noted his child-support obligation would cease, that he did not want to appear in court or by counsel and that he knew he "may not be further informed about the termination suit" or any other proceedings affecting his son. In a hearing over the past-due support, Scholer testified he assumed his parental rights ended. His ex-wife testified she decided not to follow through with the termination, did not

believe she had a duty to tell him and was unaware Scholer signed the affidavit. The trial court ordered Scholer to pay past-due support. The appeals court reversed, holding that estoppel was an available defense in the attorney general's enforcement action.

***Rosser Craig Tucker II v. Lizabeth Thomas,* 12-0183** (oral argument held on Feb. 5, 2013) (Tex. App.—Houston [14th Dist.) (Harris County).

The issues are (1) whether the trial court has authority to award attorney fees as "necessities" for child support when the nature of the action is modification and not enforcement and, if so, (2) whether awarding 6 percent compound interest on those fees abused the trial court's discretion. Tucker sued his ex-wife, Thomas, to modify final orders to give him exclusive right to designate his children's primary residence. In her counterclaim Thomas sought sole managing conservatorship and increased child support from Tucker. The trial court denied Tucker's relief and Thomas's request to be appointed joint managing conservator, but increased Tucker's child support. The court awarded Thomas attorney fees as child support, finding the fees necessities benefiting the children. The appeals court affirmed in a split decision by the whole court.

***In re Blevins,* 12-0636** (oral argument pending) (Tex. App.—Waco 2012, orig. proceeding) (Somervell County).

In this foster parents' challenge to an order placing children in Mexico with their father the issues are (1) whether the parental presumption applies in a modification suit and (2) whether the trial court abused its discretion by determining the children's best interest was served by ordering them to live in Mexico with their father.

***In re Leslie Ann Taylor Scales,* 12-1035** (response to petition for writ of mandamus requested and filed) (Tex. App.—Fort Worth, original proceeding) (Denton County).

In this divorce action involving a special appearance, the principal issue is what is necessary to establish domicile and residence sufficient to file for a divorce in Texas.

***In re Zoe Michelle Jackman,* 13-0081** (response to petition for writ of mandamus requested and filed) (Tex. App.—Dallas, original proceeding) (Dallas County).

In this modification action, the trial court appointed an amicus attorney. The principal issues in this original proceeding are (1) whether an amicus can seek attorney's fees for other attorneys in her firm, even though they were not appointed as amicus attorneys, and for support personal in her firm and, (2) if so, whether the amicus attorney can bill those individuals at their normal hourly rate without getting the consent of the court or the mother and the father or does such billing constitute an up charge prohibited under the Texas rules of disciplinary conduct.