SECTION REPORT
FAMILY LAW
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IN THIS MONTH'S REPORT

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MESSAGE FROM THE CHAIR

As football season continues to gear up, it is hard to believe that autumn is just around the corner. The summer was a busy time for the Family Law Section. Year after year, the Advanced Family Law Seminar continues to be one of the largest CLE events in the country. Thanks to the hard work and dedication of Kathyrn Murphy and Bill Morris, the 2013 Advanced Family Law Seminar was the most successful seminar on record with 1,860 registrants.

The Advanced Family Law Seminar is also an opportunity for the Section to honor family lawyers who have made a significant contribution to the practice of family law. Chris Nickelson was awarded the Dan Price Award; Jane Shin received the Ken Fuller Pro Bono award; and the article written by Joe Indelicato and Greg Enos was named Best Family Law CLE Article. An article written by Family Law Section members Chris Nickelson, Georganna L. Simpson, Jimmy A. Vaught, Lawrence Doss, Rebecca Tillery and Jeremy C. Martin won the Franklin Jones, Jr. Best CLE Article Award presented by the State Bar College. Norma L. Trusch received the first Gay G. Cox Collaborative Law Award. The Texas Academy of Family Law Specialists also awarded its Sam Emison Award to former Section Chair, Tom Ausley.

Over the summer the Family Law Section, in collaboration with the Family Law Foundation, American Academy of Matrimonial Lawyers, Texas Chapter, and Texas Academy of Family Law Specialists, put on a Legislative Update seminar in Dallas, Houston, and Austin. I was to extend a very special thank you to Diana Friedman, Joe Indelicato, Lynn Kamin, JoAl Cannon Sheridan and Warren Cole for making these seminars a huge success.

To continue its commitment to pro bono services, the Family Law Section also partnered with the Texas Young Lawyers Association on July 26, 2013, to present a seminar on how to handle pro bono family law cases. The turnout was incredible as family lawyers worked to educate attorneys from all sections of the bar and to provide them the resources and training necessary to take a pro bono family law case. A similar seminar in Austin is currently being finalized.

As I reported in my last message, the Family Law Section is currently the fourth largest section of the State Bar of Texas. What many lawyers do not realize is the exhaustive work and commitment donated by Family Law Section members across the state that contributes to the success of our section and the benefits provided to our members. There are currently twenty committees within the Family Law Section that are responsible for the resources provided to our membership.

The end of the 83rd Regular Session of the Texas Legislature brought an end to another successful year for the Legislative Committee, chaired by Jack Marr and Diana Friedman. While the 83rd Regular Session may have ended on May 27, 2013, the committee has already begun working on issues and legislation for the 84th Legislative Session.

New legislation also means more work for the Formbook Committee chaired by Norma L. Trusch and Georganna L. Simpson. The Formbook Committee authors the Texas Family Law Practice Manual that provides the forms and practice notes that most family lawyers rely on in their everyday practice. The Family Law Practice Manual is just one of the many publications and projects authored, developed and produced by Family Law Section members. New projects and practice tools are currently under development so stay tuned!! We are also very excited about our new website currently under development. Website Committee Chair Kristal Thomson will be working with our PR firm Pro Solutions to develop a site that will allow Family Law Section members greater access to all section resources and benefits.

The Appellate Committee is responsible for submitting amicus briefs in matters involving substantive or procedural law on major issues of importance to the practice of family law. On May 17, 2013, the Texas Supreme Court issued an opinion in the case of *Tedder v. Gardner Aldrich LLP*. The opinion, written by Justice Hecht, is sweeping and potentially bad for family law litigants and practitioners in that it pretty much eliminates the process of family law attorneys intervening to seek their fees once they are not paid and have withdrawn. In addition, the Court holds that the necessaries doctrine is not a basis for recovering attorney's fees from an opposing party in a divorce case. Following this decision, an amicus brief was submitted on behalf of the Family Law Section asking the Supreme Court to reconsider its ruling. A Motion for Rehearing was filed by Gardner Aldrich on July 13, 2013. Mr. Tedder's response to the Motion for Rehearing was filed on August 1, 2013, and Gardner Aldrich's Reply Brief was filed August 13, 2013. I will continue to keep you updated on new developments in the case as they occur.

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On August 27, 2013, the Dallas Court of Appeals issued a Memorandum Opinion in the case of *In the Interest of SKD and JED* holding that a Mediated Settlement Agreement is irrevocable only as it applies to suits arising under Texas Family Code Section 153 (original suits). Given the impact of this opinion on other suits not arising under Section 153, namely modification suits, the Appellate Committee asked the Family Law Council for permission to submit an amicus brief to the Dallas Court of Appeals. This request was voted on favorably by the Council. We owe a huge thank you to Appellate Committee Chair Charles Hardy and the rest of the Appellate Committee for their hard work and a special show of gratitude to Georganna L. Simpson and Jessica Janicek for their tireless work in the drafting of these amicus briefs.

The Pro Bono Committee, chaired by Steve Naylor, continues to advance the Family Law Section's goal of providing an attorney for indigent Texans across the State. This year the Pro Bono Committee hosted eleven seminars in Palestine, Fredericksburg, Kingsville, South Padre, Victoria, El Paso, Amarillo, Longview, San Marcos, Eagle Pass/Del Rio, and Abilene resulting in lawyer representation for hundreds of indigent litigants across the state. In addition, we have fast-tracked our work on Family Law Cares, the Family Law Section's campaign to mobilize and educate lawyers from all practice areas to take a pro bono family law case. As we continue to work on the launch of our statewide family law pro bono website, our first annual Family Law Cares Fun Run will take place in November at Fair Park in Dallas.

Upcoming Events

Mark your calendar for the following family law events:

October 3-4, 2013: New Frontiers in Marital Property, Napa Valley Marriott Hotel & Spa
November 10, 2013: Family Law Cares Fun Run, Fair Park, Dallas
December 5-6, 2013: Advanced Family Law Drafting, Hotel Palomar, Dallas

Finally, congratulations to our own Cindy Tisdale and Tom Vick. Cindy has been elected Chair of the Board of Directors for the State Bar of Texas and Tom has been appointed Chair of the Texas Bar Foundation.

I hope to see everyone next month in Napa Valley.

----------**Sherri Evans, Chair**

Notice from Office of the Attorney General

Revised 2013 Tax Charts with an effective date of 9-1-2013 are now published at:
http://www.sos.state.tx.us/texreg/pdf/currview/0823ia.pdf

They charts are also available on the OAG website.
https://www.oag.state.tx.us/cs/attorneys/index.shtml
https://www.oag.state.tx.us/cs/attorneys/attorneys_other_tax.shtml

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In the Law Reviews and Legal Publications

LEAD ARTICLES

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How Children Experience the Blended Family, Jonathan W. **Gould**, Nicki Beth **Fisher**, Dror **Bikel**, 36 FAM. ADVOC. 4 (Summer 2013).
What I Wish I Had Known, Paulla M. **Lipsey**, 36 FAM. ADVOC. 21 (Summer 2013).
Children's Schedules, Philip M. **Stahl**, 36 FAM. ADVOC. 8 (Summer 2013).
Polyparenting: The Psychological Impact of Having Multiple "Parents" in a Child's Life, Robert A. **Simon**, 36 FAM. ADVOC. 35 (Summer 2013).
Rights, Responsibilities, & Liabilities of a Stepparent, Peter M. **Bryniczka**, 36 FAM. ADVOC. 26 (Summer 2013).

TEXAS ARTICLES

My Country or My Child?: How State Enactment of the Uniform Deployed Parents Custody and Visitation Act Will Allow Service Members to Protect Their Country & Fight for Their Children, Brittany A. **Jenkins**, 45 TEX. TECH. L. REV. 1011 (Summer 2013).
Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates, Karel **Raba**, 15 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 293 (2013).

ASK THE EDITOR

Dear Editor*:** A new client came into my office yesterday wanting to get a divorce after she learned that her husband had never divorced his first wife. They have been "married" for six years. Since her husband was never divorced from the first wife, was my client every legally married and can I now get her a divorce and, if so, what would she be entitled to receive in a property division? ***Pondering in Ponder

***Dear Pondering in Ponder*:** Your client appears to be involved in what is called a putative marriage. A putative marriage is one that was entered into in good faith by at least one of the parties, but which is invalid by reason of an existing impediment on the part of one or both parties. *Garduno v. Garduno*, 760 S.W.2d 735, 738 (Tex. App.—Corpus Christi 1988, no writ); *Dean v. Goldwire*, 480 S.W.2d 494, 496 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.). A putative marriage may arise out of either a ceremonial or common law marriage. *Garduno*, 760 S.W.2d at 738. The effect of a putative marriage is to give the putative spouse who acted in good faith the same right in property acquired during the marital relationship as if he or she were a lawful spouse. *Davis v. Davis*, 521 S.W.2d 603, 606 (Tex. 1975). However, there being no legally recognized marriage, property acquired during a putative marriage is not community property, but jointly owned separate property. *Garduno*, 760 S.W.2d at 739.

However, if the relationship is merely meretricious—neither your client nor her "husband" had a good faith belief that they are entering into a marital relationship—there is no innocent party in need of equitable protection under the law. Thus, when a meretricious relationship ends, a party only has an interest in the property that he separately purchased and that he acquired an interest in through an express trust, a resulting trust, or the existence of a partnership. *Faglie v. Williams*, 569 S.W.2d 557 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.); *Hyman v. Hyman*, 275 S.W.2d 149, 151 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.); *see Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43, 46 (1909). In all other situations, the courts have refused to award anything to a pretended wife, who knows the nature of the relationship in which she is involved. *Lawson v. Lawson*, 30 Tex. Civ. App. 43, 69 S.W. 246, 247 (1902, writ ref'd). Normally, in meretricious rela-

tionships, "the courts will leave the parties as they find them, on the same principle that they refuse to enforce any other contract which by reason of its objects, or the nature of the consideration upon which it rests, is violative of law or against public policy." *Id; see also* *Meador v. Ivy*, 390 S.W.2d 391, 394 (Tex. Civ. App.—San Antonio 1965, no writ).

THERAPY TO GO

Dear Therapy to Go: Hey there, I am writing because I have a client that I simply do not understand at all. I find myself confused and glossy eyed after every encounter we have. She is in her late 40's and is going through a divorce from her husband of 20 years. The divorce is mutual and they have been separated for over a year. My client has a 20 year old daughter who lives with her. The daughter does not work and is a marijuana smoker. Mom says that she needs it for migraines and gives her a monthly allowance for her drug needs. The daughter has moved into her mother's room because she has "space issues." My client has missed several appointments because she drives her daughter to visit her numerous friends who are in college. I need help because my client has to run everything by her daughter, and when the two are in my office mom often gets treated with an uncomfortable level of disrespect. What in the world do I do?
In need,
Helpless Holly.

Dear Holly: Sorry to hear about your difficult client. It sounds to me like your client has an exaggerated responsibility towards her daughter and her needs. This feels icky and confusing because, well…it is. Your client's approval department consists of her daughter and most assuredly, her ex-husband. What you have here is a lifetime of learned behavior and that is not something you are going to be able to unpack and sort out on your own. Your client is going to need some help in understanding that she is an individual. This is a classic case of codependence and an intense enmeshment of family members. My recommendation, honestly, would be to refer her to a therapist who specializes in codependency and family enmeshment to help her through this process. The reason that this is important is because you are going to need to set healthy professional boundaries. The last thing you want is for your client to desire your approval. The pity she may see in her daughter quickly turns to love. It would be devastating for her daughter to not need her anymore, and if that was to happen, your client would be left helpless and abandoned. If you are not careful, your client may need you to need her. Recovery would lead your client on the path to self-reliance, freedom, love, and serenity. So, it's important to remember that when your client is healthy, your job becomes easier. Good luck Holly, you got this.

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

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IN BRIEF

Family Law From Around the Nation
by
Jimmy L. Verner, Jr.

Alimony: A West Virginia court abused its discretion by ordering a husband who grossed $2,972.80 every two weeks to pay his wife $1,600 per month in alimony when the wife's expenses exceeded her income by only approximately $200 per month and the trial court failed to make findings on the husband's monthly expenses. *Collisi v. Collisi*, 745 S.E.2d 250 (W. Va. June 13, 2013) (per curiam). In a modification suit, a Vermont court failed to make sufficient findings to support its conclusion that an ex-wife's expected inheritance of $100,000 would substantially reduce her need for maintenance when the parties previously agreed to maintenance of $6,300 per month. *Hausermann v. Hausermann*, 2013 VT 50, ___ A.3d ___, 2013 WL 3482185 (July 12, 2013). A Maine court abused its discretion when it ordered a husband to pay his wife's health insurance "throughout COBRA and thereafter" and to pay her tax debts "in perpetuity" because, among other things, the evidence was speculative on the cost of the health insurance, one ex-spouse may not be ordered to pay the other's future taxes, and a court lacks power to order spousal support indefinitely. *Finucan v. Williams*, 2013 ME 75, ___ A.3d ___, 2013 WL 4055354 (Aug. 13, 2013).

Bankruptcy: Applying South Dakota law, the 8th Circuit held a debtor's prepetition alimony award to be part of her bankruptcy estate because it was "an interest of the debtor in property" under 11 U.S.C. § 541(a)(1) and despite the provisions of 11 U.S.C. § 541(a)(5)(B), which excludes property acquired "as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree." *In re Mehlhaff (Mehlhaff v. Allred)*, 491 B.R. 898 (8th Cir. June 4, 2013). The 8th Circuit also ruled that the Nebraska Department of Health & Human Services held a priority claim for overpaid child support to the debtor because the debt was in the nature of a child support obligation. *In re Hernandez (Hernandez v. Nebraska Dep't of Health & Hum. Servs.)*, ___ B.R. ___, 2013 WL 4029207 (8th Cir. Aug. 8, 2013). The 7th Circuit reversed a bankruptcy court that excluded payments under a divorce decree of $200 per month to an ex-wife from the debtor ex-husband's estate because the ex-husband, and therefore his bankrupt estate, owned the source of the payments, an annuity. *In re Peel*, ___ F.3d ___, 2013 WL 3957581 (7th Cir. Aug. 2, 2013).

Child support: West Virginia's child support statutes do not give rise to a private cause of action by custodial parents against state child support agencies that lost child support orders and failed to reduce them to judgment, rendering the custodial parents' child support claims time-barred. *Fucillo v. Kerner*, 744 S.E.2d 305 (W. Va. June 5, 2013). Under Montana law, the Department of Public Health & Human Services holds the right to child support liens it imposed, such that the custodial parent could not assign her interest in a child support lien to her husband in her second divorce. *LeCount v. Davis*, 370 Mont. 362, 303 P.3d 281 (June 18, 2013). The Nebraska Supreme Court voided an execution sale on realty titled in the name of a third-party bona fide purchaser when there was no evidence that the prior owner, who was the child support obligor, had fraudulently conveyed the property to avoid collection of child support. *Fox v. Whitbeck*, 286 Neb. 134, ___ N.W.2d ___ (Neb. June 21, 2013).

Married? In California, the standard for determining whether an alleged putative spouse has a good faith belief in the validity of his or her marriage is subjective belief, focusing on the alleged putative spouse's state of mind, rather than objective belief, or in other words whether a reasonable person could believe the marriage was valid. *Ceja v. Rudolph & Sletten, Inc.*, 56 Cal.4th 1113, 158 Cal. Rptr.3d 21 (Cal. June 20, 2013). A Nebraska man failed in his attempt to obtain a declaratory judgment that his ceremonial marriage was invalid based on the marriage certificate being incomplete and that the certificate had not been filed with Nebraska's Bureau of Vital Statistics. *Vlach v. Vlach*, 286 Neb. 141, ___ N.W.2d ___ (Neb. June 21, 2013). The Federal Circuit Court of Appeals denied a claim by a veteran's alleged widow for dependency and indemnity com-

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pensation because the court applied state law to determine the validity of the marriage and the claimant did not meet Alabama's requirement of clear and convincing evidence to establish a common law marriage. *Burden v. Shinseki*, ___ F.3d ___, 2013 WL 3601220 (Fed. Cir. July 16, 2013).

Moving: The North Dakota Supreme Court held that, as a matter of law, a custodial parent's move from North Dakota to Minnesota constituted a material change in circumstances. *Frey v. Frey*, 831 N.W.2d 753, 2013 ND 100 (June 19, 2013). The West Virginia Supreme Court of Appeals held that a custodial parent's move from Colorado to West Virginia was not a substantial change of circumstances because the purpose of the move was to allow visitation for the father, whom the military had assigned to the Washington D.C. area. *Andrea H. v. Jason R.C.*, 745 S.E.2d 204 (W. Va. June 5, 2013).

Residency & venue: Although a Rhode Island trial court erroneously focused on a wife's intent when determining that she was a Rhode Island resident for the requisite year prior to filing for divorce, the Rhode Island Supreme Court found her to be a resident even though she had lived in France for 172 days of that year. *Meyer v. Meyer*, 68 A.3d 571 (R.I. June 26, 2013). The Arkansas Supreme Court reversed a Benton County trial court for dismissing a husband's divorce suit, filed at 9:05 a.m., in favor of the wife's divorce suit, filed in Washington County thirty-eight minutes later, because by statute, divorces are heard where first filed, notwithstanding the wife's arguments that Washington County was the "proper" venue because the parties resided there prior to separation, the wife still lived there with the parties' children and the marital home was located in Washington County. *Parker v. Parker*, 2013 Ark. 236 (May 30, 2013).

Time for valuation: A Montana court did not err in valuing a marital estate as of 2009, even though the parties separated in 2002, because between 2002 and 2009, the husband voluntarily made the mortgage payments on the wife's home and the spouses "continued to function as a 'family unit' . . . among other things, they traveled and vacationed together and gave the children joint Christmas and birthday gifts." *In re Marriage of Schwartz & Harris*, 370 Mont. 294, ___ P.3d ___ (Mont. May 30, 2013). An Alaska divorce court erred when it valued realty as of the date of separation (2008) rather than the date of the divorce trial (2011), in reliance on the husband's payment of mortgage payments with post-separation income and his claim that the real estate market was "flat" such that the realty did not appreciate during that time, because "post-separation mortgage payments to maintain marital property are common and do not qualify as unusual circumstances." *Beals v. Beals*, 303 P.3d 453 (Alaska June 28, 2013). After holding that a trial court erred by disregarding a consent order that set the date for valuing the marital estate as of October 17, 2008, which was well before trial, the Rhode Island Supreme Court ordered that on remand, the marital property be valued . . . as of the date of trial. *McCulloch v. McCulloch*, 69 A.3d 810 (R.I. June 25, 2013).

COLUMNS

DSM-5 AND EXPERT TESTIMONY: ANYTHING CHANGED?

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

Bipolar Disorder. Narcissistic and Histrionic Personality Disorders. These DSM-IV-TR (*Diagnostic and Statistical Manual of Mental Disorders*) diagnoses quickly catch a judge's or jury's ear—and raise concerns. DSM-5, the next revision, was finally published in May. Revisions portend changes, and DSM-5 delivered—adding diagnoses, recasting some, dropping others, and changing the style of reporting diagnoses.

Nevertheless, use of psychiatric diagnoses in mental health testimony has been controversial. Too many mental health experts will continue to misuse DSM-5 diagnoses as they did with diagnoses in previous DSM

[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.*

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versions—as broad-brush, professional "stamps of approval" that substitute for clear, trustworthy testimony. The most common misuse occurs when an expert attaches diagnostic criteria to cherry-picked events from a litigant's life or to selected test responses of the litigant. And diagnostic terms, particularly personality disorder labels, mix too easily with everyday language, confusing common understanding with scientific definition.

Although misunderstandings involving DSM diagnostic labels occur in many legal cases, the problem seems most endemic in family law—parents labeled with Borderline Personality Disorder or "Bipolar" must fight misconceptions about how those diagnoses directly affect their parenting abilities. In fact, the law does not make diagnoses an essential element of a claim or defense in child custody litigation—or in personal injury litigation or contractual competence determinations. Legal criteria for these actions concern themselves with impairment or capacity, not with diagnosis. *See* Stuart A. Greenberg, Daniel W. Shuman & Robert G. Meyer, *Unmasking Forensic Diagnosis*, 27 Int'l J.L. & Psychiatry 1 (2004).

Three foundational DSM-5 principles, survived from the DSM-IV-TR, offer useful starting points to question experts who insist on basing their testimony primarily on diagnoses rather than on relevant documented behaviors tied to parenting demands or other capacities at issue in the case:

• The DSM-5 was developed "to assist clinicians in conducting clinical assessments, case formulation, and treatment planning," not for legal purposes. (DSM-5 at 25).

• The DSM-5 requires that mental health professionals exercise clinical judgment when interpreting and counting the diagnostic criteria that comprise a diagnosis. Diagnostic criteria "are offered as guidelines for making diagnoses . . . ." (DSM-5 at 21)

• The DSM-5 cautions about using diagnoses in court, noting that "there are significant risks that diagnostic information will be misused or misunderstood . . . because of the imperfect fit between questions of ultimate concern to the law and the information contained in clinical diagnoses." Further, "It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a particular diagnosis does not imply a specific level of impairment or disability." (DSM-5 at 25).

The jury is still out as to how fully mental health professionals will accept DSM-5. But whether experts rely on the DSM-IV-TR or the DSM-5, the basics of their testimony still apply: "It is not so simply because an expert says it is so." *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998). If the expert invokes a DSM diagnosis, challenge the expert to specify why the diagnosis is relevant, the basis for the diagnosis, and how the diagnosis specifically compromises the litigant's functioning in matters of concern to the court.

Importance of Passports in SAPCR Cases: "Authority to Pass Through the Gate[1]"

By Jeff Coen[1]

Ever really looked at your passport? Not the picture or your physical description or even the foreign entry stamps as a reminder of all the exotic places you have, or have not been, but the official language from the U.S. State Department to all other governments. It says:

> The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection.

That language is pretty comforting when you are in a far off land, don't speak the language and you and your children are in need of help. Passports while once rare (their worldwide acceptance only came about in the 1960's with international air travel) are becoming the norm. Not just for foreign travel, they can also be used as a source of identity if the holder doesn't have a ubiquitous driver's license. If the U.S. Justice Department is unsuccessful in court, your passport will also be accepted identification used to vote in the next election.

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[1] The literal meaning of the word "passport" used in medieval times as written authority allowing the bearer to enter a walled and gated city.

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

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In my experience, all SAPCR orders should deal with the procedures of obtaining and using passports. The Boy Scout Jamboree in Canada, or the long weekend trip to Disney's Castaway Island in the Bahamas will require a passport for your children. I see two types of scenarios in my practice. Either no one has a clue as to the future need for children's passports, or one party is convinced that the other parent poses a real threat to absconding with the children, wants protection, and believes that exclusive possession of the passport guarantees it won't happen. There never seems to be anything between the extremes. As the attorney for a party you need to effectively deal with either position with information and action.

The best place to begin is the U.S. State Department, Bureau of Consular Affairs, Passport Division. Just because it is a federal bureaucracy and has a long name doesn't mean it is user unfriendly. In fact, there is a specific page dealing with children and it is written so that even attorneys and judges can understand. They have a "fact sheet" just for us at http://travel.state.gov/passport/ppi/family/family_864.html with specific links to the US CODE provisions, if you want to delve into pages of federal statutes[3].

Simply put, every U.S. citizen and national is entitled to a passport issued by the U.S. State Department. So, what is a "U.S. national"? For child custody purposes in Texas, it would be a rare person[4]. A national is defined as "...a person who, though not a citizen of the United States, owes permanent allegiance to the United States" and resides permanently in "outlying possessions of the United States" meaning only American Samoa and Swains Island[5].

Children's passport issues in a SAPCR come about in only two instances, at the time of the entry of a court order, either the child has an existing passport or he/she doesn't. When no passport exists the federal law and passport regulations established by the U.S. State Department lend a helping hand to parents in a custody case. In cases where there is already an existing passport for the child, federal law helps, but it is more problematic and specific language in a Texas SAPCR order is required.

APPLYING FOR AN ORIGINAL PASSPORT WITHOUT PRIOR COURT AUTHORIZATION

Generally if the child has no passport and the parents each have rights, duties and powers (JMC or even SMC/PC) it is going to take the consent of both parents to apply for and obtain a child's passport. The exception is specific authority from a state court granting such power to one or the other parent in a court order. Without such limitation, the parents are going to have to cooperate in obtaining a passport for their children

IF the parents cooperate a child's passport application can be handled either by both parents applying in person or by one parent appearing at the passport office with a signed and notarized[6]—Form DS-3053. The Feds do have an exception, part 5 of the form, if the applying parent articulates "special circumstances" as a reason for the inability to obtain the other parent's consent. However, more is required than "I can't find him/her." In case of death the death certificate of the parent and birth certificate of the minor showing parentage is needed. Other rejections have apparently occurred even though the "father was a non-citizen who returned to his native country and whereabouts are unknown;" was "incarcerated in an unknown foreign facility" or, "his actual identity is unknown and not named on the birth certificate." If the Passport Division rejects a parent's special circumstances, they simply return the application with another blank Form DS-3053.

In those cases where the parties fail to cooperate or the other parent's identity or location is unknown, and a Form DS-3053-part 5 "special circumstances" is rejected, the only remaining course is a state court order. If you have a previous SAPCR order that is silent as to passport application rights or if it gives such right to both the parties, then you must file a motion to modify under TFC Chapter 156. Substitute service under TRCP Rule 106(b) or 109 is appropriate if the absent parent's whereabouts are unknown.[7] If there isn't a prior

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[3] Interestingly, the salutatory cite links are currently not working. If you need the actual law see: http://www.uscis.gov/ilink/docView/22CFR/HTML/22CFR/0-0-0-1/0-0-0-2898/0-0-0-3163.html

[4] My niece's husband is from American Samoa and holds such a passport, so while rare it is something you may run into on occasion.

[5] Federal statutes and regulations can be arcane and overly detailed. Most of us can point to the Western Pacific and guess at the location of the Samoan Islands. In case you are interested, Swains Island is an American possession not far from Samoa in the Tokelau Islands (a dependency of New Zealand) and has less than 25 residents. It has been owned by one family for over 100 years as a plantation.

[6] No, TEX CIV. PRAC. & REM. CODE §132.001 (unverified statement) won't work here because this is controlled by federal law. However, the "special circumstances" section to be signed by the applying parent does not need notarization, but is still made under the "penalty of perjury."

[7] Beware of the recent Texas Supreme Court opinion severely criticizing substitute service. *In the Interest of E.R.*, 385 S.W.3d 552, 558 (Tex. 2012)

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order to modify then the correct procedure is to file a new SAPCR with all the additional cumbersome issues.[8] Once you obtain a specific "state court order" the application can proceed normally. Just make sure it gives your client the specific right to apply and possess the passport to the exclusion of all others. If you have a specific "state court order" prohibiting a named parent or guardian from applying for a passport and it is sent to the Passport Division, it will be honored.

Finally, in extreme circumstances the Secretary of State may order the issuance of a passport to a child when it is warranted by "special family circumstances." Such instances are rare and involve exigent circumstances necessitating the immediate travel of the child.

CHILDREN'S PASSPORT ISSUANCE ALERT PROGRAM (CPIAP)

This is a procedure provided by the Passport Division to alert a parent if any application has been submitted seeking original issuance, replacement or renewal of passport for the minor child. It is a notification system only. It DOES NOT prohibit or delay a passport application filed for a minor. It provides notice only and does not give any protection against a parent from absconding with child. The alert system is initiated by filling out and mailing the form.[9] The Feds will also notify a court, if notice is requested in the form.[10] Even if the parent requesting notification has no right to object to the issuance of a passport, that parent will still be notified if the form is filed.

VALID PASSPORTS ALREADY ISSUED

If the Passport Division has issued valid passports[11] at the time of a SAPCR, it is important to include possession and usage language in the court order. If no language is included, a state court's hands are tied as to controlling the possession and usage by one parent or the other without a modification order. Remember, the State Department is powerless to assist other than give out information. After the fact assistance is available in cases where the child has been abducted or the parent has been indicted for a felony in which case the State Department can revoke the parent's passport and request assistance from a foreign government.[12]

There is a widely circulated urban myth that a court order prohibiting a parent from traveling overseas with a minor can be sent to the State Department and the Feds will nab the child at the border for the rightful possessor. Be aware that the State Department cannot revoke a validly issued passport based on a state court SAPCR order. Nor does the State Department have any control over the possession of a child's passport by a parent or legal guardian once it has been validly issued. On several pages of the Passport Division's website dealing with minors is the following warning:

IMPORTANT: THE UNITED STATES GOVERNMENT DOES NOT HAVE EXIT CONTROLS AT THE BORDER. THE U.S. GOVERNMENT DOES NOT CHECK THE NAMES OR THE DOCUMENTS OF TRAVELERS LEAVING THE UNITED STATES. IF YOUR CHILD HAS A VALID PASSPORT FROM ANY COUNTRY, HE OR SHE MAY BE ABLE TO TRAVEL OUTSIDE THE UNITED STATES WITHOUT YOUR CONSENT.

The only way to control the possession and use of a child's validly issued passport is by obtaining and enforcing a state court SAPCR order. This is why it is important to have passport language in virtually all orders dealing with children.

The Texas Family Law Practice Manual (3rd ed.) has a good template, but I would advise using it as a guide only, and craft very specific language that covers your client's specific needs and concerns. Just re-

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[8] I've seen an attempt to obtain "a state court order" as required by the Passport Division by requesting an *ex parte* order based loosely on a declaratory judgment action, but I would not attempt it or approve it.

[9] Mail form to U.S. Department of State, Overseas Citizen Services, Office of Children's Issues, Attn: Children's Passport Issuance Alert Program, 2201 "C" Street NW, Washington, DC, 20520, or email it to E-mail: PreventAbduction@state.gov

[10] Having governmental, quasi-governmental agencies, or NGO's send documents directly to courts is an evidentiary quagmire and a topic for another day.

[11] Passports for children under 15 years of age when issued are good for five (5) years. For children over the age of 15 when issued, they are good for 10 years.

[12] As in the case of Richard Snowden the NSA "leaker".

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member, that if your state court order requires written consent by both parents for overseas travel, the State Department does not have the mechanism to enforce a state court order, other than by way of the actual issuing process and the Passport Issuance Alert Program.

EXTRA GOVERNMENTAL TRAVEL DOCUMENTATION REQUIREMENTS

While the Feds don't require any other consent documentation to exit or reenter the U.S. by a citizen other than a passport, many of the travel services and carriers do require them. Many of the cruise ship companies and some airlines require a notarized consent form from both parents or a copy of a court order allowing travel. Make your clients aware of this additional requirement and provide for it in your SAPCR order.[13]

TEXAS STATE COURT ASSISTANCE FOR PROHIBITING INTERNATIONAL ABDUCTION

The Feds look to the state courts for initialing controls over who can apply for and possess minors' passports. So what relief can be obtained from a Texas Court in a SAPCR regarding the real or perceived threat of international abduction of children?

Generally the trial court has authority over every aspect dealing with the "best interest of a child." But that power is neither unlimited nor applicable to each and every aspect of a child's life. The court must give one or both parents the ability to make parenting decisions without the interference of the court.[14]

When parents of different nationalities have disputes over children, can the Texas Court hearing a SAPCR limit the countries in which the child can travel? Or must it give one or the other parent the right to make that decision? I believe that the court can restrict travel to any country on the U.S. State Department's watch list of dangerous countries based on an objective as opposed to subjective safety risk.[15] Recent cases have also held that parents can be enjoined from international travel without the consent of the other parent (usually the parent who establishes the domicile).[16]

Additionally, Texas Family Code Section 153.503(4) provides state courts with passport control measures specifically designed to limit a parent's access to international travel with the child. Upon the finding of specific risk factors, the court may require: (1) a parent to surrender any passport issued for the child, including foreign national passports in dual citizenship situations; (2) prohibit a parent from applying for an original or renewal passport (presumably from any country) or an international travel visa; and, (3) require th parent to provide a copy of any court order to the U.S. State Department as well as any relevant foreign embassy or consulate. All of Subsections 5.501- 5.503 are designed to deal with protections against international child abduction by granting to the courts specific powers regarding use of passports.

However, these powers like all injunctive relief must be based on specific and articulated dangers. Texas Family Code Section 153.501-503 requires that the court make specific findings of the threat of international abduction in order to trigger the court's authority. Failure to establish the criteria will void the protective measures either by direct appeal[17] or collateral attack in an enforcement action.

CHILDREN'S DUAL NATIONALITY

If the child has dual nationality there is always the possibility of two passports being validly issued to a child. Remember that the child can travel on either passport. Even if you have prohibited a parent from apply-

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[13] Generic forms of "Affidavit of Parental Consent for Travel Outside the USA Without Both Parents" can be found with a simple google search such as (click here). The Garzmax form is the most detailed.

[14] For instance, it is not for the court to determine which school the child will attend, but to designate a parent to make the decision regarding the child's best interest. "In choosing between parents who are contending for the custody of the child, a magistrate has only such powers as the law has conferred upon him to determine whose custody would best promote the interest and welfare of the child." *Salvaggio v. Barnett*, 248 S.W.2d 244, 247 (Tex. Civ. App. – Galveston, 1952 writ re'f n.r.e).

[15] During the 1980's Iran-Iraq War, my client was divorced from an Iranian national who wanted to take his children home to visit his parents in Tehran. My facts were convincing not only because the father was a civil engineer who was automatically subject to conscription in the army, but his parents were reportedly both deceased. In those days the associate judge's bench was at eye level and as I entered her courtroom I saw her reading the New York Times with the 40pt headline stating "US Warship Downs Iranian Passenger Jet." I got my relief by the court prohibiting travel to any country on the Fed's watch list.

[16] See *Arredondo v. Betancourt*, 383 S.W.3d 730 (Tex. App.—Houston [14th] 2012, no pet); *Chia-Ying Persephone Chen v. Hernandez*, 2012 WL 3793294, 03-11-00222-CV (Tex. App.—Austin Aug. 28, 2012, pet. denied); and *Micklethwait v. Micklethwait*, 2007 WL 1852609, 03-06-00500-CV (Tex. App.—Austin June 27, 2007, pet denied).

[17] *Messier v. Messier*, 389 S.W.3d 904 (Tex. App.–Houston [14th] 2012, no pet).

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ing for a U.S. Passport (or have secured possession) there is always the possibility of the child leaving the USA as a foreign citizen.

Issuance of state court order and securing both the U.S. Passport and the foreign passport under Tex. Fam. Code §153.503(3)(B) doesn't mean that the foreign county won't issue a replacement passport to the child even if notified. Hopefully, if the child's second nation's government is a signatory of the Hague Convention it would at least flag the child's name if notified, but there is no guarantee. In most situations children traveling to the country of their alternative citizenship aren't required to obtain an entrance visa when traveling on a valid domestic passport, so such country would have no ability to prohibit the travel even if noticed.

CONCLUSION

When discussing international travel with your client, passport restrictions are just one issue. The first question to ask is the reason for restricting international travel. There is usually no middle ground. Either the parent is justifiably fearful of international abduction or simply does not want the other parent to travel (not even to Oklahoma). Where both parents were born in the USA and have no ties to any foreign country other than for business or leisure, trying to prohibit the children from appropriate travel to the Caribbean or Europe for a family vacation is a no brainier and after discussing it with your client, should be discouraged.

The more difficult situation involves those situations where dual nationality or discernible allegations of abduction exist. In those cases your solution is the U.S. State Department and a specific Texas SAPCR order. The U.S. State Department has limited authority to prohibit the issuance of a passport if its criteria are met and almost no authority to restrict or invalidate a child's passport if one has been issued. Texas Courts have wide ranging, but not unlimited authority to regulate or even prohibit international travel by a child, but only after specific requirements are met. Like all court actions, they are remedial and punitive, not proactive. Passport restrictions are but one aspect of protecting children from abduction and danger. Prohibiting a parent with a child in tow from "passing through the gate" doesn't mean they can't get in/out utilizing other means.

ARTICLES

IRS RULES ON SAME-SEX MARRIAGES

By Charles Pulman, J.D., LL.M., C.P.A.[1]

On June 26, 2013, the United States Supreme Court issued a historic decision affecting the application of federal law to same-sex married couples.

In the case of *United States v. Windsor*, U.S. , 133 S. Ct. 2675 (2013), ("***Windsor***"), the Court held that Section 3 of the 1996 Defense of Marriage Act ("**DOMA**") was unconstitutional as a deprivation of liberty protected by due process and equal protection. Section 3 of DOMA stated that for purposes of federal law, the word "marriage" meant only a legal union between one man and one woman as husband and wife, and the word "spouse" referred only to a person of the opposite sex who is a husband or a wife. As a result of *Windsor*, all federal benefits, rights and privileges are accorded to same-sex married couples.

The *Windsor* case involved a same-sex couple that was married in Canada while living in New York and residing in New York at the time of death of one of the parties to the marriage. Because New York recognizes same-sex marriages, the Court concluded, on those facts, that federal benefits would be extended to the same-sex married couple in *Windsor*. The uncertainty with the *Windsor* opinion is whether its holding extends to a same-sex married couple who was validly married in one state but residing in another state that does not recognize same-sex marriages.

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At the present time, 13 states and the District of Columbia recognize same-sex marriages as valid. The other 37 states, including Texas, do not recognize same-sex marriages.

In 2004, the General Accounting Office identified 1,138 federal statutory provisions involving marital status as of December 31, 2003, with 198 separate Internal Revenue Code provisions tied to marital status. Since the *Windsor* opinion did not explicitly provide for the application of federal laws to same-sex married couples residing in states that do not recognize same-sex marriages, the application of federal law to same-sex married couples depends upon how each federal agency decides to apply federal law administered by that agency.

For example, in June 2013, Homeland Security announced that the law of the place where the marriage took place would determine whether the marriage is valid for immigration purposes. In addition, the Office of Personnel Management issued a notice in June 2013 that federal benefits would be extended to federal employees and annuitants of a valid same-sex marriage seemingly regardless of residence. Similarly, the Department of Defense has announced that military benefits will be extended to spouses of a valid same-sex marriage regardless of the state where the parties reside. The Social Security Administration apparently looks to state of residence.

On August 29, 2013, the Internal Revenue Service issued *Revenue Ruling 2013-17* (the "**Ruling**") stating that all federal income, gift and estate tax laws will be extended to the parties to a valid same-sex marriage regardless of the state in which the parties reside. The *Ruling* also concludes that federal tax law will not be extended to parties who have entered into a registered domestic partnership, civil union or other similar form of relationship recognized under state law that is not denominated as a marriage under the laws of that state regardless of whether the parties to the marriage are same-sex or different sex.

The *Ruling* states that it is to be applied prospectively as of September 16, 2013. Thus, after that effective date, all federal tax laws will apply to the parties to a valid same-sex marriage as long as the marriage was performed in a place, whether in the United States or in a foreign county, that recognized the marriage as valid.

On the same date as the issuance of the *Ruling*, the IRS also issued *Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions* and *Answers to Frequently Asked Questions for Individuals of the Same-Sex Who Are Married Under State Law*. Those *FAQs* attempt to clarify the *Ruling* and address additional issues arising out of the Ruling.

The *Ruling* and the *FAQs* also provide that a same-sex married couple may file a claim for refund for a prior year for which the statute of limitations is still open if the couple was married during that prior year. The *Ruling* also provides that for federal tax returns to be originally filed after September 16, 2013, the original return must be filed on the basis of the parties being married, even though, for example, the income tax return may relate to a prior year.

The *Ruling* and the *FAQs* provide that if an original or amended return (claim for refund) claiming marital status is filed for a prior year, then all of the items reported on that return must be filed consistent with marital status.

Since Article 1, Section 3.2 of the Texas Constitution and Section 6.204 of the Texas Family Code explicitly do not recognize same-sex marriages and explicitly provide that no Texas benefits are to be extended to parties to a same-sex marriage, a conflict now exists between the application of Texas law to the parties to a valid same-sex marriage and the application of federal tax law to the same parties.

Subsequent issues of this Newsletter will address in more detail the *Ruling* and *FAQs*, as well as the application of federal tax law to same-sex married couples living in Texas.

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Criminal Parental Kidnapping Laws: More Than Just a Custody Dispute Gone Bad

Carina Iverson*

PART I: THE PARENTAL KIDNAPPING PROBLEM:

A. Definition

The term "kidnapping" tends to evoke images of an ill-intentioned stranger sneaking up from behind to snatch away an unsuspecting child, with any chance of return contingent on the payment of ransom. The unfortunate reality is that most children are abducted not by strangers, but rather by a parent or other family members.[1] When there is a custody order in existence, parental kidnapping or child-custody interference[2] is defined as the taking, retention, or concealment of a child by his parent in violation of the rights of the child's other parent or another lawful custodian.[3] The violated rights of the left-behind parent include custody and visitation.[4] In the absence of a court order, a person having a right of custody of the child commits the crime of parental kidnapping if "he removes, takes, detains, conceals, or entices away"[5] that child without good cause, and with the intent to deprive the custody right of another person or a public agency.[6] Parental kidnapping is most likely to occur when the child is caught in a custody tug-of-war between parents.[7] A number of self-justifications or motivations underlying parental kidnapping have been stated, some more malicious than others. Some parents take their children from the left-behind parent because he/she finds fault with the other parent.[8] Some abduct the children as revenge for the failed relationship or divorce.[9] Others just wish to return to their native country or move closer to family.[10]

Whatever the justification in a specific case, there are two likely victims suffering as a result, the left-behind parent and the abducted child. The left-behind parent can suffer "serious emotional and psychological problems" as a result of parental kidnapping.[11] In addition, the left-behind parent often does not know how or have the resources available to attempt recovery of his or her child.[12] The left-behind parent may face significant financial strain as a result of travel and legal costs.[13] Although there are international and domestic legal means to address abductions, there is still not a foolproof solution for the left-behind parents.

Parental kidnapping has been called "one of the most subtle and brutal forms of child abuse."[14] "The true victim of the kidnapping is the child himself, who suffers from the sudden upsetting of his stability, [and] the traumatic loss of contact with the parent who has been in charge of his upbringing...."[15] Abducted children

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[1] Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677 (1996).

[2] While in some cases it may be appropriate to prosecute both for kidnapping and custodial interference, states enacted custodial interference statutes intending to create criminal liability for parental abductions of children that were evading prosecution under the kidnapping statute. 51 C.J.S. Kidnapping § 31 (2012). The focus of a child custody interference or parental kidnapping statute is protection of the legal custodian's parental rights. *Id.*

[3] 20 A.L.R.4th 823 (Originally published in 1983); What Constitutes Parental Kidnapping*?*, http://www.attorneys.com/child-custody/what-constitutes-parental-kidnapping/.

[4] *Id.*

[5] Haw. Rev. Stat. § 707-726 (West); N.H. Rev. Stat. Ann. § 633:4; Ariz. Rev. Stat. Ann. § 13-1302 (2011); 51 C.J.S. Kidnapping §31(2012) *citing* *People v. Dewberry*, 8 Cal. App. 4th 1017, 10 Cal. Rptr. 2d 800 (1st Dist. 1992).

[6] *Id.*

[7] Scott Grossberg, *Child Caught in the Crossfire: Parental Kidnapping and Custodial Interference*, 9 J. Juv. L. 138 (1985).

[8] Paul R. Beaumont & Peter E. McEleavy, The Hague Convention on International Child Abduction 2, 11 (P.B. Carter ed., 1999); *See* Catlin Bannon, *The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance*, 31 B.C. Third World L.J. 129, 134 (2011).

[9] *Id.*

[10] *Id.*

[11] Office of Children's Issues, U.S. Dep't of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, Travel.State.Gov, 7 (2009); Catlin Bannon, *The Hague Convention on the Civil Aspects of International Child Abduction: The Need for Mechanisms to Address Noncompliance*, 31 B.C. Third World L.J. 129, 135 (2011).

[12] *Id.*

[13] *Id.*

[14] Note, *Prevention of Child Stealing: The Need for a National Policy*, 11 Loy. L.A.L. REV. 829, 831 (1978).

[15] Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677 (1996) *quoting* Adair Dyer, *Report on International Child Abduction by One Parent ('legal kidnapping')*, Preliminary Document No. I of August, 1978, *in* Actes Er Documentes De La Quatorzieme Session, Hague Conference on Private International Law, 6 Au 25

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face higher risks of attachment disorder, anxiety disorders and PTSD in addition to nightmares, fears of windows and doors, bedwetting, a fear of authority, a fear of strangers, depression, school and peer problems and anger at the abductor or the left-behind parent.[16] Such resulting problems have been found to persist well into adulthood.[17]

B. Available Legal Processes in the United States

Roughly one-third of the children abducted by a parent in the United States end up in Mexico.[18] In the event that a child is taken across the border to Mexico from Texas, what are a left-behind parent's options? The parent may be inclined to seek all possible remedies simultaneously, but this may not be the most effective plan of action.[19] The goals and limitations of each type of claim should also be considered. While civil remedies aim at the return of the child, criminal prosecution aims at the kidnapping party and even if successful, does not guarantee the child's return as discussed below.[20]

This article provides a brief discussion of the available civil processes and the less often utilized criminal processes available in a parental kidnapping case both domestically and internationally. The American response to parental kidnappings domestically is primarily directed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in force in all states and the federal Parental Kidnapping Prevention Act (PKPA). The civil processes for international parental kidnapping specifically emphasize the Hague Convention on the Civil Aspect of Child Abduction[21] and the U.S. adoption of the terms of the convention through the federal International Child Abduction Remedies Act (ICARA). Finally, the criminal processes available in the United States and Texas may arrive on the scene. This article will then examine the largely underutilized Texas laws in particular on parental kidnapping as a crime.

The increase of both divorce and the mobility of the population contributed to the frequency of domestic parental kidnapping within the United States.[22] The resulting custody disputes in many divorces are highly adversarial and emotional in nature. Frustrated by the legal system, such high emotions can lead to desperate parents taking their children to a different jurisdiction, hoping for a more favorable result of forum shopping.[23] Such attempts to maneuver the legal system commonly include: (1) before a custody order is finalized, one parent may leave the state with the child without informing the other parent or court in order to frustrate custody proceedings; (2) before or after a custody decree has been issued, the abducting parent may seek a conflicting custody decree in another state; (3) after a custody decree has been issued, the non-custodial parent may take the child and seek modification of the custody decree in another state; (4) after a custody decree has been issued, the custodial parent may remove the child from the jurisdiction in order to deprive the other parent of visitation rights or the capability to request a modification of the decree.[24]

The historical potential for parents to abduct their children across state lines successfully was a combination of two factors. The first factor was at the time the United States Supreme Court gave the Full Faith and Credit Clause of the U.S. Constitution only extremely limited application to child custody decrees. The result was any state could modify another state's temporary order.[25] The second factor was that the states various

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OCTOBRE 1980.

[16] Geoffrey Greif, *Parental Child Abduction and Its Impact*, Psychology Today, http://www.psychologytoday.com/blog/buddy-system/201011/parental-child-abduction-and-its-impact.

[17] *Id.*

[18] Stewart M. Powell, *More Parents Cross Border Into Mexico With Abducted Kids*, The Houston Chronicle, July 4, 2011, at http://www.chron.com/news/houston-texas/article/More-parents-cross-border-into-Mexico-with-2079514.php.

[19] Susan Kreston, *Prosecuting International Parental Kidnapping*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 533, 536 (2001).

[20] *Id.* at 547.

[21] Hague Convention on the Civil Aspects of International Child Abduction, 51 F.R. 10494 1980.

[22] *See* Letter of Schultz to President Reagan (Oct.4, 1985), Appendix A to Department of State Public Notice, 51 Fed. Reg. 10,494, 10,497 (Mar. 26, 1986), *reprinted in* ABA Sec. of Fam. L., *International Child Abductions: A Guide to Applying the 1988 Hague Convention* at 23 (Gloria F. DeHart ed. 1989).

[23] Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677 (1996).

[24] Sanford N. Katz, *Child Snatching: The Legal Response to the Abduction of Children* 14 (1981).

[25] *Halvey v. Halvey*, 330 U.S. 610 (1947) (refused to require states to give full faith and credit to another state's custody decree based on the notion that all custody orders are never truly "final" and always subject to modification in changed circumstances); *May v. Anderson*, 345 U.S. 528 (1953) (a plurality held that in a child custody case, another state was not bound to accord full faith and credit to a custody decree); *See* Russell J. Weintraub, Commentary on the Conflicts of Laws, 374 (6th ed. 2010); *See also* Kovacs v. Brewer, 356 U.S. 604 (1958); *Ford v. Ford*, 371 U.S. 187 (1962).

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developed conflicting or multiple bases for exercising jurisdiction in child custody cases because they were permitted to under Supreme Court decisions, and because the states believed strongly that flexibility was necessary to best protect children's interests. These factors could lead to more than one state simultaneously making decisions for the same child.[26] It was these practices that largely led to the passing of the Uniform Child Custody Jurisdiction Act ("UCCJA"),[27] the Uniform Interstate Family Support Act ("UIFSA"),[28] and the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").[29]

The UCCJEA is the most recent in a series of laws designed to deter interstate parental kidnapping by promoting uniform jurisdiction and enforcement provisions.[30] The UCCJA was law in all the states.[31] The UCCJEA is now the law in all states, except Massachusetts and Puerto Rico, including in the District of Columbia and the Virgin Islands.[32] It is applicable internationally. The UCCJEA governs State courts' jurisdiction to make and modify "child-custody determinations," a term that expressly includes custody and visitation orders. The main goal of this line of legislation has been to remove the forum shopping incentive by "closing the door" of state courts in cases of child custody and visitation.[33]

The Parental Kidnapping Prevention Act (PKPA),[34] enacted by Congress in 1980, aimed to resolve many of the problems of the UCCJA. The PKPA was designed to discourage interstate conflicts, deter abductions, and promote cooperation between states about custody matters[35] "The stated aims of the Act were to establish: (1) a national system for locating parents who, in response to custody disputes, had taken the child from one jurisdiction to another; and (2) national standards to guide states in determining whether to exercise jurisdiction over a custody matter."[36] In other words the PKPA establishes national standards for the assertion of child custody jurisdiction and states may enforce custody determinations made in other states if certain requirements are satisfied.[37] One of the main provisions of the PKPA requires that full faith and credit be given to child custody determinations of other states,[38] which later amendments include foreign nations. The PKPA also provides the left-behind parent with access to the Federal Parent Locator[39] as well as amended the Fugitive Felon Act[40] to allow states to request FBI assistance to obtain federal warrants for unlawful flight. In the event of a conflict, as a federal law under the Supremacy Clause the PKPA trumps the UCCJEA.[41] The PKPA still does have weaknesses however. The Act provides for only limited federal assistance and is not expressly applicable to international situations. The Federal Parental Locator Service, designed to locate and apprehend parental abductors who flee across state lines, has not been as effective as hoped.[42]

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[26] Sanford N. Katz, Child Snatching; The Legal Response to the Abduction of Children 14 (ABA Press)(1981).
[27] 9 U.L.A. §§ 1-28 (1988).
[28] Uniform Interstate Family Support Act (2001) *available at* http://www.ncsea.org/wp-content/uploads/2012/02/UIFSA_2001.pdf.
[29] Uniform Child Custody Jurisdiction Act, 9(1A) U.L.A. 271 (1999).
[30] Hoff, Patricia, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, O.J.J.D.P Juvenile Justice Bulletin (2001) *available at https://www.ncjrs.gov/pdffiles1/ojjdp/189181.pdf (*hereinafter UCCJEA Juvenile Justice Bulletin).
[31] 2 Kan. Law & Prac., Family Law § 12:2 (4th ed.).
[32] Child Custody and Enforcement Act Enactment Status Map, Uniform Law Commission, *available at* http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act (hereinafter referred to as UCCJEA Enactment Status Map) (In 2012 there have been introductions of the UCCJEA in both Massachusetts and Puerto Rico).
[33] Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677 (1996).
[34] Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A; Pub. L. No. 96-611, 94 Stat. 3566 (1980).
[35] *See* Pub. L. No. 96-611, § 7, note to 28 U.S.C. § 1738A.
[36] Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677,684 (1996); *See* Pub. L. No. 96-611 §7 (b).
[37] Federal Statues, National Center for Missing & Exploited Children, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1615.
[38] Parental Kidnapping Prevention Act, 18 U.S.C. § 1738A (1988); ("The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided **...**any child custody determination made consistently with the provisions of this section by a court of another State."); U.S. Const., Art. IV, §1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State….").
[39] Pub. L. No. 96-611 § 9, 94 *Stat.* 3571.
[40] 18 U.S.C. § 1073 (1988); Pub. L. No. 96-611 § 10.
[41] *See Atkins* v. *Atkins*, 623 So.2d 239 (La. App. 2d Cir. 1993).
[42] S.T. Dickens, *Parental Kidnapping Prevention Act: Application and Interpretation*, 23 J. Fam. L., 419 (1984-85) *available at* https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=98695.

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C. International Civil Process

The Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention), promulgated by the Hague Conference in 1980 was put into force in 1988 as a non-self-executing treaty. The Hague abduction convention is the primary civil law mechanism for parents seeking the return of the children from other treaty partner countries.[43] The Hague Abduction Convention seeks to prevent international forum shopping[44] and ultimately to protect children from the detrimental effects of abduction across international boundaries by providing a procedure to bring about their prompt return.[45]

Countries that are party to the Convention have agreed that a child who was living in one Convention country, and who has been removed to or retained in another Convention country in violation of the left-behind parent's custodial rights, shall be promptly returned.[46] Signatory countries of the treaty are obligated with only limited exceptions to return an internationally abducted child under 16 to the country from which they habitually reside if an application to the Hague Convention is made within one year from the date of the wrongful abduction occurring between countries that have signed the treaty.[47] Once the child has been returned, the custody dispute can then be resolved in the courts of that jurisdiction if necessary.[48]

The Abduction Convention makes no mention of criminal sanction. One possible reason is the past inefficacy of criminal proceedings in international child abduction cases. The UCCJEA specifically provides for the enforcement of Hague Convention return orders and authorizes public officials to locate and secure the return of children in Hague Convention cases. The UCCJEA contains other provisions that clarify when foreign custody determinations are entitled to enforcement and when U.S. courts must defer to the custody jurisdiction of a foreign court.[49]

The International Child Abduction Remedies Act (ICARA)[50] enacted by Congress in 1988, implements the Hague Abduction Convention, and authorizes state and federal courts to hear cases under the Convention.[51] Under §11611 of ICARA the U.S. State Department is to make a yearly report for congress on the compliance of signatory countries.[52] The 2010 Report on Compliance with the Hague Abduction Convention highlights Brazil, Mexico, and Honduras as non-complaint countries as well as Bulgaria with patterns of non-compliance.[53] The 2011 Report highlights St. Kitts and Nevis as non-compliant.[54] The 2011 report also names the countries with patterns of non-compliance: Bermuda, Brazil, Bulgaria, Burkina Faso, Honduras, and Mexico.[55] Mexico, for example, while there was enough marked improvement in communication to move the country from non-complaint to patterns of non-compliance, delays and inconsistencies still remain.[56] Some courts in Mexico continue to apply their own law and require identified persons to appear in their court in

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[43] Hague Convention on the Civil Aspects of International Child Abduction, 51 F.R. 10494.
[44] Elisa Perez-Vera, Explanatory Report § 11, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session Child Abduction 426 (1982).
[45] Galit Moskowitz, *The Hague Convention on International Child Abduction and the Grave Risk of Harm Exception Recent Decisions and Their Implications on Children from Nations in Political Turmoil*, 41 Fam. Ct. Rev. 580, 582 (2003).
[46] *Id.*
[47] *Id.*;(list of signatory countries available at http://travel.state.gov/abduction/resources/congressreport/congressreport_1487.html).
[48] *Id.* (The Convention does not address who should have custody of the child but rather where the custody case should be heard).
[49] Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 Tex. Int'l. L.J. 41, 42 (2003).
[50] 42 U.S.C.A §§ 11601 et al.
[51] *Id.*
[52] 42 U.S.C.A. §§ 11611 (2002).
[53] Office of Children's Issues, U.S. Dep't of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction, Travel.State.Gov, 18-24 (2010) *available at* http://travel.state.gov/pdf/2010HagueAbductionConventionComplianceReport.pdf (hereinafter Report on Compliance with the Hague Abduction Convention).
[54] 2011 Report on Compliance with the Hague Abduction Convention at 1 *available at* http://travel.state.gov/pdf/2011HagueAbductionConventionComplianceReport.pdf.
[55] *Id.* at 2-5.
[56] *Id.* at 5.

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Hague Abduction Convention cases.[57] Court proceedings often get sidetracked, particularly in Mexican states engulfed by the drug wars.[58]

Part II: CRIMINAL PARENTAL KIDNAPPING

A. Federal Law

Congress had been unsuccessful in passing a bill criminalizing international parental abductions until the enactment in 1993 of The International Parental Kidnapping Crime Act (IPKCA).[59] The main reasons commonly cited for criminalizing such conduct are: (1) to deter; (2) to give the United States a basis for requesting extradition of the kidnapping parent; (3) to allow U.S. ambassadors the use of federal warrants in assisting the return of a child and; (4) to make it clear that the United States considers parental kidnapping to be a serious offense.[60] Thus, just a little more than a decade after the PKPA and only five years after the ICARA, Congress took dramatic action on the subject of child kidnapping. Perhaps the increase in the number of marriages between persons of different cultures has resulted in a corresponding increase in the number of divorces involving an international family.[61] This factor, along with an adjustment to a historical reluctance of the federal government to interfere with what have been viewed as domestic disputes,[62] led to the passage of IPKCA in 1993.[63] The main impact of the act is meant to be as a deterrent.[64] The IPKCA makes it a federal crime to remove a child from the United States[65] to outside the country with the intent of obstructing the lawful exercise of parental rights. A criminal arrest warrant can be issued for a parent who takes a child outside of the U.S. without the other custodial parent's permission.[66] Whoever removes a child from the United States, or attempts to do so, or retains a child outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under the statute or imprisoned for up to 3 years, or both.[67]

The criminal processes available permit the arrests of the abducting parent, but do not expressly order the return of the child. The more utilized civil process facilitates the return of the child, but in no way seeks the arrest or return of the abductor.[68] With the main resolution sought in parental kidnapping cases ultimately being the safe return of the child, a criminal process will not be pursued if circumstances indicate it will jeopardize any civil process. The IPKCA makes it clear that it does not detract from the Hague Abduction Convention in any way. The IPKCA advocates the convention as a first resort in seeking the return of a child.[69] An underlying reason for this could be that there are important considerations against the criminalization of international child abductions. One main concern is the effect that pending criminal charges could have on the willingness of Hague Abduction Convention signatory countries to return the child especially if accompanied by the abducting parent.[70]

Federal and state laws regarding parental kidnapping are complementary. Federal law does not criminalize parental kidnapping within the U.S. (only internationally), but does provide a mechanism for apprehend-

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[57] *Id.*

[58] Stewart M. Powell, *More Parents Cross Border Into Mexico With Abducted Kids*, The Houston Chronicle, July 4, 2011, at http://www.chron.com/news/houston-texas/article/More-parents-cross-border-into-Mexico-with-2079514.php.

[59] 139 Cong. Rec. S16865-02 (Nov. 20, 1993); 18 U.S.C.A. § 1204.

[60] Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677, 694 (1996); 139 Cong. Rec. S16865-02 (Nov. 20, 1993).

[61] *Id.*; *See* Michael Perry, *Australia: Child Kidnappings on the Rise*, Reuters Newswire, July 29, 1993, ("Legal experts believe international child abductions are on the rise as the global village shrinks to spawn more inter-cultural relationships and the world recession bites deeper to scuttle ever more marriages").

[62] Sanford N. Katz, *Child Snatching: The Legal Response to the Abduction of Children* 14 (1981).

[63] International Parental Kidnapping Crime Act of 1993 (IPKCA).18 USC § 1204.

[64] *Id.*

[65] Or retain a child who has previously been in the United States.

[66] Susan Kreston, *Prosecuting International Parental Kidnapping*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 533, 592 (2001); *See* Antoinette Passanante, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 Colum. J. Transnat'l L. 677 (1996).

[67] IPKCA, 18 U.S.C.A. § 1204(A).

[68] FBI, Family Child Abductions *available at* http://www.fbi.gov/about-us/investigate/vc_majorthefts/cac/family-abductions.

[69] IPKCA, 18 U.S.C.A. § 1204.

[70] *Hearing on HR. 3759 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*,101st Cong., 2d Sess. 111 (1990).

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ing those persons who commit state parental kidnapping offenses and travel across state lines.[71] The federal crime under IPKCA prohibits *international* parental kidnapping but does not address kidnappings that remain within the United State borders.[72] It is also noteworthy that there are defenses available to the charge of international parental kidnapping, e.g., defendant fleeing an incidence or pattern of domestic violence.[73] State parental kidnapping laws determine what acts constitute a crime in a particular state. Although the IPKA is a step in the right direction, federal law is by its nature limited to the United States. When a U.S. parent and child are residing in a foreign country, there is no duty to comply with U.S. laws unless another agreement exists between that country and the U.S.[74]

B. Texas Law

All states follow a uniform law regarding the determination of appropriate jurisdiction for custody matters through their enactment of the UCCJEA (or the UCCJA) and compliance with the PKPA.[75] Neither the PKPA nor the UCCJEA attempt to determine matters of state procedural law or substantive custody issues. The PKPA does set forth ways in which a court can exercise jurisdiction, but does not attempt to decide when to exercise jurisdiction over a new custody matter; that is determined by state jurisdictional law.[76] In sum, the UCCJEA specifies which court has jurisdiction in a custody case, but not how the court should decide the case.[77]

In order for there to be a consideration of bringing charges of parental kidnapping in Texas there must be a specific order that a person may not remove a child from a geographic area without permission of the court. This creates narrow grounds for moving a child, which is a commonplace order in Texas.[78] Tex. Penal Code §§ 25.03, 25.031, and 25.04 provide for prosecution in criminal court. The issue is not possible prosecutions but rather those actually brought and the existence of identifiable factors in those cases that are prosecuted.

It appears that Texas district attorneys typically avoid involvement in child custody cases as measured by the level of relevant case law involving the Penal Code. For example, the Travis County Sheriff's Office views the bringing of criminal charges as a last resort in most cases.[79] The Sheriff's office website suggests first civil action under Family Code § 42.002, liability for interference with a possessory right.[80] The website also makes a point that cases may be resolved through the county's Domestic Relations Office without generation of an offense report. Only after the suggestion of these alternative resolutions are links to filing an offense report under Penal Code § 25.03 or § 25.031 listed.

In Texas, intent or knowledge is the key factor to the criminal statues on parental kidnapping. Texas Penal Code § 25.03 states:

> (a) A person commits an offense if the person takes or retains a child younger than 18 years of age:

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[71] Violence against women online resources, *The Impact of Parental Kidnapping Laws and Practice on Domestic Violence Survivors*, August 2005 *available at http://www.vaw.umn.edu/documents/pkreport/pkreport.html*; See PKPA, 28 U.S.C. § 1738A; *See also* Fugitive Felon Act ,18 U.S.C.A § 1073.

[72] *See* IPKCA,18 U.S.C.A. § 1204.

[73] 18 U.S.C.A. § 1204(c)(2) (stating that "it shall be an affirmative defense under this section that the defendant was fleeing an incidence or pattern of domestic violence").

[74] Hon. William Rigler & Howard L. Wieder, *Attempts to Prevent Parental Child Abduction, Applicable United States Laws, and the Hague Convention*, Travel.State.Gov (2012), ://www.travel.state.gov/abduction/resources/resources_545.html.

[75] *Id.*

[76] NCFFC Custody Tool Series, Practitioners' Guide to PKPA (2004) http://www.vaw.umn.edu/documents/pkpa/pkpapdf.pdf.

[77] NCFFC Custody Tool Series, Practitioner's Guide to UCCJEA (2004) http://www.bwjp.org/files/bwjp/articles/uccjea%20revised%2010-08.pdf.

[78] The Texas Family Code permits a court, or the parties by agreement, to restrict the domicile of children after divorce by establishing the child's county of residence. *See* Tex. Fam. Code Ann. §152 and §153. Even if there is no restriction of the domicile of the child to a particular county, the Texas Family Code penalizes the custodial parent who moves more than 100 miles from the location of the residence of the other parent. *See* Tex. Fam. Code Ann. § 153.313 (Vernon 2009).

[79] *Interference With Child Custody*, Travis' County Sheriff's (2012) Officehttps://www.tcsheriff.org/departments/law-enforcement/211-interfere-with-child-custody#42.002.

[80] Tex. Fam. Code § 42.002 ((a) A person who takes or retains possession of a child or who conceals the whereabouts of a child in violation of a possessory right of another person may be liable for damages to that person; (b) A possessory right is violated by the taking, retention, or concealment of a child at a time when another person is entitled to possession of or access to the child).

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(1) when the person knows that the person's taking or retention violates the express terms of a judgment or order, including a temporary order, of a court disposing of the child's custody;

(2) when the person has not been awarded custody of the child by a court of competent jurisdiction, knows that a suit for divorce or a civil suit or application for habeas corpus to dispose of the child's custody has been filed, and takes the child out of the geographic area of the counties composing the judicial district if the court is a district court or the county if the court is a statutory county court, without the permission of the court and with the intent to deprive the court of authority over the child; or

(3) outside of the United States with the intent to deprive a person entitled to possession of or access to the child of that possession or access and without the permission of that person.

(b) A noncustodial parent commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, the noncustodial parent knowingly entices or persuades the child to leave the custody of the custodial parent, guardian, or person standing in the stead of the custodial parent or guardian of the child.

(c) It is a defense to prosecution under Subsection (a)(2) that the actor returned the child to the geographic area of the counties composing the judicial district if the court is a district court or the county if the court is a statutory county court, within three days after the date of the commission of the offense.

(c-1) It is an affirmative defense to prosecution under Subsection (a)(3) that:

(1) the taking or retention of the child was pursuant to a valid order providing for possession of or access to the child; or

(2) notwithstanding any violation of a valid order providing for possession of or access to the child, the actor's retention of the child was due only to circumstances beyond the actor's control and the actor promptly provided notice or made reasonable attempts to provide notice of those circumstances to the other person entitled to possession of or access to the child.

(c-2) Subsection (a)(3) does not apply if, at the time of the offense, the person taking or retaining the child:

(1) was entitled to possession of or access to the child; and

(2) was fleeing the commission or attempted commission of family violence, as defined by Section 71.004, Family Code, against the child or the person.

(d) An offense under this section is a state jail felony.[81]

Under Texas Penal Code § 25.03 (Interference with Child Custody) the actor must know that retaining[82] a child violates express terms of an order.[83] Similarly, it is an offense when the actor knows that suit for a custody order has been filed and that taking a child is with the intent to deprive the court of authority of the child.[84] The statute applies if an actor entices a child with the intent to interfere with the lawful custody of the child.[85] Subsection (a)(3) was added in 2011 to mimic the federal PKA, making international removal of children an offense.[86]

Under Texas Penal Code § 25.031 (Agreement to Abduct From Custody) the offense is agreeing to abduct a child known to be in the custody or someone else.[87] § 25.031 states:

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[81] Tex. Penal Code Ann. § 25.03 (Vernon 2011).

[82] *Williams v. State*, 05-01-01645-CR, 2002 WL 1839146 (Tex. App.—Dallas Aug. 13, 2002)(not designated for publication) *quoting* Webster's Third New Int'l Dictionary 1938 (1993)("To hold or to continue to hold in possession or use: continue to have, use, recognize or accept: maintain in one's keeping").

[83] Tex. Penal Code Ann. §25.03(a)(1)(Vernon 2011).

[84] Tex. Penal Code Ann. §25.03(a)(2)(Vernon 2011).

[85] Tex. Penal Code Ann. §25.03(b)(1)(Vernon 2011).

[86] Tex. Penal Code Ann. §25.03(a)(3)(Vernon 2011).

[87] Tex. Penal Code Ann. §25.031(Vernon 2007).

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> (a) A person commits an offense if the person agrees, for remuneration or the promise of remuneration, to abduct a child younger than 18 years of age by force, threat of force, misrepresentation, stealth, or unlawful entry, knowing that the child is under the care and control of a person having custody or physical possession of the child under a court order, including a temporary order, or under the care and control of another person who is exercising care and control with the consent of a person having custody or physical possession under a court order, including a temporary order. (b) An offense under this section is a state jail felony.[88]

Under Texas Penal Code § 25.04 (Enticing a Child) it is the specific intent to interfere with the lawful custody of a child younger than the age of 18.[89] Texas Penal Code § 25.04 states:

> (a) A person commits an offense if, with the intent to interfere with the lawful custody of a child younger than 18 years, he knowingly entices, persuades, or takes the child from the custody of the parent or guardian or person standing in the stead of the parent or guardian of such child.
> (b) An offense under this section is a Class B misdemeanor, unless it is shown on the trial of the offense that the actor intended to commit a felony against the child, in which event an offense under this section is a felony of the third degree.[90]

While section § 25.03, initially enacted in 1973, is the most often litigated of the three sections, the case law is still sparse. Under § 25.03, any person, including a parent, who takes or retains a child under the age of eighteen years with the requisite intent or knowledge as discussed above violates this section.[91] However, the law does provide a three-day window for the actor to return the child without prosecution in certain cases.[92] Kinkeade & McColloch's *Texas Penal Code Annotated* lists four leading cases associated with § 25.03: *Roberts v. State*,[93] *Perry v. State*,[94] *Briggs v. State*,[95] *Smith v. State*,[96] *Ex Parte Rhodes*,[97] *Ex parte Jones*,[98] *Samford v. State*,[99] *and Dewalt v. State*.[100] In *Roberts v. State* a child's grandmother took the child to Colorado and refused to return when prompted by her son, the child's father and possessory conservator.[101] The grandmother was convicted of interference with child custody based on her knowledge that keeping the child was a violation of a court order in Texas.[102] *In Perry v. State* a mother violated § 25.03 by not returning her son to the father at the end of a Christmas vacation period pursuant to the terms of the divorce decree.[103] In *Briggs v. State* a father violated § 25.03 (and § 25.04) when he removed his child from a shelter with knowledge of a temporary order granting CPS temporary managing conservatorship of the child.[104] In *Smith v. State* a father took his two children to travel the world for seven years instead of returning them to their mother pursuant to the custody order.[105] In *Ex Parte Rhodes* a father took his son to Malaysia and Singapore for over a year knowing that a divorce order existed.[106] Because the father was convicted of criminal contempt by a civil court, the court found double jeopardy barred prosecution under § 25.03 based on the same conduct being involved.[107] *In Ex*

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[88] *Id.*
[89] Tex. Penal Code Ann. §25.04(a).
[90] Tex. Penal Code Ann. §25.04(Vernon 1999).
[91] *See* Ed Kinkeade & S. Michael McColloch, *Texas Penal Code Annotated* 256 (2011-2012 Ed.)
[92] *See* Tex. Penal Code Ann. §25.03(c)(It is a defense to prosecution under Subsection (a)(2) that the actor returned the child to the geographic area of the counties composing the judicial district if the court is a district court or the county if the court is a statutory county court, within three days after the date of the commission of the offense); *See Also* Id.
[93] *Roberts v. State*, 619 S.W.2d 161 (Tex. Crim. App. 1981).
[94] *Perry v. State*, 727 S.W.2d 781 (Tex. App.—Austin 1987).
[95] *Briggs v. State*, 807 S.W.2d 648 (Tex. App.—Houston [1st Dist.] 1991).
[96] *Smith v. State*, 874 S.W.2d 269 (Tex. App..—Houston [14 Dist.] 1994).
[97] *Ex parte Rhodes*, 974 S.W.2d 735 (Tex. Crim. App. 1998).
[98] *Ex Parte Jones*, 36 S.W.3d 139 (Tex. App.—Houston [1st. Dist] 2000).
[99] *Samford v. State*, 302 S.W.3d 522 (Tex. App.—Texarkana, 2009).
[100] *Dewalt v. State* 307 S.W.3d 437 (Tex. App.—Austin, 2010).
[101] *Roberts v. State*, 619 S.W.2d 161, 163 (Tex. Crim. App. 1981).
[102] *Id.* at 164.
[103] *Perry v. State*, 727 S.W.2d 781, 781 (Tex. App.—Austin 1987)
[104] *Briggs v. State*, 807 S.W.2d 648 (Tex. App. 1991)(The state must show the actor knew he was violating a court order when removing the child under the age of 18).
[105] *Smith v. State*, 874 S.W.2d 269 (Tex. App.—Houston [14th Dist.) 1994).
[106] *Ex parte Rhodes*, 974 S.W.2d 735, 736-737 (Tex. Crim. App. 1998).
[107] *Id.* at 742.

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Parte Jones, a mother was held in contempt or an order meant to coerce her into returning her daughter[108] leading to an incarceration of 29 days, as well as charged with interference with child custody a year later for failing to return her daughter to the child's father.[109] The charges were upheld, as a coercive contempt punishment is not a double jeopardy bar to subsequent prosecution under § 25.03, the contempt punishment being civil and the violation of § 25.03 being criminal.[110] In *Samford v. State* a mother, who was no stranger to civil court with continuous domestic disputes, returned her son a day late to her ex-husband.[111] The mother tried to argue that she did not have the requisite intent due to handwritten notations on the decree changing "Friday" to "Saturday" and 8:00 "pm" to "am."[112] It was found that the mother knew her retention of the child violated the custody order.[113]

A Westlaw search for Texas Penal Code § 25.03 returns seventy-one cases dating from 1980 to 2012.[114] Of those, some only mention § 25.03 in a footnote[115] while others couple use of § 25.03 in conjunction with a civil rights torts action under 42 U.S.C.A §1983, claiming custodial interference is assisted by acting under the color of state law.[116] Cases in which a violation of Penal Code § 25.03 is found, the predominate fact pattern is of a parent being late in returning the child to the other parent or simply refusing to do so without crossing any jurisdictional lines.[117] In a limited number of cases, international parental kidnapping was involved. In some of those cases, the left-behind parent knew where the child was.[118] Only in a very small number of the cases were the children taken internationally and the left-behind parent was unsure of the child's location.[119]

A common factor identifiable in the cases brought under § 25.03 is the existence of some type of court order, either divorce or custody, in the majority of cases. A 2001 study based on a nationally representative survey of law enforcement agents and prosecutors found the most common factors influencing whether a prosecutor's office opened a parental kidnapping case and the actual prosecution of a case were the existence of a custody order or joint custody.[120]

Section 25.031 was enacted in 1987 to allow prosecution of a third party who agrees to abduct a child for remuneration while knowing that there is a custody order in place.[121] A completed abduction is not necessary.[122] Neither Kinkeade & McColloch's *Texas Penal Code Annotated* nor Westlaw lists any cases associated with this section.

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[108] *Ex parte Jones*, 36 S.W.139, 142 (*Tex. App.*—Houston [1st Dist.) 2000).
[109] *Id.* at 141-2.
[110] *Id.* at 143.
[111] *Samford v. State*, 302 S.W.3d 552, 555 (Tex. App.—Texarkana 2009).
[112] *Id.*
[113] *Id.*
[114] Seventy-four cases cite Tex. Penal Code §25.03.
[115] *See Beggs v. Texas*, 597 S.W.2d 375, 380 (Tex. Crim. App. 1980); *See also Little v. State*, 246 S.W.3d 391, 403 (Tex. App.—Amarillo 2008).
[116] *See Smith v. Texas*, 2011 WL 2883402 (N.D. Tex. 2011); *Quintero v. Baggio* 2011 WL 805941 (W.D. Tex. 2011).
[117] *Garcia v. State*, 172 S.W.3d 270 (Tex. App.—El Paso 2005)(Mother did not allow father his visitation rights for the couple's daughter); *Lovell v. State*, 2006 WL 1916950 (Tex. App.—Tyler 2006)(Mother took child from school without permission); *Samford v. State*, 302 S.W.3d 552 (Tex. App. 2009)(Mother dropped off child a day late); *Samford v. Samford*, 2010 WL 582498 (Tex. App.—Texarkana 2010)(Mother was two hours late in returning child to father); *Ellison v. State* 2011 WL 631822 (Tex. App. 2011)(Father picked up daughter and sent messages to child's mother threatening that she would never see her again) *See also Briggs v. State*, 807 S.W.2d 648, (Tex. App.—Houston [1st Dist.] 1991)(a father violated section 25.03 (and section 25.04) when he removed his child from a shelter with knowledge of a temporary order granting CPS temporary managing conservatorship of the child).
[118] *Sims v. State*, 2005 WL 1713940 (Tex. App.—Dallas 2005)(Father knew that child was in Colorado with mother despite not knowing specifically where); *Charlton v. State*, 334 S.W.3d 5 (Tex. App.—Dallas 2008)(child's mother had told Attorney General's office that she was moving to the Virgin Islands with child); *Roberts v. State*, 619 S.W.2d 161 (Tex. Crim. App. 1981) *supra* 93-94. (See discussion above).
[119] *Dewalt v. State*, 307 S.W.3d 437, 438 (Tex. App.—Austin 2010)(Mother charged with aggravated kidnapping for taking child and fleeing to Mexico); *Ex Parte Rhodes*, 974 S.W.2d 735 (Tex. Crim. App. 1998) (see discussion above *supra* 92).
[120] Kathi Grasso et al., *The Criminal Justice System's Response to Parental Abduction*, O.J.J.D.P Juvenile Justice Bulletin (2001) at 4 available at https://www.ncjrs.gov/pdffiles1/ojjdp/186160.pdf (hereinafter Response Juvenile Justice Bulletin)(("The most common factors influencing whether a prosecutor's office opened a case were the existence of a custody order (70.6 percent) or joint custody (62.8 percent))…." "Regarding whether a case was actually prosecuted most common factors influencing this decision were the existence of a custody order (77.0 percent), the length of time the child had been gone (68.0 percent), and joint custody (66.9 percent)").
[121] Tex. Penal Code §25.031; Ed Kinkeade & S. Michael McColloch, *Texas Penal Code Annotated* 256 (2011-2012 Ed.).
[122] *Id.*

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Section 25.04 was enacted in 1973 with the essence of the offense being the specific intent to interfere with the lawful parent's (or guardian's) right to custody.[123] In the typical case, the specific intent to interfere with the parent's custody has been shown to be difficult to prove.[124] Merely offering an inducement to a child to accompany a party on a short excursion will normally not be enough to constitute an offense under this section.[125] Kinkeade & McColloch's *Texas Penal Code Annotated* lists seven leading cases associated with section 25.04: *Cummins v. State,*[126]*Escobar v. State,*[127] *Sanchez v. State,*[128] *Cunyus v. State,*[129] *Winthrop v. State,*[130]*Davis v. State*[131] and *Briggs v. State.*[132]

In *Cummins v. State*, the defendant hired a minor to work for him.[133] The appellate court found no knowing enticement despite minor's mother's testimony stating she never consented to the work arrangement.[134] *In Escobar v. State*, a minor girl asked the defendant multiple times to allow her to live with him rather than with her parents.[135] The court distinguishes this case from *Cummins v. State* and expresses a firm policy in favor of the parents of the minor.[136] The court found the defendant was calculating in his seduction and temptation and convicted him of enticing and decoying a minor from the custody of her parents.[137] *In Sanchez v. State*, the first case directly examining Section 25.04, a minor went to defendant's house from school and the two drove to a motel and stayed the night.[138] The minor's parents made it clear they did not consent and did not want to the two to have any further contact.[139] The appellate court found that even if defendant knowingly took the minor from her parent's custody, there was no evidence of intent to interfere with their lawful custody.[140] In *Cunyus v. State*, the defendant offered to take minor boys to the movies, buy them beer, give them a ride and gave them obscene materials to look at.[141] The court cited *Escobar v. State* for the premise that the parents are the victims of this offense, but nonetheless stated merely offering a minor what his parents have not granted him permission for is not an offense without some evidence of the actor's intent to interfere with the custody of the parents.[142] In *Winthrop v. State*, no specific facts were given other than defendant unlawfully and with intent interfered with the lawful custody of the minor's parent.[143] In *Davis v. State*, a child's adoptive father attempted to obtain possession of the child while the child was with his mother.[144] The adoptive father broke into the back bedroom window and took the child while the child's mother fled to the neighbors to call for help.[145] Neither the adoptive father nor the child had the mother's permission.[146] In *Briggs v. State* it was established that this offense under §25.04 is not a lesser-included offense of interference with child custody under §25.03.[147]

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[123] Tex. Penal Code §25.04; Ed Kinkeade & S. Michael McColloch, *Texas Penal Code Annotated* 258 (2011-2012 Ed.).
[124] *Id.*
[125] *Id.*
[126] *Cummins v. State*, 36 Tex. Crim. 398, 37 S.W. 435 (Tex. Crim. App.1896)(hiring a minor with the knowledge that the minor has a living parent is not sufficient to constitute an offense of knowingly enticing).
[127] *Escobar v. State*, 138 Tex. Crim. 71, 133 S.W.2d 781 (Tex. Crim. App.1939).
[128] *Sanchez v. State*, 712 S.W.2d 170 (Tex. App.—Austin 1986).
[129] *Cunyus v. State*, 727 S.W.2d 561 (Tex. Crim. App. 1987).
[130] *Winthrop v. State*, 735 S.W.2d 545 (Tex. App.—Houston [1st Dist.] 1987).
[131] *Davis v. State*, 736 S.W.2d 217 (Tex. App.—Corpus Christi 1987).
[132] *Briggs v. State*, 807 S.W.2d 648 (Tex. App.—Houston [1st Dist.] 1991)(This offense is not a lesser included offense of interference with child custody).
[133] 36 Tex. Crim. 398,399, 37 S.W. 435 (Tex. Crim. App 1896).
[134] *Id.*
[135] 138 Tex. Crim. 71, 72, 133 S.W.2d 781 (Tex. Crim. App.1939).
[136] *Id.* at 74.
[137] *Id.* at 76.
[138] 712 S.W.2d 170, 171 (Tex. App.—Austin 1986).
[139] *Id.*
[140] *Id.* at 172.
[141] 727 S.W.2d 561 (Tex. Crim. App. 1987).
[142] *Id.* at 564; Ed Kinkeade & S. Michael McColloch, *Texas Penal Code Annotated* 258 (2011-2012 Ed.).
[143] 735 S.W.2d 545 (Tex. App..—Houston [1st Dist.] 1987).
[144] *Davis v. State* 736 S.W.2d 217 (Tex. App. —Corpus Christi 1987)
[145] *Id.* at 18.
[146] *Id.*
[147] 807 S.W.2d 648 (Tex. App...—Houston [1st Dist.] 1991) *supra* 97.

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C. International Law

Despite more than thirty years of case law for both §§ 25.03 and 25.04, there is a lack of identifiable factors in the prosecuted international cases. The resulting inconsistency and unpredictability is best highlighted by the facts of a current case listed on the FBI's Most Wanted Page of Karla Campbell. She is wanted in Texas for parental kidnapping. Her profile on the website states that in March 2011, she was awarded joint custody of her son after divorce proceedings.[148] An order in the decree of divorce stated that all people, including Karla Campbell, were prohibited from taking her son to Mexico for any reason.[149] On August 2, 2011, Karla Campbell's ex-husband attempted to pick up their son pursuant to his visitation rights, both at school and at Campbell's residence.[150] Due to the father's inability to locate his son, Campbell's house appearing to be vacant and a neighbor telling Campbell's ex-husband that he saw her moving out, Campbell was charged with interference with child custody.[151] The 65th Judicial Court in El Paso, Texas, issued a state arrest warrant on September 19, 2011. The United States District Court of the Western District of Texas issued a federal warrant on August 9, 2012, after she was charged federally with removing a child from the United States with intent to obstruct the lawful exercise of parental rights and international parental kidnapping.[152] Currently, Campbell is believed to be living in Juarez, Mexico.[153]

There are two typical scenarios in international kidnapping.[154] In the first, an abductor returns to her native country, usually to a strong support network. In the second, an abductor flees to another country primarily to frustrate any attempts to locate the child.[155] In the latter scenario, the abductor usually flees to another jurisdiction with the same language as that of the abductor or to the closest border.[156] As Karla Campbell is known to have multiple sclerosis and to need help with transportation, scenario one is clearly plausible. Campbell is known to have fled from Texas with the closest international border being Mexico, thus scenario two is also plausible. Why the federal government decided to prosecute this case is less clear. As stated above, a large percentage of international parental kidnappings from the U.S. are to Mexico, yet the case law does not clearly indicate this fact. Of the numerous cases of parental kidnapping to Mexico, why this case? The existence of a divorce decree is a likely factor for bringing charges under § 25.03 but that cannot be enough. A bigger question in this case, is why the FBI involvement? The Parental Kidnapping Prevention Act authorizes FBI investigation into cases in which children have been taken by their parents (or others) across state lines or out of the country.[157] In the Response Juvenile Justice Bulletin, the majority of law enforcement personnel surveyed reported only minimal contact with the FBI.[158] From the basic facts given, there does not appear to be a definite explanation for the involvement in this case. The remaining question is if she is believed to be just across the border in Juarez, why has she been at large for over a year and one half? Why rely on federal law rather than the international treaty to which Mexico is a signatory country (notwithstanding acknowledgement of the non-compliance patterns established by the country)? The inability of the author to answer these questions illustrates some of the issues created by the under-utilization of the criminal statutes in Texas, and the lack of consistency in the treatment of parental kidnapping cases.

In an increasingly mobile society, it is more likely that child custody will cross state lines either due to divorce, job relocation, interstate or international relationships etc. If states, such as Texas, are unpredictable in bringing criminal charges and non-complying Hague Abduction Convention signatory countries exist, the best option is for a custodial parent to take preventative measures at the first sign that parental kidnapping may be a possibility.[159] Possible prevention measures available in most states include restraining orders or emergency

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[148] Karla Alicia Campbell, Parental Kidnappings FBI's Most Wanted, http://www.fbi.gov/wanted/parent.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Karla Alicia Campbell, Parental Kidnappings FBI's Most Wanted, http://www.fbi.gov/wanted/parent.
[154] Susan Kreston, *Prosecuting International Parental Kidnapping*, 15 Notre Dame J.L. Ethics & Pub. Pol'y 533 (2001).
[155] *Id.*
[156] *Id.*
[157] PKPA 28 U.S.C. § 1738A.
[158] Response Juvenile Justice Bulletin *Supra* at 107 at 5.
[159] *See* Janet Johnston et al., *Early identification of Risk Factors for Parental Kidnapping*, O.J.J.D.P Juvenile Justice Bulletin (2001) *available at http://deleteonlinepredators.org/en_US/documents/riskfactors.pdf* (hereinafter Risk Juvenile Justice Bulletin).

custody orders. In addition, Customs and Borders Protection strongly recommends that "unless the child is accompanied by both parents, the adult have a note from the child's other parent (or, in the case of a child traveling with grandparents, uncles or aunts, sisters or brothers, friends, or in groups, a note signed by both parents) stating "I acknowledge that my wife/husband/etc. is traveling out of the country with my son/daughter/group. He/She/They has/have my permission to do so."[160] A further issue raised by this recommendation is how is a border agent able to recognize the signature of the absent parent? Texas law is unusual in that it provides preventative measures in statute: §153.501 Necessity of Measures to Prevent International Child Abduction;[161] §153.502 Abduction Risk Factors;[162] and §153.503 Abduction Prevention Measures.[163]

Conclusion

This article has outlined the development of both domestic and international law in relation to parental kidnapping. While parental kidnapping has long been a problem needing to be addressed,[164] in an increasingly interconnected society that need has been exemplified. While the international community and the United States have taken substantial steps to deal with the problems created by increased mobility, there still remain serious weaknesses in applicable legislation that need to be addressed. It seems that a historical reluctance to bring criminal charges at the federal and state level relating to parental kidnapping will continue, leaving largely civil options available. Whether that is the best approach in all cases is unclear, and appropriate actions will be specific to each case. States such as Texas should work to better utilize the criminal statutes in cases where it is the best approach and to create identifiable factors in the application. The existence of a court order in section 25.03 and strong evidence of specific intent in section 25.04 are a good start, but not enough. Completely unpredictable application is not likely to have much desired deterrence. While Texas has been innovative in its adoption of preventative measures to compensate for the low parental kidnapping caseload, action at the front-end will not always be successful. In the cases where preventative measures are not enough, there needs to be a consistency in the application of criminal or civil remedies.

Texas Agreed Protective Orders: An Alternative Approach

By Stephen A. Simon[165]

I. Introduction

Since 1979, civil protective orders have been an essential legal tool of Texas courts to protect individuals from domestic violence. Over the past three decades, protective order statutes have evolved to encompass broader subjects, expanded to protect more classes of individuals, all the while maintaining basic due process for the accused. Texas laws continue to take great strides to ensure the safety and protection of individuals. However, in recent years three prominent issues have plagued the effectiveness of protective orders. First, the growing number of civil protective order applications filed has overwhelmed many jurisdictions, including, at one point, Harris County.[166] Second, agreed protective orders without a finding of family violence forgo vital

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[160] U.S. Customs and Border Protection, https://help.cbp.gov/app/answers.

[161] Tex. Fam. Code Ann. § 153.501 **(**(a) In a suit, if credible evidence is presented to the court indicating a potential risk of the international abduction of a child by a parent of the child, the court, on its own motion or at the request of a party to the suit, shall determine under this section whether it is necessary for the court to take one or more of the measures described by Section 153.503 to protect the child from the risk of abduction by the parent. (b) In determining whether to take any of the measures described by Section 153.503, the court shall consider: (1) the public policies of this state described by Section 153.001(a) and the consideration of the best interest of the child under Section 153.002; (2) the risk of international abduction of the child by a parent of the child based on the court's evaluation of the risk factors described by Section 153.502; (3) any obstacles to locating, recovering, and returning the child if the child is abducted to a foreign country; and(4) the potential physical or psychological harm to the child if the child is abducted to a foreign country.

[162] Tex. Fam. Code Ann. § 153.502

[163] Tex. Fam. Code Ann. § 153.503

[164] *See* U.S. News & World Rep, vol. 130(6) at 16 (2001)(It is generally perceived that international parental kidnapping is a relatively recent phenomenon. This is simply not true, there were two such kidnappings occurring on the Titanic in 1912).

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[166] John Council, *Harris County Family Courts Overwhelmed With Cases, Litigants and Lawyers*, Texas Lawyer, July 19, 2010; Tex. S.B. 2217, 81st Leg.,R.S. (2009)

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rights and protections for victims. Third, is the questionable civil and criminal enforceability and effectiveness of protective orders.

While these issues exist independently, each has the capacity to affect the others. It is clear that we must provide an avenue to alleviate the backlog in courts, a safeguard-policy to avoid jeopardizing protections available to victims, and a way to strengthen both civil and criminal enforceability of protective orders through the use of law enforcement. However, any viable solution to be considered must not exacerbate either of the other two issues.

In one attempt to quell the continued overwhelming number of protective order applications, and the courts' inability to resolve prior to a time and resource consuming hearing, H.B. 3172 entitled "Relating to Protective Orders" was introduced during the 82nd regular session (2011) of the Texas Legislature.[167] H.B. 3172 seeks to lessen the burden on courts while facilitating and promoting resolution through an agreed protective order between the parties without a finding of family violence, which ordinarily requires an adversarial hearing.[168] These adversarial hearings are often time and resource consuming. While a consent order without a hearing may potentially fix the issue of judicial overload, it could, depending on the particular circumstances, negatively affect victim rights and criminal enforcement. The second provision of the bill would seek to rectify the inability of courts in most circumstances to punish a person with contempt of court for failure to comply with the conditions of a protective order by giving the courts the power to do so on its own motion.[169] Beside the fact that it is already possible to have an agreed protective order without a finding of family violence (*see* IV. Agreed Protective Orders), this bill highlights the continued need to reduce and erase judicial overload, protect victims from giving up important statutory rights, all the while maintaining both civil and criminal enforceability.

This article will focus on nuances of agreed protective orders both with and without a finding of family violence as an avenue for alleviating pressure on Texas courts as well as fixing criminal enforceability without forgoing statutory safeguards established to protect individuals from domestic violence or to assure due process for the accused. Part II reviews the history of protective orders in the United States and here in Texas. Part III summarizes the various types of protective orders under the Texas Family Code. Part IV specifically details agreed protective orders under the Texas Family Code. Part V addresses the issue of judicial overload. Part VI previews the potential ramifications of legislation allowing for agreed protective orders without a finding of family violence. Part VII analyzes the question of civil and criminal enforceability. Part VIII presents several feasible solutions capable of reinforcing Texas civil protective orders for years to come.

II. Protective Orders: A Brief History

Prior to the adoption of protective order statutes, there was little protection available for victims of family violence. Issuing orders regulating interpersonal conduct, living arrangements and communications of people who were still living together or in a family relationship and to demand a form of ongoing supervision beyond the power or capacity of judges at that time was seen as extreme. Recourse was often slow and in many instances sadly too late. As social policies were dramatically being reformed across the country during the 1960s and 70s, advocates of battered women began to push for legislation that would allow victims to find preventative relief within the jurisdiction of the courts.[170] The State of New York pioneered the way by first introducing legislation in 1962 aimed at creating a procedure for obtaining civil orders of protection maintained under the jurisdiction of the courts.[171] Despite New York's actions, reform inched across the country as only one additional state offered civil domestic protective orders prior to 1976.[172] Then, in the late seven-

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[167] Tex. H.B. 3172, 82nd Leg., R.S. (2011); House Cmte. On Juvenile Justice & Family Issues, Bill Analysis, 82nd Leg., R.S. (2011)
[168] *Id*.
[169] *Id.*
[170] Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 Yale L. & Pol'y Rev. 93, 99-100 (2005).
[171] *Id.* citing The Family Court Act, ch. 686, art. 8, 1962 N.Y. Laws 2189, 3123 (codified as amended at N.Y. Fam. Ct. Act art. 8 (McKinney 2004)).
[172] *Id.* citing Clare Dalton & Elizabeth M. Schneider, *Battered Women and the Law* 499 (2001); Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy*, Women & Pol., Fall 1984, at 13.

ties, reform swept the nation.[173] By the end of the 1980s all of the remaining forty-eight states had adopted legislation allowing victims of domestic abuse to obtain a civil protective order.[174]

In 1979, the Texas Legislature followed suit and first recognized civil protective orders exclusively for victims of family violence.[175] Since its first enactment, the Texas legislature has continually developed and expanded the language in protective order provisions in the Family Code to include spouses involved in divorce actions, unmarried parents of a child, and former members of the same household.[176] The legislature most recently extended protection by adding a definition for dating violence in 2001, as well as a definition including third parties in 2011.[177] Given the steady progression of the Texas Family Code to date, it is likely that protective order coverage will continue to expand in the future to meet societal needs. However, this also means a continuing expansion of the courts' protective order caseload.

III. An Overview of Texas Protective Orders

A protective order issued under Title IV of the Texas Family Code is a civil court order issued to prevent continuing acts of family violence.[178] While a temporary restraining order is very similar in its ability to provide for the safety and welfare of a child or family member, a temporary restraining order is only temporary and is only enforceable by contempt of court.[179] Temporary Restraining orders are regularly and routinely issued without a finding of violence as an incident to a divorce as part of the court's general management of the dissolution.[180] Because protective orders depend on a finding of violence, they depend on fact-finding hearings of far reaching implications of the parties. Family violence is defined as any act by one member of a family or household intended to physically harm another member, a serious threat of physical harm, or the abuse of a child.[181] Members of a family include individuals related by consanguinity or affinity, former spouses of each other, individuals who are the parents of the same child, a foster child and foster parent, and relationships established by marriage (in-laws).[182] Divorce, however, terminates family relationships established by marriage.[183] Members of a household include people living together in the same dwelling, regardless of whether they are related to each other.[184] A person who previously lived in a household is also considered a member of that household.[185]

There are three types of protective orders currently issued under Title Four of the Texas Family Code and Texas Code of Criminal Procedure, (1) a temporary ex parte order, (2) a final protective order, and (3) a magistrate's emergency order. Each type of protective order may be filed by either: (1) an adult member of a family or household, (2) a member of a dating relationship, or (3) a third party victim who is harmed or threatened because the victim is dating or married to a person whom the offending party use to date or be married to, (4) any adult for the protection of a child, (5) a prosecuting attorney, or (6) the Texas Department of Family and Protective Services (DFPS).[186] Protective orders can either be a no-contact order or a restrictive contact order.[187] Violation of any protective order issued under Title IV of the Texas Family Code is enforceable both by criminal and civil means (*see* Section VII for a discussion on enforceability).[188] What follows is a general overview of each type of protective order available and the distinguishing characteristics of each.

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[173] Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 Tex. J. Women & L. 163, 165 (1993).
[174] *Id.*
[175] Steve Russell, *The Futility of Eloquence: Selected Texas Family Violence Legislation 1979-1991*, 33 S. Tex. L. Rev. 353, 356 (1992).
[176] *Id.* at 361.
[177] Tex. Fam. Code Ann. § 71.0021(a)(1)(B) (West 2012).
[178] *O'Connor's Texas Family Law Handbook*, p. 676 Jones McClure (2013).
[179] *Id.* §§ 6.501, 105.001(f); *see also* Tex. Rules Civ. Pro. § 680 (TROs in general).
[180] *Id.*
[181] Tex. Fam. Code § 71.004.
[182] *Id.* Tex. Fam. Code § 71.003; *James v. Hubbard*, 21 S.W.3d 558,561 (Tex. App.—San Antonio 2000, no pet.).
[183] *Id.*
[184] Tex. Fam. Code § 71.003.
[185] *Id.* Tex. Fam. Code § 71.006.
[186] *Id.* Tex. Fam. Code § 82.002.
[187] *Id.* Tex. Fam. Code § 85.022(b)(2).
[188] *Id.* Tex. Fam. Code § 85.026; Tex. Pen. Code § 25.07(a).

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A. Temporary Ex Parte Protective Order

Temporary ex parte protective orders are used to protect members of a family, household, or dating relationship when there is a clear and present danger of family violence.[189] While there is no statute of limitations for when a party must request a temporary ex parte protective under the under the Family Code, it is less likely that a court will grant the order if a significant period of time has passed between the act of family violence and the filing of the application.[190] Because of the clear and present danger, a temporary ex parte order may be granted without notice and last up to 20 days.[191] They may be extended for additional 20-day periods, if necessary.[192]

Because temporary ex parte orders occur under emergency situations where time is of the essence (within 14 days), any court exercising jurisdiction must be amenable to short notice and docket flexibility. If a court is ill prepared, judicial overload is almost certain to occur.

B. Final Protective Order

Final protective orders, similar to temporary ex parte protective orders, are used to protect members of a family, household, or dating relationship from family violence.[193] A final protective order's main function is to extend the duration of an ex parte protective order from 20 days to up to two years; however, an ex parte order is not a prerequisite.[194] A final protective order may be issued for a duration of longer than two years if the respondent has either caused serious bodily injury to the applicant or a member of applicant's family or has been the subject of two or more previous protective orders issued to the same applicant.[195] There must be either, both a finding of a history of family violence and that family violence is likely to occur again or that there has been a violation of prior protective order between the parties in order for a court to issue a final protective order.[196] Unlike an ex parte protective order, a final protective order does require an adversarial hearing based on the facts along with notice.[197]

Naturally, when the restrictions on the respondent are even more severe and the immediate emergency has passed, the balance shifts in favor of normal due process protection for the respondent. As with temporary ex parte orders, final protective orders are time sensitive and must be handled in a manner much quicker than most other family law issues (matter of weeks from date of filing to the court hearing and the protective order's issuance). Similarly, if a court is unable to handle an influx of protective order applications due to other docket deadlines, judicial overload is all the more likely.

C. Magistrate's Emergency Order

A magistrate's emergency order ("MOEP") is an exclusive tool of a criminal court to issue an order for emergency protection after a person has been arrested for family violence, sexual assault, aggravated sexual assault, or stalking.[198] MOEPs are typically issued at a bail hearing and last for at least 31 days but no more than 61 days (at least 61 and no more than 91 if involving the use of a deadly weapon).[199] A MOEPs purpose is to protect victims of family violence, not to impose criminal punishment.[200] No hearing or notice is necessary.[201] Relief available for a MOEP is very similar to those of protective orders issued under the Family Code however there are a few benefits to a MOEP.[202] Under a MOEP, if the court finds that further violence is likely the court can order him/her held an additional 24 hours even after posting bond.[203] As a MOEP can

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[189] *Id.* Tex. Fam. Code § 83.001.
[190] *O'Connor's Texas Family Law Handbook*, p. 663.
[191] Tex. Fam. Code § 83.001.
[192] *Id.* Tex. Fam. Code § 83.002.
[193] *O'Connor's Texas Family Law Handbook*, p. 676.
[194] *Id.*
[195] Tex. Fam. Code § 85.025; *see S.B. 789, §2, 82nd Leg., R.S., eff. Sept. 1, 2011.*
[196] Tex. Fam. Code §§ 85.001, 85.002.
[197] *Id.* Tex. Fam. Code §§ 82.043, 84.001.
[198] Tex. Crim. Proc. Code art. 17.292 (Lexis Nexis 2012).
[199] *Id.*; *see* Warne, *The Protective Order Hearing Prosecution & Defending*, Advanced Family Law Course, State Bar of Texas CLE, ch.49.2.1, p. 10 (2008).
[200] *Ex Parte Necessary*, 333 S.W.3d 782,789 (Tex.App.—Houston [1st Dist.] 2010, no pet.).
[201] *Id.*
[202] Warne, *The Protective Order Hearing Prosecution & Defending*, Advanced Family Law Course, 34th Annual Advanced Family Law Course, ch.49.2.1, p. 10 (2008).
[203] *Id.*

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be granted on the court's own motion, the presence of the victim is not required in order to proceed with the MOEP's issuance.[204] This provides a more streamlined process while also sheltering a victim from what has been coined "custody blackmail", where battered victims frequently feel compelled to negotiate with their batterer on issues such as custody, possession, and support where batterers frequently use litigation to continue their abuse.[205]

One disadvantage of a MOEP is that it is part of a criminal case and not an independent charge. Therefore, if the defendant pleads out (which is beyond the control of the victim), the MOEP terminates. This can have the disastrous result of leaving a victim without any form of protection. Most attorneys representing the State will also file for a civil protective order under the Family Code to avoid this potential pit fall. A MOEP may exist at the same time as either an ex parte or final protective order.[206]

Violation of a MOEP is subject to both civil penalties (contempt of court[207]) and criminal prosecution under both state[208] and federal law.[209] A MOEP order will be issued under mandatory guidelines when a defendant is brought before a magistrate after an arrest for family violence (includes offenses previously listed above).[210] In all other cases, the issuance of a MOEP is discretionary and may be requested by a magistrate's own motion, the victim of the offense, the guardian of the victim, a peace officer, or the attorney representing the state.[211]

As MOEPs are handled under criminal court jurisdiction, they do not affect judicial overload of civil courts, they have no issue of civil or criminal enforceability as they are not only directed under contempt statutes but also under state and federal law, nor do they forgo any civil rights of victims. MOEPs are however, the weakest form of a protective order and whenever possible should be coupled with a civil protective order to provide the most protection possible to victims of domestic violence.

IV. Agreed Protective Orders

In order to facilitate settlement, the parties to a proceeding may agree in writing to the terms of a final protective order rather than having a hearing.[212] For that same reason and alleviating judicial overload, the Family Code does not require an agreed order to include a finding of family violence.[213] There are numerous advantages that come along with an agreed protective order. By facilitating settlement, the parties can avoid a lengthy adversarial hearing, thus providing ease on any potential judicial overload. An agreed protective order can also provide for reciprocal restrictions against a petitioner as well as give attorneys a better opportunity for a more careful and particular crafting of the order's terms based off the circumstances present. Lastly, an agreed protective order can avoid a judicial finding of misconduct by not having a finding of family violence occurred.

However, one hurdle in effectuating settlement occurs when respondents in a protective order case also face concurrent criminal charges of assault, battery, and/or domestic abuse. Those additional charges tend to keep an agreement from being possible when the respondent fears that a "finding of family violence" will be used in criminal court as evidence of an admission of guilt. In Harris County's 280th District Court, the issue is avoided by including the following order language:

> ***For the Limited purpose of enforcing this order***, the Court finds that family violence has occurred, ***that family violence is likely to occur in the future and that*** Respondent, [insert name] has committed family violence. The Court finds that the following protective orders are for the safety and welfare and in the best interest of the Applicant(s) and are necessary for the prevention of family violence.
>
> (*Additional language option*)

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[204] *Id.*
[205] *Id.* at 11.
[206] *O'Connor's Texas Family Law Handbook*, ch.6(D) § 7, p. 706.
[207] Tex. Fam. Code § 85.026.
[208] Tex. Pen. Code §§ 25.07, 46.04(c).
[209] 18 U.S.C. § 2262.
[210] *O'Connor's Texas Family Law Handbook*, Ch.6(D) § 4.2, p. 704.
[211] Tex. Code Crim. Proc. Art. 17.292(a).
[212] Tex. Fam. Code § 85.005(a), (b).
[213] *O'Connor's Texas Family Law Handbook*, Ch.6(C) §7.3(2)(cautionary note), p. 686.

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Respondent denies committing family violence; he/she only agrees to comply with this order.[214] While this is clearly a step in the right direction, there has yet to be a protective order with such language invalidated. Thus, it remains unclear whether this is a sure-proof method to avoid the protective order being used as evidence in a related criminal proceeding. Any agreed order is of course subject to the review of the court before being issued.[215]

An agreed protective order must be issued under either Section 85.021 (requirements of an order applying to *any party*) or Section 85.022 (requirements of an order applying to a *person who committed family violence*) of the Family Code or with provisions from both.[216] An agreed protective order is enforceable in the same manner as a protective order that is granted subsequent to a criminal or civil evidentiary hearing.[217] Even if an agreed protective order does not include a finding of family violence, the order remains enforceable by both civil and criminal means.[218] While this may or may not in actuality be true, the effect might not be practical or helpful in protecting victims. The Family Code does not prohibit a court from issuing a protective order that applies to both parties where there is no finding of family violence as provided under Section 85.022 (this can be done under Section 85.021).[219] Thus, one can imagine settlement on the basis of reciprocal limits. *See* supra. However, in such an order the court shall make a finding in such an agreed protective order that the order is in the best interest of the person protected by the order or a member of the family or household of the person protected by the order.[220] The court has a responsibility to reject any agreed protective order that is not in the best interest of the person protected by the order or a member of the family or household of the person protected by the order.[221]

A. Relief Under § 85.021 (Applying to Any Party)

An agreed protective order issued under Section 85.021 can require either or both the applicant and the respondent to do or refrain from doing certain acts.[222] These include, but are not limited to, (1) prohibiting a party from removing a child who is a member of the family or household from the possession of a person named in the court order or from the jurisdiction of the court[223]; (2) prohibiting a party from transferring, encumbering, or otherwise disposing of property mutually owned or leased by the parties, except in the ordinary course of business[224]; (3) prohibiting a party from removing a pet, companion animal, or assistance animal from the possession of a person named in the order[225]; (4) granting exclusive possession of a residence to a party and if appropriate, directing one or more other parties to vacate the residence based on different owning/leasing situations[226]; (5) providing for possession of and access to a party's child if the person receiving possession or access is a parent of the child[227]; (6) requiring the payment of support for a party or for a party's child if the person required to make the payment has an obligation to support the other party or the child[228]; (7) awarding a party the use and possession of specified property that is community property or jointly owned or leased.[229]

The relief options available in this section are normally not significant issues for settlement if an agreed protective order is possible. Exceptions may include instances where substantial property (quantity and / or value) is in dispute.

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[214] Handout re: Agreed Protective Orders and Tex. Fam. Code § 85.005 from Harris County Distric Attorney's Office (on file with the 280th District Court, Court Coordinator).
[215] *Id*.
[216] *O'Connor's Texas Family Law Handbook*, Ch.6 § 9.3, p. 687.
[217] *Id*.
[218] Tex. Fam. Code § 85.005(b); see also House Cmte. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 1059, 79th Leg., R.S. (2005).
[219] *O'Connor's Texas Family Law Handbook*, Ch.6 § 8.4, p. 674.
[220] Tex. Fam. Code § 85.001(b)(2); see also House Cmte. on Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 1059.
[221] *In re I.E.W.*, No. 13-09-00216-CV (Tex.App.—Corpus Christi 2010, no pet.)(memo op.; 8-27-10).
[222] *O'Connor's Texas Family Law Handbook*, Ch.6 § 3.4(10), p. 678; Tex. Fam. Code § 85.021.
[223] Tex. Fam. Code § 85.021(1)(A).
[224] *Id*. § 85.021(1)(B).
[225] *Id*. § 85.021(1)(C); *see* Hum. Res. Code § 121.002(1).
[226] Tex. Fam. Code § 85.021(2).
[227] *Id*. § 85.021(3).
[228] *Id*. § 85.021(4).
[229] *Id*. § 85.021(5).

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B. Relief Under § 85.022 (Applying to a Person Who Committed Family Violence)

Alternatively, an agreed protective order with relief issued under Section 85.022 can require only the respondent to do or refrain from doing acts.[230] For a court to require the original applicant to do or refrain from doing an act under Section 85.022, the respondent must have filed a separate application against the original applicant.[231]

The court may order the respondent, found to have committed family violence, to perform certain acts in order to prevent or reduce the likelihood of family violence.[232] These include, (1) requiring the respondent to complete a battering intervention and prevention program ("BIPP" training) accredited under Article 42.141, Code of Criminal Procedure[233]; (2) prohibiting the respondent from committing family violence[234]; (3) prohibiting the respondent from communicating with the protected party or a member of the protected party's family or household in a multitude of ways[235]; (4) prohibiting the respondent from going to or near the residence or place of employment or business of the protected party or a member of the protected party's family or household[236]; (5) prohibiting the respondent from going to or near the usual residence, school, or child-care facility of a child protected by the order[237]; (6) prohibiting the respondent from engaging in conduct directed specifically toward the protected party or member of the protected party's family or household that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person, including following the person[238]; (7) prohibiting the respondent from possessing a firearm or ammunition unless the party is a peace officer, as defined by Texas Penal Code § 1.07, who is actively engaged in employment as a sworn, full time, paid employee of a state agency or political subdivision[239]; and (8) prohibiting the respondent from harming, threatening, or interfering with the care, custody, or control or a pet, companion animal or assistance animal that is possessed either by a person protected by an order or by a member of the protected person's family or household.[240]

A protective order with relief provided in this section would more likely be an impediment to any settlement of an agreed protective order due to the elevated requirements, restrictions and prohibitions, most commonly in terms of BIPP training. Furthermore, Even though the Family Code does not require an agreed protective to include a finding of family violence, it must be included if any of the relief under this section is to apply in the protective order. A failure to include a finding of family violence within an agreed protective order including relief from Section 85.022 would make such elements of relief void and unenforceable.

V. Legal Consequences of Family Violence

H.B. 3172 seeks to amend Section 85.005(a) to include that a court may render an agreed protective order under Section 85.021 without making a finding of family violence.[241] Besides being unnecessary as it is already possible to issue an agreed protective order without a finding of family violence (*see supra* text accompanying note 49), H.B. 3172 highlights the already problematic scenario where a victim forgoes important statutory safeguards.[242] While there might be situations where this is okay, victims (and their attorney's) should be made aware of the statutory safeguards they would lose in order to make the best possible decision concerning their safety and wellbeing. A person who is found to have committed family violence is subject to substantial legal consequences, which should not lightly be compromised on.[243]

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[230] *Id.* § 85.022.
[231] *State v. Cockerham*, 218 S.W.3d 298, 307-08 (Tex.App.—Texarkana 2007, no pet.).
[232] Tex. Fam. Code § 85.022.
[233] *Id.* § 85.022(a)(1), (2), (3).
[234] *Id.* § 85.022(b)(1); see *Godfrey v. Godfrey*, 2008 WL 3166328, No. 03-07-00220-CV (Tex.App.—Austin 2008, no pet.)(mem. op.; 8-8-08).
[235] Tex. Fam. Code § 85.022(b)(2).
[236] *Id.* § 85.022(b)(3).
[237] *Id.* § 85.022(b)(4).
[238] *Id.* § 85.022(b)(5).
[239] *Id.* § 85.022(b)(6).
[240] *Id.* § 85.022(b)(7); *see* Hum. Res. Code § 121.002(1).
[241] Tex. H.B. 3172, 82nd Leg., R.S. (2011).
[242] *O'Connor's Texas Family Law Handbook*, Ch.6 § 9.4, p. 688.
[243] See *Adams & Lewis, Civil and Criminal Ramifications of a Family Violence Protective Order*, Advanced Family Law Course, State Bar of Texas CLE, ch.5, p.1 (2010).

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What follows is an application of how an agreed protective order without a finding of family violence affects both Texas and federal law while jeopardizing the safety of victims of domestic violence. If an agreed protective order is to be had so as to avoid an adversarial hearing, the parties need to know what advantages each party is giving up in proceeding on the basis of a settlement. Failure to do so unjustifiably risks the safety and wellbeing of victims and their families.

A. Texas Family Code

Under the Texas Family Code, the following provisions concerning issues of divorce, custodianship, emergency jurisdiction, and the length of a protective order are all affected by a protective order without a finding of family violence.

1. Grounds for Divorce - Cruelty

The court may grant a divorce in favor of one spouse if the other spouse is guilty of cruel treatment toward the complaining spouse of a nature that renders further living together insupportable.[244] Insupportable means unendurable, insufferable, intolerable, and incapable of being borne.[245] Cruel treatment, by itself, is determined on a case-by-case basis.[246] The suffering may be mental or physical and consist of a single or multiple incidents that cumulatively are sufficient to justify as ground for cruelty.[247] With a finding of cruelty, the court may award disproportionate award in the division of the marital estate in which family violence is a factor.[248] However, the division of property must not be so disproportionate as to be inequitable.[249]

A finding of family violence in a protective order is legally sufficient evidence of cruelty as grounds for a divorce.[250] A protective order without a finding of family violence would not be legally sufficient evidence but a mere factor of consideration of cruelty in a divorce. In order to establish cruelty, the plaintiff would have to bring the very same evidence presented for a protective order hearing to the family court hearing. A finding of family violence is important for a judicial (and searchable) record of cruelty, implications for just and right divisions of property, as well as related child issues.

2. Waiving Divorce Mediation

A dissolution suit along with a suit affecting the parent-child relationship ("SAPCR") may be referred to mediation on the written agreement of the parties or on the court's own motion (many jurisdictions and courts make mediation a mandatory requirement for dissolution and SAPCR suits).[251] The suit may alternatively be referred to alternative dispute resolution procedures.[252] Normally, a party may object to mediation (or other forms of alternative dispute resolution) on the basis of family violence. [253] However, without a finding of family violence in a protective order, victims would have to file a written objection to the referral of mediation within ten days after receiving notice of it.[254] If despite a finding of family violence, the suit is still referred to mediation, then the court shall order appropriate measures to ensure the safety of the objecting party including no face-to-face contact and the use of separate rooms.[255]

Mediation delays divorce proceedings significantly and victims of family violence are often at a disadvantage in mediation due to power and control tactics often used by abusers. Good faith negotiation is even made more difficult by this dynamic. Even if provisions are made to ensure the physical and emotional safety of the party who filed the objection, it cannot be guaranteed. Waving mediation would provide one more opportunity for the abuser to use the system to control the victim.

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[244] Tex. Fam. Code § 6.002.
[245] *Henry v. Henry*, 48 S.W.3d 468, 473 (Tex.App.—Houston [14th Dist.] 2001, no pet.).
[246] *Mobley v. Mobley*, 263 S.W.2d 794, 794-95 (Tex.App.—Waco 1953, no writ).
[247] *Fomby v. Fomby*, 329 S.W.2d 111, 112-13 (Tex.App.—Austin 1959, no writ); *Mobley*, 263 S.W.2d at 794; *Emerson v. Emerson*, 409 S.W.2d 897, 900 (Tex.App.—Corpus Christi 1966, no writ).
[248] Tex. Fam. Code § 7.001; *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980).
[249] *Fischer-Stoker v. Stoker*, 174 S.W.3d 272, 277 (Tex.App.—Houston [1st Dist.] 2005, pet. denied.).
[250] *Henry*, 48 S.W.3d at 474.
[251] Tex. Fam. Code § 6.602.
[252] *Id*. Tex. Fam. Code § 153.0071.
[253] *Id*. § 6.602(d); *Id*. § 153.0071.
[254] Tex. Fam. Code § 154.22(b).
[255] *Id*. Tex. Fam. Code § 153.0071(f).

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3. Waiving the 60-day Waiting Period for Divorce

Normally the Court may not grant a divorce before the 60th day after the date the suit was filed. However, a waiting period is not required where either: (1) the respondent has been finally convicted of or has received deferred adjudication for an offense involving family violence under Section 71.004 against the petitioner or a member of the petitioner's family or household[256]; or (2) the petitioner has an active protective order or an active magistrate's order for emergency protection, based on a finding of family violence, against the respondent.[257]

An active protective order or magistrate's order without a finding of family violence would preclude a petitioner from automatic waiver of the 60-day waiting period. This could potentially trap victims, endangering them and their children. A court's compliance with the waiting period provision is procedural, not jurisdictional; thus, such a matter could only be challenged or corrected by direct appeal.[258] Short of an appeal, victims would have no other recourse other than wait the required 60 days further endangering him or her.

4. Costs and Fees

Except for a showing of good cause or of the indigence of a party found to have committed family violence, the party against whom the protective order is rendered shall pay for the court costs and attorney fees.[259] The applicant for a protective order and their attorney are not charged a fee by the district clerk for anything in connection with the filing, service, or entering of a protective order.[260] An agreed order without a finding of family violence would thus forfeit that right and the ability for the court to impose contempt for nonpayment.[261]

5. Protective Order Requirements & Restraints

While parties may agree in writing to the terms of a protective order, a finding of family violence is necessary to restrain any party under its terms.[262] The court therefore would not be able to compel an abuser to enroll in a battering intervention and prevention program (BIPP training) or a similar accredited program, would not be able to prohibit a party from committing future family violence, would not be able to enjoin someone from communicating, or going to or near protected locations relating to the protected person and their family, or possessing a firearm, and most significantly it would not be able to suspend a concealed handgun license.[263] These restraints are all meant to provide protection to victims and their families, which simply cannot happen without a finding of family violence.

6. Kick Out Order

Similar to a protective order, a party may be excluded from a mutual residence if within the 30 days before the date the application was filed committed family violence against a member of the household and there is a clear and present danger that the person to be excluded is likely to commit family violence against a member of the household which is supported by either testimony or an affidavit.[264] The applicant may additionally request the assistance of law enforcement with a protective order with a finding of family violence would be legally sufficient evidence for a kick out order. However, a protective order without a finding of family violence would be only a mere consideration and a hearing would be necessary.

7. Duration of Order

Normally, a final protective order is effective for a period of not more than two years.[265] If the respondent is confined or imprisoned on the date the protective order would expire, the duration of the protective order is extended until a year after the respondent is released from confinement or imprisonment.[266] A finding of family violence is a necessary element in establishing grounds for a protective order beyond the standard two-year maximum in certain circumstances.[267] A protective order may be issued with a duration exceeding two years in length if the court finds that the respondent (1) caused serious bodily injury to the applicant or a

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[256] Tex. Fam. Code § 6.702(c)(1).
[257] *Id.* § 6.702(c)(2).
[258] *In re Marriage of Gillman*, 507 S.W.2d 610, 612 (Tex. App.—Amarillo 1974, writ dism'd).
[259] Tex. Fam. Code §§ 81.003, 81.005.
[260] *Id.* Tex. Fam. Code § 81.002.
[261] *Id.* Tex. Fam. Code § 81.004.
[262] *Id.* Tex. Fam. Code § 85.022.
[263] *Id.*
[264] *Id.* Tex. Fam. Code § 83.006(b).
[265] *Id.* § 83.025(a).
[266] *Id.* § 83.025(c).
[267] *Id.* § 85.025(a-1).

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member of the applicant's family or household; or (2) was the subject of two or more previous protective orders regarding the same applicant after findings of family violence and the likelihood of it occurring in the future.[268] The court is allowed to enter a protective order here for any duration in these limited circumstances.

Without a finding of family violence, an agreed protective order cannot support a later protective order that is effective for more than two-years. The person whom the protective order is rendered has the burden to request a modification of the protective order to establish that there is no "continuing need" for the order.[269]

8. Temporary Emergency Jurisdiction

A trial court may acquire temporary emergency jurisdiction to issue an emergency custody order if (1) the child is present in Texas and (2) either the child has been abandoned or the court must protect the child because the child or the child's sibling or parent is subjected to or threatened with mistreatment and abuse.[270] States have a *parens patriae* duty to children within their borders, and the possibility that allegations of immediate harm might be true is sufficient for a court to assume temporary emergency jurisdiction in the best interests of the child under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)[271] The UCCJEA and Parental Kidnapping Prevention Act (PKPA) recognize that a temporary ex parte protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse.[272] A temporary ex parte protective order issued under temporary emergency jurisdiction may include all of the provisional restrictions listed under Section 85.022(b) as specifically tailored to the facts presented as well as any other restrictions (under Sections 85.021 or 85.022) necessary for the reasonable protection of a child or a child's sibling or parent.[273] Furthermore, even if the court finds that Texas is an inconvenient forum it may allow the parties to submit information including whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child.[274]

An active protective order with a finding of family violence is legally sufficient evidence of a threat of mistreatment or abuse to either the child or a sibling or parent of the child. Without a finding of family violence, it could be more difficult to establish such proof. Without a finding of family violence, victims would have to request a hearing to prove family violence to establish grounds for proper venue. In situations like these, time is of the essence. Every moment wasted in a hearing to determine emergency jurisdiction endangers victims. It further delays protective safeguards and restrictions, allowing the abuser an opportunity to take the child(ren) before a hearing.

9. Possession & Access

The court shall consider the commission of family violence in determining conservatorship, periods of possession, access, and visitation in a SAPCR.[275] The court may deny, restrict or limit the possession of a child by a parent who is appointed as a possessory conservator.[276] However, the restriction or limitation may not exceed what is required to protect the best interest of the child.[277] Generally, the court may limit a parent's access to a child if that parent has been found by a preponderance of the evidence to have committed family violence within the preceding two years.[278] Exceptions include (1) where the court finds such access would not endanger the child and is in the child's best interest, and (2) where the court issues a possession order whereby accounting for the safety of the child by requiring the parent found to have committed family vio-

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[268] *Id.* § 85.025(a-1)(1), (2).
[269] *In the Interest of I.E.W.*, 2010 WL 3418276 (Tex.App.—Corpus Christi 2010, no pet.).
[270] Tex. Fam. Code § 152.204(a).
[271] *Saavedra v. Schmidt*, 96 S.W.3d 533, 544 (Tex.App.—Austin 2002, no pet.) (citing *Garza v. Harney*, 726 S.W.2d 198, 202 (Tex. App.—Amarillo 1987, orig. proceeding)).
[272] Tex. Fam. Code § 152.204 (NCCUSL comt); *In re M.G.M.*, 163 S.W.3d 191, 196 (Tex.App.—Beaumont 2005, no pet.).
[273] *Id. at 198-99*.
[274] Tex. Fam. Code § 152.207(a), (b)(1).
[275] *Id.* Tex. Fam. Code § 153.004.
[276] *Id.* § 153.004(c) .
[277] *Id.* § 153.193.
[278] *Id.* § 153.004(d).

lence to have supervised possession, safe exchanging of the child, abstaining from the consumption of alcohol, and/or the completion of a battering intervention and prevention program.[279]

The issuance of a civil protective order within the preceding two-year period is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent directed against the other parent, spouse, or child.[280] A protective order without a finding of family violence would not be conclusive evidence of a history of domestic violence, further endangering the victim and or child.

10. Visitation & Communication

There is a presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent against the other parent, spouse, or a child.[281] If there is credible evidence, the court may require that parent to have supervised visitation through the use of a particular visitation center or exchange facility to ensure the safety of the victim or child.[282] The court may also grant periods of electronic communication with a child by the conservator.[283]

The issuance of a civil protective order within the preceding two-year period is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent directed against the other parent, spouse, or child.[284] There is some question as to whether a protective order without a finding of family violence would be considered credible evidence of a history of domestic violence. Regardless, one can safely assume it does not carry as much weight as a protective order with a finding of family violence and therefore would risk endangering the victim and or child during periods of potential unsupervised visitation. The victim and/or child would have to produce other credible evidence in a hearing that would once again delay the use of statutory safeguards and protections to prevent future violence.

11. Conservatorship

It is a rebuttable presumption that the appointment of parents as joint managing conservators is in the best interest of the child.[285] This presumption is removed by a finding of family violence involving the parents of a child.[286] A protective order containing a finding of family violence is legally sufficient evidence to rebut the joint managing conservatorship presumption in child custody proceedings. In determining what is in the best interest of a child, the trial court is given wide latitude, and it is for the trial court to determine whether such credible evidence of a history of family violence was presented.[287] Furthermore, just one incident of physical violence can constitute a history of physical abuse.[288]

Without a finding of family violence, evidence of family violence would be but one factor for the Court to consider. This would likely waste the Court's time, resources, and potentially burden victims. Additionally, many attorneys note that evidence regarding violence tends to become diluted in a hearing in which the court also hears issues of child support and marital property.

12. Material & Substantial Change

A modification of a SAPCR order may be issued by the court if (1) it is in the best interest of the child, and (2) the circumstances of the child, a conservator, or another party affected by the order has materially and substantially changed since the order took effect.[289] Alternatively, a modification may be sought to modify the parent or conservator with the exclusive right to designate the primary residence of the child if the child may be endangered due to their present environment.[290]

Domestic violence can have a significant impact on a modification proceeding. A finding of family violence in a civil protective order would clearly illustrate that the child's current environment being an endangerment to the child's physical and emotional development. A protective order without a finding would thus

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[279] *Id.* § 153.004(d)(1), (2).
[280] *Id.* § 153.004(f).
[281] *Id.* § 153.004(e).
[282] *Id.* § 153.014.
[283] *Id.* § 153.015.
[284] *Id.* § 153.004(f).
[285] *Id.* § 153.131(b).
[286] *Id.*
[287] *In re* *Collier*, 2011 Tex. App. LEXIS 13 (Tex.App. – El Paso 2011, no pet.).
[288] *In re R.T.H.*, 175 S.W.3d 519, 521 (Tex.App. – Fort Worth 2005, no pet.).
[289] Tex. Fam. Code § 156.101.
[290] *Id.* § 156.102.

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not be legally sufficient evidence of a material and substantial change and an additional hearing would likely be necessary to show family violence has occurred again putting the victim and child in harm's way.

B. Federal Concerns

Federal laws are also impacted by a Texas civil protective order without a finding of family violence in the interstate enforcement under the full faith and credit clause of the Fourteenth Amendment, gun control laws, and immigration laws.

1. Full Faith and Credit Clause

Under the Full Faith and Credit Clause of the Fourteenth Amendment, any protective order issued that is consistent with subsection (b) by the court of one State issuing the order must be accorded full faith and credit by the court of another State and must be enforced by the court and law enforcement personnel of the other State as if it were the order of the enforcing State or tribe.[291] Any protective order that is otherwise consistent with this section must be accorded full faith and credit, notwithstanding failure to comply with any requirement that the order be registered or filed in the enforcing State. For a protective order to be valid, the court that issued the order must have had personal jurisdiction over the parties and subject matter jurisdiction over the case, and the respondent must have had notice and an opportunity to be heard.[292]

A protective order, even one without a finding of family violence would seem to pass this two-prong test. Full faith and credit helps to protect the victim's freedom of movement by requiring the justice system to enforce protective orders throughout the country. If an abuser travels across state or tribal lines and violates a protective order, the abuser can be punished under the laws of the jurisdiction where the violation occurred and may also be charged with federal crimes. It remains unclear whether a Texas protective order without a finding of family violence would be criminally enforceable if restraints nonetheless were in place within the order. Despite the questionable enforceability, it can be assumed that such a protective order would unjustifiably risk a victim's safety and protection.

2. Federal Gun Control - Brady Bill

In a Texas protective order with a finding of family violence under Section 85.022, the court may prohibit a respondent from possessing a firearm, unless the person is a peace officer, as defined by Section 1.07, Penal Code.[293] In a protective order, the court must suspend a concealed handgun license issued under Subchapter H Chapter 411, Government Code that is held by a person found to have committed family violence.[294]

According to federal gun control laws, provided all other sections are in accord with the order, it is illegal for an abuser to buy, own, or have a gun in his/her possession during the period of time that a protective order is valid and enforceable.[295] This clearly applies to anyone who has a protective order with a finding of family violence issued against him or her. There are exceptions for active peace officers and military personnel.[296] To be valid, a protective order must contain specific language forbidding the respondent from harassing, stalking, threatening, or behaving in any way that causes the petitioner to fear physical injury of his/her self or his/her child and either state that the abuser represents a threat to the physical safety of the petitioner or petitioner's child or specifically prohibit the use, attempted use, or threatened use of physical force against the petitioner or petitioner's child.[297] The last prong of the statute (containing specific language) does provide a problem for a protective order without a finding of family violence. A Texas court cannot restrain a party to do or refrain from doing an act under Section 85.022 without finding the party has committed family violence and that the party is likely to commit family violence in the future under Section 85.001(c). Without a finding, it does not appear possible to have a valid protective order that would trigger the federal restriction on firearms.

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[291] 18 U.S.C.S. § 2265 (LexisNexis 2012).
[292] *Id*. § 2265(b).
[293] Tex. Fam. Code. § 85.022(b)(6).
[294] *Id*. § 85.022(7)(d); Tex. Penal Code § 46.01.
[295] 18 U.S.C. § 922(g)(8) (LexisNexis 2012); *Cockerham v. Cockerham*, 218 S.W.3d 298,303 n.5 (Tex. App.—Texarkana 2007, no pet.).
[296] 18 U.S.C. § 925.
[297] 18 U.S.C. § 922(g)(8).

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3. Immigration

Victims of trafficking and violence in the United States who are willing to assist authorities in investigating crimes are eligible for U-visa status under any Federal or State program or activity funded or administered by any official or agency.[298] The U-visa status may be available to victims of domestic violence and certain other crimes. A protective order with a finding of family violence would aid in an application for U-visa status. A protective order without a finding would likely make it more difficult to establish the grounds sufficient for protection under U-visa status.

Violation of a protection order by an alien resident that includes credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issues is deportable.[299] A protection order includes temporary or final orders issued by civil or criminal courts.[300] A conviction for violating a protective order is legally sufficient evidence of violating a protective order for purposes of deportation under Section 1227(a)(2)(E)(ii).[301]

Additionally, the Violence Against Women Act (VAWA) created special provisions in United States immigration law to protect alien victims of abuse, often by threats of having the victim deported while any children remain here. In cases of domestic violence, federal law allows certain victims of abuse who are not citizens to obtain lawful status without having to rely on their abuser for application.[302] VAWA provides three possible forms of relief. First, a victim may under a VAWA self-petition file for lawful permanent residence without the assistance of the abuser if the victim is abused by: their United States Citizen (USC) or legal permanent resident (LPR) spouse, parent, or non-LPR adult child.[303] Second, a victim may be able to apply for a "battered spouse or child waiver" if they have conditional legal permanent residence as a spouse (and in certain circumstances as a child) of a USC or LPR, and the USC or LPR has abused them.[304] With a battered spouse or child waiver, the abuser does not have to file the joint petition with them. Third, if a victim is in removal proceedings (formerly known as deportation proceedings) before an immigration judge, and is abused by their USC or LPR spouse or parent (or they have a child with the USC or LPR who is abused by him/her), it is possible to apply for "VAWA cancellation of removal."[305] A protective order with a finding of family violence would bolster an application for protection under a visa through the provisions of VAWA where as a protective order without a finding would, likely would make it more difficult to establish the grounds sufficient for such protection.

VI. Judicial Overload

Texas courts play a critical role for visitors, citizens, businesses, and communities. Each counts on being able to "get their day in court," however when significant delays caused by judicial overload occur, justice breaks down. The longer cases are delayed, the greater the risk of harm or injury grows. Especially for emergency situations, judicial overload is unacceptable.

Harris County treated its own family law court backlog as an organizational flaw of how the courts were structured. Protective orders, unlike other matters of family law (which can last months, even years), are almost exclusively matters of emergency. In these situations time is of the essence as victims and their families are in dire need of court protection to escape the violent real danger that threatens them. Through the Texas Legislature, the 280th district court was created in Harris County with the exclusive jurisdiction to handle civil protective order cases.[306] Designation of a specialized court has allowed for a more unified and streamlined response to the protective order process, while easing the burden on the rest of the family law court dockets. In the three years since its establishment, neither the 280th district court nor any Harris County family court has reported any abnormal backlog as previously reported.

The Harris County solution is not necessarily practical for other counties, and many other jurisdictions continue to report having over-burdened courts. Smaller counties with fewer courts do not present the same

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[298] *Victims of Trafficking and Violence Protection Act of 2000*, 22 U.S.C.S. § 7105(b) (LexisNexis 2012).
[299] *Immigration and Nationality Act*, 8 U.S.C.A. §§ 1227(a)(2)(E)(i), (ii).
[300] *Id.*
[301] *Alanis-Alvarado v. Holder*, 558 F.3d 833 (9th Cir. 2009).
[302] *Violence Against Women Act of 2005*, 8 U.S.C.S. §§ 1151, 1154 (LexisNexis 2012).
[303] *Id.*
[304] *Id.*
[305] *Id.* § 1229(b).
[306] *Id.*

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opportunity for specialization and streamlining of judicial operations. However, while they may not be as large in population as Harris County or hold as many district courts with exclusive jurisdiction, the fact remains that these smaller jurisdictions can be overwhelmed by the number of applications for protective orders. For jurisdictions in which the Harris County solution is impractical, it is clear that we must look to either the organizational structure of the courts or the protective order application process itself to correct the problem. Regardless of either, there are alternative means by which we can address these concerns through more affective, simpler reforms than H.B. 3172.

VII. Enforceability

The Texas Family Code specifically provides that any civil protective order is enforceable both criminally and civilly.[307] However, a civil protective order must nonetheless include a finding of family violence to refrain a party in any capacity.[308] Violation of any act prohibited by a protective order is automatic grounds for the issuing of a new protective order without the necessity of making any findings under Section 85.001(a).[309] The applicant need only prove that (1) a violation occurred while a protective order was in effect and (2) that the protective order is now expired.[310] A violation of any of the provisions in Section 85.022(b) may result in immediate arrest.[311] Furthermore, a warrant need not be issued for a peace officer to make an arrest after observing a person violating a protective order.[312] This is true, even if by the invitation of the applicant.[313] If the violation was not observed by a peace officer, the officer may still make a warrantless arrest if there is probable cause to believe the respondent has committed one of the terms under Section 85.022.[314] Violation of a protective order is a class A misdemeanor.[315]

While it is possible to have an agreed protective order without a finding of family violence (regardless of H.B. 3172), such a protective order would not be able to restrict the person from any prohibitions under Section 85.022. Nonetheless, the Texas Legislature has been clear that even if an agreed civil protective order does not include a finding of family violence, the order is still enforceable by civil and criminal means.[316] Presumably then, it appears that the prohibitions listed in a protective order issued under Section 85.021 would be the only grounds for criminal enforcement (Section 85.022 prohibitions would not be possible without a finding of family violence). Contempt of court is the only means for enforcement under the Texas Rules of Civil Procedure for failure to comply with Section 85.022(a) (BIPP training, counseling, or any other specified act directed by the court to ensure the victim's safety).[317] Contempt is understandably difficult to enforce as the respondent will likely dodge service or any writ of attachment a court might issue in an attempt to enforce contempt of court.

The concern with a civil protective order without a finding of family violence is that it would preclude too many of the safeguards established within the family code to protect victims as previously discussed. Forgoing these securities simply to try and alleviate the court docket is unquestionably reckless and ill advised for protecting victims of domestic abuse. Additionally, contempt of court is not a powerful deterrent. This must be fixed if victims and their families are to be sufficiently protected.

VIII. Viable Solutions

It is clear that H.B. 3172 is not the answer. While granting the court the ability to *sua sponte* find a respondent in contempt of court, its practical application seems to fail as an effective deterrent or remedy. Each issue discussed in detail to this point, may demand different strategies and remedies depending on the size of

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[307] *Id.* § 85.005(b).
[308] *Id.* § 85.022(b).
[309] *Id.* § 85.002.
[310] *Id.*; *Id.* § 82,008(a).
[311] Tex. Pen. Code § 25.07.
[312] Tex. Code Crim. Pro. § 14.03(b).
[313] Tex. Fam. Code § 85.026(c).
[314] Tex. Code Crim. Pro. § 14.03(a)(3).
[315] Tex. Pen. Code § 25.07(g).
[316] *Id.* § 85.005(b); see also House Cmte. On Juvenile Justice & Family Issues, Bill Analysis, Tex. H.B. 1059, 79th Leg., R.S. (2005).
[317] Tex Gov. Code § 21.002, Tex. Fam. Code § 85.024(a).

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the jurisdiction, the structure of the court system, and the resources available. Regardless, any viable solution must not aggravate the other two issues if there is to be positive progress made.

A. Legal Consequences of Family Violence

Looking at the protective order application process itself, is it possible to reduce the pressure on the courts and to provide for greater enforcement of protective order violations? How can we provide a smoother, cleaner process for civil protective orders without jeopardizing the health and safety of victims of domestic violence? How can we provide for better enforcement for violation of court specified acts and conditions (BIPP training, counseling, any other specified act providing for the safety of the applicant)? What follows are several options targeting these primary concerns.

H.B. 3172 does not address the legal protections provided by the Family Code for victims of domestic abuse that would be lost if the applicant agreed to such a protective order without a finding of family violence detailed in Part V - Legal Consequences of Family Violence. This must be addressed as to both inform and protect victims from signing away these rights without a true understanding of their ramifications.

Regardless of whether or not H.B. 3172 is enacted, there should be no disagreement that there needs to be a way to properly advise an applicant of what rights they would be forgoing should they agree to a protective order without a finding of family violence. The safest route would seem to have a court form that any party agreeing to a protective order without a finding of family violence would have to read and sign giving their understanding of the statutory rights to which they would lose. The form would list every instance (detailed above) where a finding of family violence affects victim rights. If this is impractical then perhaps a warning from the court or judge would suffice. Alternatively, It could be a warning detailed itself in the protective order signifying the applicants understand of the rights being waved. However it is addressed, victims of domestic abuse need to be properly notified of the legal protections they lose by such agreement without a finding of family violence.

B. Enforceability

H.B. 3172 would allow the court to *sua sponte* find the person to whom the protective order is issued against in contempt. While this could prove to be a useful tool of the court, the bill does not provide penalties for failing to comply with any provisions set forth by the court under Section 85.022(a), again BIPP training, counseling, and any other specified act providing for the safety of the applicant.

Another option is to allow for peace officers to enforce a violation of a protective order without a finding of family violence under Sections 85.005(a) with a breach of the peace. This would involve amending Section 25.07 of the Texas Penal Code as well as Sections 14.03(a)(3) and 14.03(b) of the Texas Code of Criminal Procedure. Additionally Section 85.026 regarding the warning on protective orders would need to be amended to include a new section that reads:

> (d) Each protective order issued under this subtitle, including a temporary ex parte order, must contain the following prominently displayed statement in boldfaced type, capital letters, or underlined:
>
> "NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS AND CONDITIONS OF A PROTECTIVE ORDER SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO THE ACTIVE PROTECTIVE ORDER. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000."

This variation of the notice to peace officers in the contents of a final SAPCR order under Section 105.006(e-1) might provide a more practical enforcement for a civil protective order issued without a finding of family violence.

The best and simplest option is to amend Section 85.002 of the Texas Family Code so as to allow for better enforceability when terms of a protective order are not complied with (namely Section 85.022(a) provisions). This Section should be amended to read as follows:

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> If the court finds that a respondent violated a protective order by failing to either comply with any of the terms of the order provided by Section 85.022(a) or committing an act prohibited by the order as provided by Section 85.022(b), that the order was in effect at the time of the violation, and the order has expired after the date that the violation occurred, the court, without the necessity of making the findings described by Section 85.001(a), shall render a protective order as provided by Section 85.022 applying only to the respondent any may render a protective order as provided by Section 85.021.

Currently only Section 85.022(b) provides for criminal enforceability. Subsections (a)(1), (2), or (3) may only be enforced with contempt of court. As previously noted, contempt of court is difficult, costly, and not very effective. This includes requiring the respondent comply with BIPP training, professional counseling, and any other specified act that court determines necessary or appropriate to prevent or reduce the likelihood of family violence. So according to Section 85.002 a respondent's failure to comply with subsections (a)(1), (2), or (3) of Section 85.022 has no viable consequences. Amending Section 85.002 would allow courts to issue another protective order for a respondent's failure to comply with the terms of a protective order under Subsections (a)(1), (2), or (3) of Section 85.022. Additionally Section 85.026 regarding the warning on protective orders would need to be amended to specifically advise the person subject to the order of the requirement of this section and the possible punishment if the respondent fails to comply with the requirement(s).

C. Judicial Overload

One practical solution is to simply enact, via legislation, more courts of exclusive jurisdiction in those counties where courts are overburdened by protective order applications and hearings. The 280th District Court in Houston is a perfect example of how a court of exclusive jurisdiction can eliminate such a burden while providing a unified response to their application and order. This of course may not be practical or possible in every jurisdiction, especially smaller counties, facing the backlog of court dockets. A smaller county could also achieve this by changing its local rules to provide for a certain court or courts to maintain all civil protective order applications or creating local policy to provide for the preferential handling of protective order situations so as to not interfere with other judicial matters.

IX. Concluding Thoughts

Regardless of the solution, it is obvious that protective order enforcement needs to be strengthened both through civil and criminal means and those jurisdictions burdened with protective order applications and hearings, need to find the most effective avenue for alleviating that burden without hindering the effect and enforceability of protective orders in general or jeopardizing the rights of victims. An agreed protective order, under the right circumstances, can provide effective relief and enforcement in protecting victims while at the same time relieving the backlog of courts. A protective order's purpose is first and foremost to protect, let us not do a disservice to our constituents by muddying up a system designed to provide quick, effective relief in emergency situations.

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Guest Editors this month include Michelle May O'Neil (*M.M.O.*), Jimmy Verner (*J.V.*), Rebecca Tillery (*R.T.*), Jeff V. Coen *(J.V.C.)*, Sallee Smyth *(S.S.S.)*

DIVORCE
STANDING AND PROCEDURE

WHEN ONE OF THE SPOUSES TO A DIVORCE ACTION DIES, THE TRIAL COURT MUST DISMISS THE SUIT, INCLUDING CLAIMS FILED BY AN INTERVENOR WHO INTERVENED AFTER THE SPOUSE'S DEATH

¶13-5-01. ***Janner v. Richardson,*** -- S.W.3d --, 2013 WL 4606063 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (08/29/13).

Facts: Father and Mother were married and had one child. In 2010, Mother filed for divorce and requested that the trial court enter an order requiring that all possession of and access to Child by Father be supervised. On August 25, 2010, the trial court signed temporary orders requiring Father's visitation with Child be supervised. Three months later, on November 27, 2010, Father died. Nearly seven months after Father's death, on June 20, 2011, Father's parents filed in the divorce suit a "Petition in Intervention in Suit Affecting the Parent-Child Relationship," seeking access to their grandchild. The Paternal Grandparents, however, did not personally serve Mother with the petition at that time. In early July 2011, Mother moved to the U.S. Virgin Islands with Child. One month after the move, the trial court held a temporary orders hearing at which Mother was not present. On October 24, 2011, the trial court signed temporary orders granting the Paternal Grandparents access to Child. Mother ultimately was served with the petition in intervention and the temporary orders on December 12, 2011 (six months after the petition was filed) while she was visiting family in Texas. Mother then filed a document entitled "Plea to Decline Jurisdiction, Plea in Abatement and Motion to Dismiss." Mother requested that the trial court dismiss the petition in intervention because the trial court had lost jurisdiction over the divorce proceeding upon Father's death, leaving no suit in which the Paternal Grandparents could intervene. The trial court concluded that it lost jurisdiction upon Father's death, vacated its temporary orders, and dismissed the suit. The Paternal Grandparents appealed.

Holding: Affirmed.

Opinion: A cause of action for a divorce is purely personal and terminates on the death of either spouse prior to the rendition of a judgment granting a divorce. This dismissal includes all incidental inquiries of property rights and child custody. The death of either party to the divorce action prior to entry of the divorce decree withdraws the court's subject matter jurisdiction over the divorce action. The proper procedural disposition of a divorce action when one of the parties dies is dismissal. Here, the COA found that it was undisputed that Father died before the Paternal Grandparents filed their petition in intervention. Under well-established Texas law, Father's death caused the trial court to lose jurisdiction over the divorce action in which the Paternal Grandparents attempted to intervene. Accordingly, the trial court was required to dismiss the case and vacate the orders it had entered after Father's death. The Paternal Grandparents nevertheless argued that the trial court should have treated their petition in intervention as an original petition for access to Child since they could have filed an original proceeding for grandparent access instead of intervening in the divorce action. They contended that this was required by Texas Rule of Civil Procedure 71, which is titled "Misnomer of Pleading." The rule states: "When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated." The typical application of Rule 71 permits a trial court to consider a motion or other filing according to its substance, even if it is not accurately titled. However, the COA held that the fact that the Paternal Grandparents may have had the right to file a separate proceeding for access does not alter the rule that, after the death of a party to a divorce action, the divorce action terminates and the trial court loses authority to enter any order other than an order of

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dismissal. Accordingly, the COA concluded that the trial court, having lost authority to enter any order other than an order of dismissal, correctly dismissed the suit, including the Paternal Grandparent's petition in intervention.

Editor's comment: *The COA misses the point of TRCP 71. This was a county court at law with family jurisdiction. If the trial court loses jurisdiction automatically after a death, then the grandparents' filing can be nothing other than a "new suit" as they have argued. Look at the examples rejected by the COA of TRCP 71. Are we arguing over a higher filing fee for an original action or a new case number? J.V.C.*

DIVORCE
GROUNDS FOR DIVORCE

ADULTERY COMMITTED POST-SEPARATION BUT PRE-DIVORCE CAN BE BASIS FOR GRANTING A DIVORCE AND DISPROPORTIONATE DIVISION OF PROPERTY

¶13-5-02. ***In re Marriage of C.A.S. & D.P.S.,*** -- S.W.3d --, 2013 WL 3204314 (Tex. App.—Dallas 2013, no pet. h.) (06/26/13).

Facts: Husband and Wife separated in March 2009 and Wife filed for divorce in August 2009. After Wife moved out of the marital residence, she hoped that she and Husband would reconcile and she asked Husband to participate in counseling. However, Husband failed to participate meaningfully in counseling and, in June 2009, Wife began to suspect (and a private investigator confirmed) that Husband had committed adultery. Husband admitted that he began a personal relationship with Girlfriend in 2010. In 2010, in violation of a court order, Husband used community assets to take Girlfriend on vacations and buy her expensive gifts. Further, Husband failed to appear at two appointments to be deposed by Wife in order to spend time with Girlfriend. Wife had initially alleged irreconcilable differences as the grounds for her divorce, but she later amended her petition shortly before trial, asserting that Husband had committed adultery and seeking a disproportionate share of the community estate.

Holding: Affirmed.

Opinion: Husband argues that the trial court erred by granting the divorce on fault grounds. A trial court may grant a divorce in favor of one spouse and make a disproportionate division of the community estate if the other spouse has committed adultery. Adultery is not limited to actions committed before the parties separated. Adultery can be shown by direct or circumstantial evidence. However, there must be clear and positive proof and mere suggestion and innuendo are insufficient. Although the date that Husband began his relationship with Girlfriend was disputed, Husband admitted that the relationship began sometime in 2010 (i.e. before October 13, 2011 when the trial court granted the final decree of divorce). In addition, in 2009, a private investigator filmed Husband and Girlfriend kissing and hugging in an airport. Accordingly, the COA held that the evidence was both legally and factually sufficient to support the trial court's finding that Husband committed adultery, and the trial court did not abuse its discretion by granting the divorce on fault grounds and making a disproportionate division of the community estate in Wife's favor. Further, the COA held that the record establishes a number of other circumstances that justified awarding a disproportionate share of the community estate to Wife, including: the disparity in the financial condition and earning capacities of the parties; the wrongful dissipation of community assets by a spouse; the misconduct of a spouse during a divorce proceeding; and the payments made to attorneys from the community estate.

Editor's comment: *It's nice to have a case that goes into specifics on what constitutes adultery, as there are so few reported decisions that do so. R.T.*

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Editor's comment: *This case out of Collin County is one of the few cases addressing adultery as a fault basis in a divorce justifying a disproportionate division of the marital estate. The Dallas Court clarified that adultery during separation is grounds for fault. Many people believe that once the divorce is filed, then it's okay to have a girlfriend. It also confirms that proof of intercourse is required. Will this case cause a spike in new adultery claims? Probably not outside of Collin County. M.M.O.*

Editor's comment: *The conventional wisdom has been that the courts don't care about post-separation relationships so long as they don't hurt the kids. But this couple didn't have any kids. J.V.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

LANGUAGE IN MSA REGARDING "AFFILLIATED COMPANIES" AMBIGOUS, TFC DOES NOT AUTHORIZE COURT TO MODIFY MSA TO RESOLVE AMBIGUITIES; THEREFORE, COA HAD NO OPTION BUT TO REMAND BACK TO TRIAL COURT FOR PARTIES TO GO TO ARBITRATION AS PROVIDED IN MSA TO RESOLVE AMBIGUITIES.

¶13-5-03. *Diggs v. Diggs*, 14-11-00854-CV, 2013 WL 3580424 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (mem. op) (06/11/13).

Facts: Husband and Wife, after mutually agreeing upon a mediator to settle the property division aspect of their divorce, voluntarily entered into a Mediated Settlement Agreement (MSA). The MSA referenced itself as a partition agreement. It also failed to account for all of the community property by referring to at least eight of the couple's businesses simply as "affiliated companies." Wife later expressed her desire to revoke the MSA because she never wanted to get a divorce, but the trial court informed her that once she had signed the MSA, it was binding on her and on the court. The trial court signed a final decree of divorce and incorporated the MSA by reference. Wife appealed.

Holding: Affirmed in part, reversed and remanded in part.

Opinion: Wife argued that (1) the property division in the divorce decree did not properly reflect the terms of the MSA because it distributed property that was not referenced in the MSA, and (2) Husband was precluded from returning to the previous mediator for binding arbitration. If an agreement's language is susceptible to more than one reasonable interpretation, then the agreement is ambiguous, which creates a fact issue on the parties' intent. The Family Code does not authorize a court to modify an MSA, to resolve ambiguities or otherwise, before incorporating it into a decree. Wife asserted that the "affiliated companies" included on a spreadsheet incorporated by reference to the MSA were not divided by the MSA. Husband asserted that the reference to "affiliated companies" was detailed and disclosed by each party within their respective sworn inventories and appraisements, and thus, the final judgment did not add or significantly alter the terms of the MSA. The COA held that without reference to extrinsic evidence, it could not determine what companies the term "affiliated companies" in the MSA intended to convey. Since there was a fact question regarding the parties' intent, the trial court should not have determined which companies were to be awarded to Husband in the final decree of divorce. Accordingly, the trial court sustained this issue. However, the MSA required the parties to return to the mediator for binding arbitration in the event of a dispute regarding the drafting of the MSA, issues regarding interpretation of the MSA, and issues regarding the intent of the parties as reflected in the MSA. Therefore, the COA overruled Wife's last issue and noted that the parties should be ordered to return to the mediator for binding arbitration to resolve the issue.

Editor's comment: *This case doesn't sit well with me. Although certainly the MSA could have been more specific regarding what "affiliated companies" meant, I think the wife really got a lucky break here. Perhaps the*

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*result would have been different if the trial court did not go so far as to order the wife to execute assignments of interests for all of the specific "affiliated companies" that's where it really starts to look like the trial court possibly modified the MSA. Or, perhaps the result would have been different if the court of appeals didn't have such a great "out" by ordering the parties back to the mediator for arbitration per the MSA. This case is a good read for any attorney new or experienced as to the perils of mediation. It's got several good practice points within it. Here are a couple I found. First, remember to push hard (especially when it's late and everyone is tired and just wants to go home) for specificity in your MSAs. Even if you and your opposing attorney absolutely understand what certain terms in the MSA mean, you never know when that attorney will get replaced by a new attorney (like in this case) and suddenly you're fighting a whole new battle. Second, the MSA in the case had a more detailed clause regarding arbitration that I, at least, have not seen as often in my MSAs. It read: "the parties are required to return to the mediator for binding arbitration in the event of a dispute regarding the drafting of the MSA, **issues regarding interpretation of the MSA, and issues regarding the intent of the parties as reflected in the MSA**." I think it's very interesting that this mediator chose to expand the typical "drafting dispute" language to specifically include interpretation and intent situations. This is something you may or may not want in your MSAs, but it's at least worth considering. R.T.*

Editor's comment: *This case upholds the provision in many family law MSAs appointing the mediator as arbitrator of disputes regarding the MSA language. Here the Houston 14th Court reversed a decision made by the trial court interpreting the MSA and sent the case back for binding arbitration before the mediator for interpretation of the agreement. The parties agreed to this scheme and the trial court should have upheld their agreement and sent them to arbitration. M.M.O.*

DIVORCE
DIVISION OF PROPERTY

U.S. SOCIAL SECURITY PAYMENTS ARE NOT COMMUNITY PROPERTY, & FOREIGN SOCIAL SECURITY PAYMENTS MAY (OR MAY NOT) BE COMMUNITY PROPERTY.

¶13-5-04. ***Marriage of Everse,*** -- S.W.3d --, 2013 WL 3362054 (Tex. App.—Amarillo 2013, no pet. h.) (06/18/13).

Facts: Wife filed for divorce in October 2009. During trial, Husband testified that the funds in a Bank account were his separate property because he placed his Social Security payments for 2010 in that account. A document pertaining to the balances of that account were present in the courtroom and discussed, but not offered into evidence. The trial court held that the funds in the Bank account were also community property. At trial, Wife contended that certain investment accounts should be characterized as community property even though the funds originated from Husband's previously received social security payments. The trial court disagreed and characterized said investment accounts as Husband's separate property. Husband also received "Dutch Social Security" payments because he was a native of the Netherlands, and the trial court also characterized these funds as Husband's separate property over Wife's objections. Both Husband and Wife appealed.

Holding: Reversed in Part, Affirmed in Part.

Opinion: Wife argued that the social security payments received by Husband in the past should have been characterized as community property and were subject to a just and right division. This was a matter of first impression for the COA, and after a thorough analysis, the COA held that the trial court was correct to exempt Husband's previously received social security benefits from the just and right division of community property.

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Similarly, in Wife's second issue, she argued that Husband's previously received "Dutch Social Security" payments should have been characterized as community property. This time, the COA agreed, finding that its conclusion about Husband's United States Social Security benefits was the result of judicial application of the nation's highly complex and interrelated statutory structure for Social Security; its conclusion resulted directly from the specific provision precluding assignment and attachment of benefits. However, the COA held that whether the Dutch system that produced benefits for Husband contained provisions contrary to the application of the United States' community property laws, it did not know. Nor did the COA know whether such provisions, if in place, would have been binding on the trial court. The record also shed no light on those questions. Thus, the COA held that Husband did not overcome his burden of the community property presumption by clear and convincing evidence, and the trial court erred by exempting Husband's previously received Dutch Social Security payments from the just and right division of community property.

A SERIES OF AGREEMENTS CAN BE USED TO CONVERT SEPARATE PROPERTY TO COMMUNITY PROPERY

¶13-5-05. ***Alonso v. Alvarez,*** -- S.W.3d --, 2013 WL 3722479 (Tex. App.—San Antonio 2013, no pet. h.) (07/17/13).

Facts: Husband and Wife were married in 1980, divorced in 1995, and immediately entered into an informal marriage on the same date of their divorce. Husband and Wife later sought to dissolve the informal marriage. Wife, who was a United States citizen with no intention of returning to Mexico, was awarded all properties in the United States. Husband, who was a Mexican National that traveled between the two countries to conduct business, was awarded all properties in Mexico. The properties in the United States were valued equal to all the properties in Mexico, except for a lawsuit that involved a business venture of Husband and HSBC bank. Husband appealed.

Holding: Affirmed.

Opinion: Husband contended that real property (known as "the Ranch") was awarded to him as separate property in the 1995 divorce decree, and therefore the trial court erred in awarding the Ranch to Wife. The Texas Family Code permits spouses by written agreement to convert separate property to community property. An agreement to convert separate property to community property must: (1) be in writing; (2) be signed by the spouses; (3) identify the property being converted; and (4) specify the property is being converted to the spouses' community property. Husband and Wife testified that Husband executed a series of agreements after Wife discovered that Husband was having an affair with her sister. Each of the agreements identified the Ranch as "our" property and agreed to divide the Ranch on a 50/50 basis. Although the agreements did not use the term "conversion," the purpose of the agreements was to reassure Wife by identifying the assets that constituted the community estate and acknowledging that both Husband and Wife owned 50% of those assets. Thus, the COA held the trial court could have determined that the agreements converted the Ranch from Husband's separate property to community property.

Editor's comment: *Interesting that a series of communications add up to a binding post-marital agreement to convert separate property to community property. Spouses out there… beware! M.M.O.*

Editor's comment: *Why would you want to enter into an informal marriage on the same day you got divorced? To enable your daughters to become United States citizens before your oldest daughter began applying for college. J.V.*

Editor's comment: *I was about to give kudos to the COA for correctly describing the relationship as an "informal marriage" but in the opinion they just had to clarify and call it a "common law marriage" which we don't have in Texas. If the "agreements" had not qualified to convert H's separate property to community, wouldn't this have been a classic gift of 50% separate interest to the W? J.V.C.*

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DIVORCE
SPOUSAL MAINTENANCE

TEN-YEAR DORMANCY PERIOD APPLIED TO WIFE'S MOTION FOR ENFORCEMENT OF SPOUSAL SUPPORT RATHER THAN FOUR-YEAR STATUTE OF LIMITATIONS. SPOUSAL SUPPORT NOT SUBJECT TO CONTINUATION UNDER FORMER TFC 8.054(b) BECAUSE NOT BASED UPON MENTAL OR PHYSICAL DISABILITY

¶13-5-06. ***O'Carolan v. Hopper,*** -- S.W.3d --, 2013 WL 3186388 (Tex. App.—Austin 2013, no pet. h.) (06/21/13).

Facts: Husband and Wife's divorce was finalized on May 1, 2000. The decree awarded Wife spousal maintenance for two years and awarded all of the community property and corresponding debts to Husband. Wife appealed, and in 2002 the COA remanded finding that the trial court erred by awarding Husband all of the community property and only awarding spousal maintenance to Wife.

On remand, Wife filed a claim in 2009 for enforcement of the original spousal maintenance award and Husband filed a motion to strike. The trial court dismissed Wife's claim for enforcement of the original spousal-maintenance award, holding that the four-year statute of limitations had expired in 2006.

On remand, Wife also requested additional spousal maintenance based on evidence that she had a disability that would continue beyond the two-year period of the original award. Husband moved for summary judgment on both no-evidence and traditional grounds, asserting that (1) Wife could not establish that the parties were still married, as required for an award of maintenance, and (2) res judicata barred her claim because the trial court had awarded maintenance in the final decree, and she had not appealed that award. Wife countered that her claim was not a request for a new award of spousal maintenance, but rather simply a request for a continuation of the original spousal-maintenance award, which she asserted was allowed under Former Family Code § 8.054. The trial court orally ruled that there should be no new order on spousal maintenance because spousal maintenance had been determined in the original decree and that the COA's opinion during the first appeal of the case only remanded the issue of property division, not the spousal-maintenance award. Thus, the trial court dismissed Wife's request with prejudice, stating that res judicata barred the request.

Holding: Reversed and Remanded in Part and Affirmed in Part.

Opinion: The COA analyzed whether Wife's motion for enforcement was timely filed based on whether the judgment in the divorce decree ordering Husband to pay spousal maintenance was dormant under Civil Practice and Remedies Code § 34.001, or whether Wife's claim should have been brought within the four-year limitation period of the date that the last installment was due. A judgment becomes dormant if writ of execution is not issued within ten years after rendition of judgment. Additionally, when an original decree of divorce precludes any further adjudication of a specific right, then enforcement motions "are clearly not separate claims that would come under the [four-year] catchall statute of limitations." Thus, the COA concluded that the ten-year dormancy period applied to the judgment in the parties divorce decree for spousal maintenance; therefore, the trial court erred by dismissing Wife's enforcement claim. However, the COA held that because of procedural defects with Husband's motion to strike and the subsequent dismissal of the claim, Wife was denied the opportunity to present evidence supporting her enforcement claim, and the COA could not render judgment and instead remanded the claim to the trial court.

Whether the trial court properly granted summary judgment is dependent on whether the original spousal maintenance award was statutorily eligible for review and continuation. Former Family Code § 8.054(a) limits a trial court's award of spousal maintenance to no more than three years. However, under Former § 8.054(b), if the spouse seeking maintenance cannot support herself because of physical or mental disability,

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the trial court may order spousal maintenance for a definite or indefinite period, as long as the disability continues. Extended maintenance is discretionary under the statute, even if a spouse is permanently disabled. Also, period review is discretionary and need not be explicitly provided for in the final decree. The COA held that because the trial court ordered payments to continue for a period of twenty-four months or less, not an indefinite period, and because it could not be implied from the duration of the award that it was based on a finding of physical or mental disability under Family Code § 8.051(2)(A), the order was not subject to the continuation provision of Former § 8.054(b).

Editor's comment: *Among other things, the court relied on "the lack of a specific disability finding or language in the order providing for review or continuation of the maintenance order under Section 8.054(b)" in concluding that the trial court's spousal-maintenance order was not subject to a motion for continuation. The prudent practitioner will include such findings in a spousal-maintenance order. J.V.*

TRIAL COURT ERRED IN INCLUDING HUSBAND'S VA DISABILITY BENEFITS AND SOCIAL SECURITY BENEFITS IN CALCULATING SPOUSAL MAINTENANCE

¶13-5-07. *Marriage of Franklin*, 10-13-00007-CV, 2013 WL _____ (Tex. App.—Waco 2013, no pet. h.) (mem. op) (08/29/13).

Facts: Husband and Wife married in 1977 and separated in 1997. Husband retired from the military and was receiving VA Disability payments in lieu of military retirement. Husband was also receiving combat-related special compensation (CRSC) and social security. Wife was living with their daughter at the time of the final hearing and was unemployed but was receiving social security. The divorce decree awarded Husband the vast majority of the community property, all of which Husband had acquired since the parties' separation. It also awarded Wife $565 in spousal support. Husband appealed that amount of the spousal support awarded to Wife because it exceeded 20% of his average gross monthly income. Tex. Fam. Code § 8.055(a)(2).

Holding: Reversed and remanded.

Opinion: At the time of trial, Husband's income consisted of $3,023.00 in VA disability, $1,450.00 in CRSC, and $1,261.50 in social security benefits. Two exhibits were offered into evidence which demonstrate that the $3,023 was disability compensation from the Department of Veteran's Affairs. Additionally, Husband testified that he had a combat-related disability and VA disability. As such, it was not properly included in Husband's gross monthly income. Additionally, the social security benefits are likewise excluded. Frank's gross monthly income was $1,450 per month with the exclusion of those two sources of income. Twenty percent of $1,450 is $290.00, which would be the maximum amount allowed by statute.

Editor's comment: *Gross income, for maintenance purposes, doesn't include a lot of things: return of principal or capital; accounts receivable; benefits paid in accordance with federal public assistance programs; benefits paid in accordance with the Temporary Assistance for Needy Families program; payments for foster care of a child; Department of Veterans Affairs service–connected disability compensation; supplemental security income (SSI), social security benefits, and disability benefits; or workers' compensation benefits. Tex. Fam. Code § 8.055(a-1)(2). Note also that the court did not simply modify the maintenance award downward but remanded because "the amount of maintenance awarded by the trial court is discretionary within the statutory limits." J.V.*

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SAPCR
STANDING AND PROCEDURE

TRIAL COURT FAILED TO GIVE FATHER 45 DAYS' ADVANCE NOTICE OF A HEARING ON A MOTION TO TRANSFER SAPCR, AN OPPORTUNITY TO BE HEARD, OR AN OPPORTUNITY TO RESPOND TO MOTION

¶13-5-08. *In re Hamilton*, 12-13-00080-CV, 2013 WL 2456499 (Tex. App.—Tyler 2013, orig. proceeding) (mem. op) (06/05/13).

Facts: On March 4, 2013, a trial court signed an order in a SAPCR naming Father of S.H. as the JMC of the Child with the exclusive right to designate the primary residence of the Child. On March 7, 2013, Mother filed a motion for a new trial, a motion to modify the parent-child relationship, and a motion to transfer. Mother requested to be appointed as the person who had the right to designate the primary residence of the child, and she requested that since the child had lived in Pettis County, Missouri for more than ten months, the court transfer the case to that state and county. On March 8, 2013, after considering the pleadings and corresponding affidavits, the trial court granted Mother's motion to transfer. Father then filed a writ of mandamus.

Holding: Writ conditionally granted

Opinion: Before a child custody determination is made under the UCCJEA, notice and an opportunity to be heard must be given to all persons entitled to notice under the law of Texas. The rules of civil procedure provide that except on leave of court, each party is entitled to at least forty-five days notice of a hearing on a motion to transfer and any response or opposing affidavit must be filed at least thirty days prior to the hearing. Likewise, in cases involving motions for intrastate transfers, the Texas Family Code specifies a scheme providing for due process. The COA found that since the trial court previously made a custody determination in Father's SAPCR, the trial court had continuing exclusive jurisdiction. The COA also found that the record showed that the motion to transfer was filed and served on March 7, 2013; however, the trial court granted the motion on March, 8, 2013, thereby depriving Father of the opportunity to respond. The COA held that (1) it was an abuse of discretion for the trial court to rule on a motion to transfer without giving Father the notice required by the rules, (2) nothing in the record reflected a viable reason for the court's failure to provide Father the notice and hearing contemplated by the laws of Texas, and (3) Father did not have an adequate remedy by appeal. Therefore, the COA conditionally granted mandamus relief, noting that the writ would issue if the trial court failed to comply with the COA's opinion within ten days o the date of the order.

UNDER UCCJEA DEFAULT JURISDICTION APPLIES IN SAPCR WHERE CHILD HAS NO HOME STATE

¶13-5-09. ***Barabarawi v. Rayyan,*** -- S.W.3d --, 2013 WL 3353983 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (07/2/13).

Facts: Father and Mother traveled to the West Bank in 2003 to be married in accordance with their religious customs. After the ceremony, they returned to Houston and conceived a son, who was born there in 2003. The family returned to the West Bank in June 2007. Once overseas, Father divorced Mother in a Sharia court. Mother retained custody of Child, and Father returned to Houston by himself. According to Mother, Father obtained an order forbidding her from leaving the West bank region without his permission. With some help, Mother was eventually able to leave the West bank region and fly back to the United States with her son. They resettled in Orlando, Florida in July 2009. Father learned that Mother and Child had been living in Flor-

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ida less than four months after their return and promptly filed suit in Texas state court, seeking primary custody of Child. Mother disputed whether the trial court had jurisdiction. In the alternative, Mother also argued that the trial court should decline jurisdiction because Texas is an inconvenient forum and because Father engaged in unjustifiable conduct. The trial court rejected Mother's challenges and determined that it had jurisdiction under a default provision in the UCCJEA. After a trial on the merits, the trial court named both parents as joint managing conservators. Father received primary custody of the child and Mother was ordered to pay child support. Mother appealed and only requested a partial reporter's record of the trial. Mother sent Father a letter asserting that she did not request the whole record from the trial on the merits because she was only appealing jurisdictional issues which were considered prior to trial.

Holding: Affirmed

Opinion: On appeal, Mother challenged the trial court's exercise of subject-matter jurisdiction. The trial court's jurisdiction is governed by the UCCJEA, a uniform act that has been adopted in both Texas and Florida. Under the UCCJEA, the trial court has jurisdiction to make an initial child custody determination only if one of these four exclusive bases of jurisdiction applied: (1) this state is state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; (2) a court of another state does not have jurisdiction under Subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 152.207 or 152.208, and: (A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships; (3) all courts having jurisdiction under Subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 152.207 or 152.208; or (4) no court of any other state would have jurisdiction under the criteria specified in Subdivision (1), (2), or (3). The COA held (as the parties agreed during their first pretrial hearing) that Child had no home state when Father first filed his suit; Child had not been to Texas for more than two years, he had only been living in Florida for less than four months, and West Bank could not assume priority jurisdiction because no member of the immediate family continued to reside there. Since the trial court rejected Father's argument that Texas qualified as a state with significant connections, Mother contended that before the trial court could exercise default jurisdiction, Father needed to demonstrate that Florida was not a state with significant connection jurisdiction. The COA found, however, the trial court did have evidence of the child's connection with Florida. The trial court heard from Mother that the child had been living there continuously since their return from the West Bank, that Mother had sought Medicaid in Florida, and that the Florida Attorney General had filed a lawsuit against Father for the provision of child support. The trial court did not, however, hear more pertinent evidence regarding the nature and quality of the child's contacts in Florida. There was no evidence, for instance, that the child had enrolled in preschool in Florida, or that Mother had planned for the child's future education in Florida. Based on the evidence before the trial court, the COA held that the trial court did not err in concluding that neither Texas nor Florida would have significant connection, and thus the third jurisdictional basis under TRAP 34.6(c)(1) would not apply. When the first three bases for jurisdiction are not present, jurisdiction by default remains. Thus, the COA held that the trial court did not err by exercising default jurisdiction, overruling Mother's first issue.

In her second issue, Mother argued that the trial court should have declined jurisdiction under Section 152.207 of the Texas Family Code, which states that the trial court "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." The trial court may consider any relevant factor when deciding whether to decline jurisdiction for inconvenient forum. Among the factors that should be weighed, the UCCJEA specifically enumerates the following: (1) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child; (2) the length of time the child has resided outside this state; (3) the distance between the court in this state and the court in the state that would assume jurisdiction; (4) the relative financial circumstances of the parties; (5) any agreement of the parties as to which state should assume jurisdiction; (6) the nature and location of the evidence required to resolve the pending

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litigation, including testimony of the child; (7) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and (8) the familiarity of the court of each state with the facts and issues in the pending litigation. Mother did not cite any specific reason in her motion explaining why the trial court should have declined jurisdiction for inconvenient forum. Her main argument was that Florida was a more appropriate forum because both Mother and Child had been living there for several months. Mother also suggested that traveling to Texas is unduly burdensome because she, as a drugstore clerk, had less financial resources than Father, who was a public school teacher. The trial court was not convinced by this argument, and even noted that traveling is "an expensive trip for either of them to make." Mother also argued in her brief that "[e]vidence pertaining to the child's environment, schooling, medical treatment, and personal relationships was all available and accessible in Florida, while none was available in Texas." This argument lacked record support. No testimony was heard during the pretrial hearings regarding the child's environment, schooling, or medical treatments. Furthermore, the trial court heard limited testimony regarding Child's extended relations, the scope of which was merely that Mother had family in Chicago, and that Father's family lived in the West Bank. There was no evidence that Child had a personal relationship in Florida with any person other than Mother. Thus, the COA held that the trial court did not abuse its discretion in failing to decline jurisdiction for inconvenient forum.

In her third issue, Mother argued that the trial court should have declined jurisdiction because Father had engaged in unjustifiable conduct by divorcing her overseas and then prohibiting her from leaving the West Bank without his permission. Mother's argument invoked Section 152.208, which states that a court must decline jurisdiction if it determines that it has jurisdiction under the UCCJEA "because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct." During the pretrial hearings, Father denied any role in restricting Mother's movements inside the West Bank. The COA found that even if Mother's allegations were accepted as true, there was no evidence suggesting that Father engaged in such conduct for the purpose of invoking jurisdiction in Texas. Furthermore, the COA could not perceive how Father could have obtained any legal advantage by divorcing Mother overseas and leaving his son behind. Thus, the COA held that the conduct that Mother alleged did not fall within the scope of the statute and overruled Mother's third issue. Father also requested appellate sanctions for Mother's allegations of the hardships she endured while in West Bank. The COA held that without findings of fact and a record from the trial court, it had no way of determining whether Mother's representations were accurate, and thus rejected Father's argument that Mother was deserving of sanctions.

Editor's comment: *The court rejected Mother's contention that it could "reasonably presume" that "much more evidence" was available in Florida because "the child had been absent from Texas for such a long period of time, and had been a resident in the state of Florida nearly long enough to establish Florida as his home state." The court continued: "We decline to indulge this 'close enough to six months' presumption. The evidence adduced at the pretrial hearing showed little more than that the child was physically present in Florida, and presence alone is not sufficient under the statute." J.V.*

Editor's comment: *Texas Courts can be overly protective of their jurisdiction. Lack of a total record and absence of findings of fact to attack on appeal made it hard to challenge the trial court's discretion. J.V.C.*

EVIDENTIARY HEARING NOT REQUIRED ON MOTION TO TRANSFER CHILD CUSTODY CASE UNDER UCCJEA, AND MOTION FOR ENFORCEMENT OF CHILD SUPPORT MAY NOT BE TRANSFERRED WITHOUT OBLIGEE'S CONSENT IF OBLIGEE STILL LIVES IN TEXAS

¶13-5-10. ***Lesem v. Mouradian,*** -- S.W.3d --, 2013 WL 3354185 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (07/2/13).

Facts: Father and Mother's final decree of divorce was modified on July 27, 2007. The modified order provided that Father and Mother were to remain joint managing conservators of child, but it bestowed upon Fa-

ther the exclusive right to establish Child's primary residence. Five years later in August 2012, Father filed a "Motion for Enforcement of Possession or Access" alleging that Mother had refused to surrender possession of Child in violation of the modified divorce decree. In response, Mother filed a petition to modify the parent-child relationship, a motion to transfer, and a request for the trial court to decline its jurisdiction to Florida. Mother alleged that Father had voluntarily relinquished primary care and possession of Child to her in Florida for more than six months beginning in May 2011. Mother requested a transfer of the proceedings to the Florida court "for the convenience of the parties and witnesses and in the interest of justice" and alleged that all parties, including potential witnesses, lived in Florida (except for Father). Mother then submitted a bench brief in support of her motion to transfer and attached evidence supporting her motion. The trial court held a hearing on Mother's motion to transfer on October 5, 2012. Father and Mother's counsel attended in person, and the trial judge of the Florida trial court was present by phone. Father's counsel argued that the hearing was not "noticed for a forum non-convenience hearing," and he requested that the trial court hold such a hearing on "proper notice" and allow the parties to present evidence. The trial court stated at the hearing that it was uncontroverted that Florida was not Child's home state and that the fact that Father had intended for Child to only stay with Mother temporarily was irrelevant to that determination. The court concluded that, under the UCCJEA, it did not "have to hear any evidence because [it had an] uncontroverted stipulation that the child ha[d] been out of the State of Texas for six months." The court also noted that it had "absolute authority" to cede its jurisdiction to Florida and indicated its willingness to do so. The trial court then determined that it no longer had continuing, exclusive jurisdiction, and it ceded jurisdiction to the Florida court. Father appealed.

Holding: Affirmed in part, reversed and remanded in part.

Opinion: Father argued that the trial court erroneously transferred the proceedings to Florida without holding an evidentiary hearing, which was required both by Section 152.202, relating to whether Child had a significant connection to Texas, and Section 152.207, relating to whether Texas is an inconvenient forum. Section 152.207(b) provides that, before a Texas court determines whether it is an inconvenient forum, it shall consider whether it is appropriate for a court of another state to exercise jurisdiction. "For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors," including the statutorily enumerated factors. The COA held that this section does not explicitly state that the trial court must hold an evidentiary hearing before making a determination that Texas is an inconvenient forum. The COA found that in this case, there was no indication that the trial court did not allow Father an opportunity to present relevant evidence. Although the trial court did not hear testimony at the October 5, 2012 hearing, it stated on the record that counsel could have brought their clients to the hearing. Additionally, Mother submitted an affidavit with her amended motion to modify and a bench brief with exhibits attached as support for her motion to transfer. Father did not avail himself of these methods of presenting relevant information to the trial court, and there was no indication in the record that he was prevented from doing so. Moreover, Father did not articulate the information that he would have elicited had the trial court held a full evidentiary hearing on Mother's motion to transfer, nor did he identify any fact issue that he would have disputed at such a hearing. Thus, the COA, concluding that Section 152.207 did not require the trial court to hold an evidentiary hearing, held that the trial court did not err by granting Mother's motion to transfer without holding an evidentiary hearing.

Father further argued that the trial court erroneously transferred the child support portion of the modification suit to Florida because he was the obligee under the July 27, 2007 modified order, and he continued to reside in Texas. Section 159.205(a)-(b) of the Texas Family Code provides that a Texas court that has issued a child support order "has and shall [(absent consent)] exercise continuing, exclusive jurisdiction to modify its order if the order is the controlling order and . . . at the time a request for modification is filed, this state is the state of residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued." In this case, Texas was the state of residence of Father, the obligee, and Father (who had resisted the trial court's efforts to transfer the support modification proceeding to Florida) did not consent to Florida assuming jurisdiction over this proceeding. As a result, the COA held that Florida could not assume jurisdiction to modify child support, and Texas could not divest itself of jurisdiction and transfer the support modification proceeding to Florida. Thus, the trial court erroneously transferred the child support portion of Mother's modification proceeding to the Florida court.

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Editor's comment: *The UCCJEA wasn't untended to be this complex. The trial court and the mother's counsel did everything right including getting the Florida judge "to listen in by phone". Believe me, that was one patient Florida judge. There is a very different jurisdictional requirement for UCCJEA and UIFSA cases. J.V.C.*

ATTORNEY GENERAL CANNOT ASSIST A FATHER IN OBTAINING SERVICE ON MOTHER, THE CUSTODIAL PARENT, BY REVEALING CONFIDENTIAL INFORMATION WHEN THERE HAS BEEN AN ALLEGATION OF FAMILY VIOLENCE BY MOTHER AGAINST FATHER

¶13-5-11. *In re Office of Atty. Gen.*, 13-13-00344-CV, 2013 WL 4039988 (Tex. App.—Corpus Christi 2013, no pet. h.) (mem. op) (08/06/13).

Facts: Father and Mother were divorced in August 2006. Mother was appointed SMC of the couple's two minor children, and Father was ordered to pay her child support. Shortly thereafter, Father filed a petition to modify the conservatorship and was appointed as the temporary SMC of the children, with neither party obligated to pay child support. Father's modification suit was ultimately dismissed for want of prosecution. In April 2013, Father filed a "Motion to Void Alleged Child Support Arrearages and Illegal Child Support Lien and Application for Temporary Restraining Order." Father attempted to serve his motion on Mother through the Attorney General ("OAG"). The OAG filed a "Notice of Defective Service" asserting that it did not represent Mother and that it only represented the State of Texas. At a trial court hearing held on Father's motion on June 6, 2013, the OAG contended that it was unable to provide Father with Mother's address because the provisions of the Texas Family Code rendered such information confidential. The trial court disagreed and orally ordered the OAG to provide Father with Mother's address within seven days. The OAG filed a motion for reconsideration of the trial court's order contending that Mother's address was confidential under the Texas Family Code because an allegation of family violence had been made against Father. The trial court denied the OAG's motion for reconsideration by written order rendered on or about June 19, 2013. The Attorney General filed a petition for writ of mandamus.

Holding: Writ of mandamus conditionally granted.

Opinion: Texas Family Code § 231.108 provides that "all files and records of services provided under this chapter, including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential." While the statute allows the discretionary release of information for purposes associated with the administration of certain expressly identified programs, assisting a private party in obtaining service on a custodial parent is not one of those discretionary purposes. Furthermore, the information sought was also protected by subsection (e)'s prohibition against releasing information on the physical location of a person where there is reason to believe that the release of the information may result in physical or emotional harm to that person. Thus, the COA held that based on the particular factual and procedural context of the case, the trial court abused its discretion in requiring the OAG to provide Father with Mother's location or address.

Editor's comment: *I just don't think I agree with this result. I understand the balance in protecting a litigant with a protective order, but the parties are entitled to an address. If the governmental unit is tasked by state law in receiving and disbursing child support and in performing that task under state law obtains an address at which a party may be served, it should be required to provide that address to the court where the case is pending. I don't see the OAG, a governmental unit, having a right not to disclose here. M.M.O.*

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EVEN IF MOTHER KNOWS WHO THE FATHER IS AND LIES ABOUT IT, IF FATHER HAS NOT REGISTERED WITH THE PATERNITY REGISTRY, HE IS NOT ENTITLED TO NOTICE OF TERMINATION/ADOPTION IF TERMINATION FILED WHEN CHILD LESS THAN ONE YEAR OLD

¶13-5-12. ***In re Baby Girl S.,*** -- S.W.3d --, 2013 WL 4768396 (Tex. App.—Dallas 2013, no pet. h.) (08/05/13).

Facts: In this case, Mother did not name a father of Child at the time she put the infant up for adoption; instead, she falsely claimed she did not know Father's name. The biological father of Child was unaware of the pregnancy or birth and did not register with the paternity registry. However, Father admitted that he had unprotected sex with Mother over 100 times and did suspect that Mother was pregnant. Consequently, thirty-five days after the birth of Child, Father's rights as an unknown father were terminated without notice to him after General Adoption, a private adoption agency, filed the appropriate petition. Generations Adoption was named the infant's managing conservator. Father learned of the birth of Child the following month but waited for more than four months to file a bill of review to set aside the trial court's order terminating his rights. By that time, the adoption of Child had been finalized. Father, Generations Adoptions, and the adoptive parents all moved for summary judgment on the bill of review. After considering the competing motions, the trial court granted the motions of Generations Adoptions and the adoptive parents, denied Father's motion, and denied the relief sought by his bill of review. Father appealed raising several constitutional issues.

Holding: Affirmed.

Opinion: The Texas Paternity Registry provides a mechanism for a man who may have fathered a child to assert his parentage, independent of the mother, and protect his parental rights by filing a notice of intent to claim paternity with the bureau of vital statistics. If an alleged father files the notice before the child is born or no later than thirty-one days after the child's birth, he is entitled to be notified of a proceeding for adoption or the termination of parental rights. If an alleged father fails to register, however, his rights may be terminated without notice if the child is under one year old at the time the petition for termination is filed; the statute imposes no requirement to identify or locate him.

Here, Father not denied his constitutional rights because in order to be entitled to notice, Father only needed to fill out a pre-printed form and file it with the bureau of vital statistics before Child was born or within thirty-one days of her birth. That he may not have known of the registry did not relieve him of the requirement to follow the law. Further, the fact that he did not know about the pregnancy or birth did not relieve him of his responsibility to register when he had reason to believe that Mother could have been pregnant. The statutory scheme, at least in the context of the facts presented in Father's case, permitted an alleged father to protect himself by invoking statutory procedures to ensure he received notice. The fact that Father failed to do so did not render the statutory procedure unconstitutional.

Further, Father did not make a diligent affirmative action that manifested a full commitment to parenting responsibilities within a short time after he discovered or reasonably should have discovered that Mother was pregnant with Child or once he learned that Mother had given birth to Child. Therefore, Family Code Section 161.002 was not unconstitutional as applied to Father because it did not operate to prevent Father from developing a meaningful relationship with Child prior to the termination of his rights.

Editors comment: *Potential fathers out there need to be educated about the paternity registry. This is serious! M.M.O.*

Editor's comment: *When the paternity registry statute was enacted we were told that a male "player" needed to keep a pad of forms to fill out and send in each time he had sexual relations with a woman if he wanted to claim paternity. For several years thereafter, the rumor was that the list was so short it was kept on a legal pad in some manager's desk drawer at the BVS. Compare the Supreme Court criticizing due process notice by publication under TRCP 109 (In the Interest of E.R., 385 S.W.3d 552 (Tex. 2012)). Here, the COA concluded with a statement that it was balancing act among the best interest of the child, the father's rights and*

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the "privacy rights of the mother." What privacy rights are those? The mother relinquished her rights; she is a stranger from that point forward. J.V.C.

NOTICE OF TRIAL SETTING IS REQUIRED FOR RESPONDENTS WHO HAVE SUBMITTED AN ANSWER (OR AT MINIMUM MADE AN APPEARANCE) TO A CITATION AND PETITION.

¶13-5-13. ***In re R.K.P.***, -- S.W.3d --, 2013 WL 4516816 (Tex. App.—El Paso 2013, no pet. h.) (08/23/13).

Facts: Mother and Father were appointed JMCs of their daughter in 2009. On May 23, 2011, Father filed a petition to modify in which he sought to be named as "the person who has the right to designate the primary residence of the child." He alleged that Mother had a history of family violence and abused controlled substances. A hearing for temporary orders was set for 9:00 a.m. on June 6, 2011. Mother was served on May 24th. Mother entered a behavioral health institution on June 3rd. She informed Father that she would be unavailable to attend the hearing on the 6th and she prepared a letter to the court advising of her hospitalization and her inability to attend the hearing on June 6th. The letter was eventually received by the court clerk, but the hearing had already been completed. The docket sheet reflected that the letter was filed of record on June 9th at 1:35 p.m. Temporary orders were entered appointing Father as temporary SMC, relief he had not yet requested. These orders were signed on June 9th and filed with the district clerk at 1:35 p.m. At 1:37 p.m. Two minutes later, Father filed a first amended petition to modify in which he sought SMC. The clerk mailed the orders to Mother on June 10th to the address then on file with the court. The envelope was returned as undeliverable because Mother no longer lived there. Mother was released from the hospital on June 12th. She moved in with her father in Cleburne, Texas, and by the end of June, she had spoken with Father at least three or four times, advising him of her living situation. She also provided the court with her new address. The docket sheet confirmed this, reflecting that the court knew the Cleburne address and mailed the temporary orders there on June 14th. According to Mother, she contacted Father's attorney in early July. When asked whether a final hearing had been scheduled, Father's Attorney told Mother that no hearing had been set. The record reflected a letter signed by Father's Attorney on June 23rd confirming that a final hearing had been set for Monday, August 1st. Mother never received notice and did not appear at the hearing. Father's Attorney admitted that no notice was sent. The trial court granted all relief requested and denied Mother's motion for new trial.

Holding: Reversed and Remanded.

Opinion: A trial court must set aside a default judgment when the movant satisfies the requirements articulated in *Craddock*, which are: (1) the movant's failure to appear was not intention or the result of conscious indifference; (2) the movant has a meritorious defense; and (3) the granting of a new trial will not operate to cause delay or injury. When a party has appeared, they are entitled to at least forty-five days' notice of trial pursuant to Rule 245. If an entitled party receives no notice of a trial setting, they have satisfied the first prong of *Craddock* and need not meet the remaining two prongs. The COA characterized Mother's June 5th letter as an answer since was a timely response, acknowledging receipt and acceptance of Father's citation and petition. Thus, Mother was entitled to notice of the trial setting. Since Mother was entitled to notice of the trial setting, and did not receive notice, the COA held that she met the Craddock test and that the default judgment against her should be set aside.

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WHEN OBTAINING A DEFAULT JUDGMENT SUBSEQUENT TO SERVING AN INMATE WHO HAS NOT ANSWERED, THE RECORD MUST CONTAIN AFFIRMATIVE PROOF THAT THE PERSON SERVED AT THE JAIL WAS IN FACT THE DESIGNATED AGENT FOR SERVICE OF PROCESS (AS DESCRIBED BY STATUTE).

¶13-5-14. ***In re J.M.H.,*** -- S.W.3d --, 2013 WL 4606151 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (08/29/13).

Facts: On November 9, 2011, the State filed a petition seeking to establish Father's paternity and to establish his child support obligation for Child. Father was incarcerated at a Texas Department of Criminal Justice (TDCJ) facility at the time. A private process server delivered citation and a copy of the petition to Employee at the TDCJ facility in Tennessee Colony, Texas on February 9, 2012. On June 21, 2012, the trial court held a hearing on the State's petition. The next day, the trial court entered a default order stating that Father was duly notified but did not appear at the hearing, adjudicating Father as the father of Child, and ordering Father to pay child support. Father appealed, contending that the trial court lacked personal jurisdiction over him because he was not properly served.

Holding: Reversed.

Opinion: Father contended that the trial court erred by rendering a default judgment because the record did not show that he was properly served; the record contained no evidence that Employee was designated by the warden to serve as an agent for service of civil process on inmates confined in the facility. At any time after a defendant is required to answer, a plaintiff may take a default judgment against the defendant if the defendant has not previously filed an answer and the citation with proof of service has been on file with the clerk of the court for at least ten days. However, unless the record affirmatively shows either an appearance by the defendant, proper service of citation on the defendant, or a written memorandum of waiver, the trial court does not have in personam jurisdiction to enter the default judgment against the defendant. Texas Civil Practice and Remedies Code Section 17.029 sets forth a method of service for inmates incarcerated in a TDCJ facility. It provides that an inmate may be served by serving an employee of the facility that the warden has designated as an agent for service of civil process on inmates. Before obtaining a default judgment against an incarcerated individual, affirmative proof in the record is required to show that the person served was in fact the designated agent for service of process. The COA held that since the record contained no evidence establishing that Employee was designated by the warden as the agent for service of process for inmates, and since the COA could not take judicial notice of such facts, the trial court lacked in personam jurisdiction over Father and reversed the trial court's judgment.

Editor's comment: *One way to handle service of inmates is to get a TRCP 106(b)(2) substitute service order to "any employee" at the TDC facility. J.V.C.*

SAPCR
PARENTAGE

IF CHILD HAS A PRESUMED FATHER, A PROCEEDING TO ADJUDICATE THE PARENTAGE OF THE CHILD CANNOT BE BROUGHT AFTER THE CHILD'S FOURTH BIRTHDAY

¶13-5-15. *In re Ngo*, 05-13-00382-CV, 2013 WL 3974136 (Tex. App.—Dallas 2013, no pet. h.) (mem. op) (08/02/13).

Facts: Mother gave birth to Child in 2005. In 2011 Husband filed for divorce from Mother. In the divorce decree, the trial court found that Husband was not Child's biological father and that no parent-child relationship existed between Husband and Child. In 2012, Mother filed a petition to adjudicate parentage in which

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she asked the court to adjudicate Father as Child's biological father. Father raised the affirmative defense of the statute of limitations and Mother filed a motion for partial summary judgment on that issue. The trial court granted the motion for partial summary judgment. Father filed for mandamus relief.

Holding: Petition for writ of mandamus conditionally granted.

Opinion: A man is presumed to be a child's father if he is married to the mother of the child and the child is born during the marriage. Under the Texas Family Code, a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father shall be commenced not later than the fourth anniversary of the date of the birth of the child. The COA found that Husband's petition for divorce was filed after Child's fourth birthday. Thus, it was error for the trial court to adjudicate Child's parentage in the divorce case. Since the order finding no parent-child relationship between Husband and Child was void, Child still had a presumed father when Mother filed her lawsuit (which was well after Child's fourth birthday). Therefore, the COA held that it was an abuse of discretion for the trial court to grant Mother's motion for summary judgment when her case was filed after the four-year statute of limitations.

SAPCR
SPECIAL APPOINTMENTS

AMICUS ATTORNEYS' EX PARTE COMMUNICATIONS WITH THE JUDGE ARE NOT ALLOWED, BUT ERROR HARMLESS BECAUSE NO RECORD OF PROCEEDINGS MADE TO ALLOW COA TO DETERMINE OTHERWISE

¶13-5-16. ***In re S.A.G.,*** -- S.W.3d --, 2013 WL 2988783 (Tex. App.—Texarkana 2013, no pet. h.) (06/14/13).

Facts: Grandmother sought to be appointed Child's JMC. Mother of Child was named as a respondent. Under Texas Family Code § 107.021, the trial court appointed Amicus Attorney. In accord with the applicable statute, Amicus Attorney reviewed the pleadings, met with the Child and his counselor, spoke with the parties and their attorneys, and attended the trial of the case on August 15, 2012. Amicus Attorney then submitted an invoice to the trial court, which included a reference to a forty-five minute "Meeting with [Judge]" that occurred the day after the contested hearing. An August 27, 2012 letter from the trial judge informed counsel that Amicus Attorney had given her his recommendation that the child should remain with Mother. The letter further stated that Amicus Attorney's recommendation and the testimony of the witnesses led the trial judge to deny the request to change custody. After the date of the trial court's letter, but before the proposed order was actually signed, a motion for rehearing was filed that vigorously complained of the ex parte meeting between Amicus Attorney and the trial court. The motion alleged that the "amicus attorney statute provisions…are unconstitutional on the grounds that they violate [] due process rights," "the rights of confrontation," "the attorney client privilege and right of privacy between the child and the attorney," and "the right of privacy and the right of attorney client privilege of the parties in the suit." The trial court denied the motion for new trial and entered its order in conformity with its August 27th letter. Grandmother appealed.

Holding: Affirmed.

Opinion: Grandmother argued that the trial court erred in permitting Amicus Attorney's ex parte communications. Ex parte communications are "those that involve fewer than all of the parties who are legally entitled to be present during the discussion of any matter. All attorneys are subject to the Texas Disciplinary Rule of Professional Conduct Rule 3.05 prohibiting ex parte communications, and judges "shall not initiate, permit, or

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consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding." The COA held that the trial court erred in engaging in ex parte communications with Amicus Attorney. The COA reasoned that if Amicus Attorney was the attorney for the court, then perhaps ex parte communications would be permitted based on the attorney-client privileges. However, the COA held that the Texas Legislature did not intend the trial court to be an amicus attorney's client or that the statutory language encourages ex parte communications. The role of an amicus attorney is "to provide legal services necessary to assist the court in protecting a child's best interest rather than to provide legal services to the child." The COA held that this simply means that the court has the authority to appoint a lawyer to advocate for the best interests of the child, without being bound by the child's objectives of representation or the wishes that the child may express. Nothing suggested that because the amicus attorney does not "provide legal services to the child," he must be providing legal services to the trial court by process of elimination. Rather the amicus attorney "by definition does not exactly have a client."

Despite finding that the trial court erred by allowing ex parte communications, the COA held that the error was harmless. Amicus Attorney testified that the trial judge told her that she had come to the same conclusion as Amicus Attorney on her own. Also, at the conclusion of the hearing on Grandmother's motion for new trial, the judge remarked that "I can tell you right now that I did my own thinking and made my opinion specifically on what I believed was in the best interest of the child." Further, in the aforementioned August 27th letter, the judge wrote that given Amicus Attorney's recommendations and "the testimony of the witnesses[,] the Court denie[d] the request to change custody." Finally, Grandmother waived the making of a record of the trial proceedings, and without availability of the record at trial, the COA held that it could not determine whether the trial court's error in allowing ex parte communications so influenced the trial judge in a pending matter that suggests the error probably caused the rendition of an improper judgment.

SAPCR
TEMPORARY ORDERS

UNLESS TRIAL COURT MAKES A FINDING THAT IS SUPPORTED BY THE EVIDENCE THAT APPOINTMENT OF NATURAL PARENT AS TEMPORARY SMC WOULD NOT BE IN CHILD'S BEST INTEREST, IT MAY NOT APPOINT A NON-PARENT AS A TEMPORARY JMC

¶13-5-17. ***In re Crumbley,*** -- S.W.3d --, 2013 WL 2606662 (Tex. App.—Texarkana 2013, orig. proceeding) (06/12/13).

Facts: Maternal Aunt filed a petition for conservatorship of Child, alleging that she met Section 102.003(a)(9)'s requirements and that the appointment of Mother or Father as conservator would present a serious and immediate question concerning the welfare of the child and that such an appointment would significantly impair the physical health of the child's emotional development. In her affidavit attached to the petition, Maternal Aunt alleged that she had primary custody and control of the child for extended periods of time, that the child had lived with her since 2005, that Mother had a history of drug abuse and living with a known drug dealer and user, and that Mother had been threatening to take the child out of Maternal Aunt's care.

Maternal Aunt testified that she started caring for the child in February 2005, when the child was about six months old. The child lived with and was cared for by Maternal Aunt and her husband and continued to be cared for by Maternal Aunt even after her husband died. Maternal Aunt testified that Mother did not see the child more than six times in 2005, and from 2005 through 2011, Mother's visits were very infrequent and totaled less than 100 days. After the child started attending school (and for two and one-half years until Maternal Aunt's petition was filed), Mother's periods of possession became more frequent, but Maternal Aunt still had possession of the child for approximately two-thirds of each month, including almost every weekend and two entire summers.

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The trial court held that Maternal Aunt "had actual care, control, and possession of the child for at least six (6) months ending not more than 90 days preceding the filing of [the] [p]etition" and denied Mother's plea to the jurisdiction. The trial court appointed Mother and Maternal Aunt of Child as temporary joint managing conservators with Mother having the right to establish Child's primary residence. Mother filed a petition for writ of mandamus asking the COA to order the trial court to set aside its temporary orders and to dismiss with prejudice the petition for conservatorship filed by Maternal Aunt. Mother argued that the trial court did not have subject-matter jurisdiction because Maternal Aunt lacked standing to file a SAPCR and that the trial court abused its discretion in appointing Maternal Aunt as a joint managing conservator.

Holding: Writ of mandamus conditionally granted.

Opinion: The COA held that the trial court did not abuse its discretion by determining that Maternal Aunt had sufficient care, control, and possession of Child over a statutorily sufficient period (at least six months) to have standing to bring the suit because, based on the evidence and the pleadings, the COA held that it could not conclude that the trial court could reasonably have reached only one conclusion. However, Mother also argued that the trial court abused its discretion in appointing Maternal Aunt as a temporary joint managing conservator because there was "no finding that appointment of [Mother] as sole managing conservator would significantly impair the child's physical health or emotional development." There is a strong presumption that the best interest of a child is served if a natural parent is appointed as a managing conservator. Maternal Aunt argued that "the presumption that a parent should be appointed or retained as managing conservator of the child is rebutted if the court finds that…the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent…for a period of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit…" and such an appointment is in the best interests of the child. However, the trial made no express findings that the appointment of Mother as sole managing conservator would significantly impair the child's physical health or emotional development or that Mother voluntarily relinquished actual care, control, and possession of the child to a nonparent for the statutorily required period. When no express findings of fact are requested or filed, it is implied that the trial court made all findings necessary to support its judgment. However, the COA held that many of the provisions in the judgment negated and conflicted with a "deemed" finding that the appointment of Mother would not be in the child's best interest; the trial court gave Mother the most important rights concerning the child (i.e. the exclusive rights to establish the primary residence of the child and make decisions concerning the child's education). Therefore, the COA held that it could not deem that the trial court concluded that appointment of Mother as Sole Managing Conservator would not be in the child's best interest.

Implied findings may also be attacked for insufficiency of the evidence. Thus, the COA held that even though the trial court made no express findings that Mother had voluntarily relinquished actual care, control, and possession of the child for the statutory period, it could not deem that the trial court properly concluded such when the evidence showed that Mother maintained actual care, control, and possession of the child for thirty percent of each month; thus the evidence was insufficient to overcome the parental presumption. The COA conditionally granted the writ of mandamus.

Editor's comment: *I would feel better about the COA holding that the Trial Court's implied finding of significant impairment was negated by the terms of the Trial Court's judgment if the judgment had been a final one. Instead, the COA disregards the fact that the Trial Court's appointment of mother and aunt as JMCs was a TEMPORARY ORDER. I don't know that a trial court's appointment of mother and aunt as TEMPORARY JMCs should be grounds for blowing off the implied finding of significant impairment. The parental presumption is alive and kickin' in Texarkana. R.T.*

Editor's comment: *Troxel Troxel Troxel. A natural parent has a constitutional right to parent without interference absent proof that appointment of the parent as primary or sole conservator would significantly impair the child's physical health or emotional development. It's not just a best interest standard. M.M.O.*

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SAPCR
CHILD SUPPORT

TRIAL COURT MUST OFFSET A PARENT'S CHILD SUPPORT OBLIGATION BY THE AMOUNT OF MONEY THE CHILD RECEIVES IN SOCIAL SECURITY BENEFITS BASED ON THE PARENT'S DISABILITY

¶13-5-18. *In re D.T.S.*, 05-12-00110-CV, 2013 WL 4082302 (Tex. App.—Dallas 2013, no pet. h.) (mem. op) (08/13/13).

Facts: Father and Mother divorced in 2005, and Father was ordered to pay $925 per month in child support. In 2010, Father became disabled, and as a result Child began to receive $1,078 each month in social security. In 2011, Mother filed a motion to enforce Father's child support payments. Father argued that the $1,078 social security payments Child received should be considered an offset against Child's child support payments. Specifically, Father argued that because the $1,078 payment exceeded Father's child obligation of $925, Father should have no further obligation. The trial court found that Father failed to show a material and substantial change of circumstances to justify a reduction of child support. Father appealed.

Holding: Reversed.

Opinion: Family Code Section 154.132 provides that in applying the child support guidelines for an obligor who has a disability and who is required to pay support for a child who receives benefits as a result of the obligor's disability, the court shall apply the guidelines by determining the amount of child support that would be ordered under the child support guidelines and subtracting from that total the amount of benefits of the value of the benefits paid to or for the child as a result of the obligor's disability. Thus, the COA found that the trial court failed to subtract the $1,078 in benefits from Father's $925 child support obligation, and therefore, the trial court had abused its discretion.

SAPCR
CHILD SUPPORT ENFORCEMENT

★★★TEXAS SUPREME COURT ★★★

TEXAS SUPREME COURT HOLDS THAT ESTOPPEL IS NO LONGER A DEFENSE TO A CHILD SUPPORT ENFORCEMENT PROCEEDING

¶13-5-19. ***OAG v. Scholer,*** -- S.W.3d --, 2013 WL 3240258 (Tex. 2013) (06/28/13).

Facts: Father and Mother divorced in California and trial court ordered Father to pay child support. Father, Mother, and Child subsequently moved to Texas. Years later, Father and Mother agreed that Father's child support obligation would cease if Father voluntarily relinquished his parental rights. Father signed the necessary paperwork, but Mother's attorney never filed it with the court (possibly due to the termination of the attorney-client relationship). Father was unaware that Mother's attorney never filed the paperwork. Nine years later, the OAG sought a court order to modify the future child support obligation and confirm support arrearages. Father denied that he owed money, claiming that Mother (and thus the OAG as an assignee) was estopped from pursuing child support payments because Mother led Father to believe that his parental rights had

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been terminated nine years earlier. The trial court rejected Father's estoppel defense, but the COA reversed. OAG appealed.

Holding: Reversed.

Opinion: In this case, the SC held that the OAG is not explicitly an assignee for purposes of collecting child support. More importantly, the SC analyzed Family Code § 157.008, which was added in 1995, and held that because payment of child support reflects a parent's duty to child that furthers the child's welfare and best interests, estoppel is no longer a defense to a child support enforcement proceeding. Thus, the SC held that even though Father and Mother had an agreement, that agreement did not override his duty to pay child support. Accordingly, the SC reversed the COA and reinstated the trial court's judgment.

SAPCR
MODIFICATION

RETROACTIVE REDUCTION OF CHILD SUPPORT NOT PERMITTED PRIOR TO DATE OF SERVICE

¶13-5-20. ***In re P.M.G.*****, --** S.W.3d --, 2013 WL 3678448 (Tex. App.—Texarkana 2013, no pet. h.) (07/16/13).

Facts: Father and Mother divorced in 2005, and Mother was appointed joint managing conservator having the exclusive right to designate the primary residence of Child without regard to geographic location. In 2011, Mother made plans for her and Child to move from Bowie County, Texas to Denton County, Texas so that she could attend Texas Women's University to obtain a nursing degree, increase her income, and provide a better life for Child. Father filed a motion to modify seeking the right to determine Child's primary residence. Mother filed a counter-petition asking the trial court to increase Father's child support payments and asking for a judgment for all support arrearages. In response Father asked the trial court for a credit on medical support payments made during an approximate two-year period when Child was uninsured.

The trial court issued a modification order that (1) restricted Child's primary residence to Bowie County, Texas (but did not otherwise modify Mother's exclusive right to determine the primary residence of Child), (2) increased child support, and (3) gave Father a credit for medical insurance payments ordered and accrued from July 2009 through October 2012, including any interest on any unpaid premiums.

Holding: Affirmed in part. Reversed and remanded in part.

Opinion: Mother argued that the trial court allowed Father to receive a retroactive credit and reduction in his arrearage in violation of the Texas Family Code. A support order may be modified with regard to the amount of support ordered only as to obligations accruing after the earlier of: (1) the date of service of citation; or (2) an appearance in the suit to modify. Thus, the COA held that the trial court erred by giving Father a credit against his arrearages in child support payments for medical insurance payments ordered and accrued from 2009 through 2011. Even though Child did not have insurance during this time, (1) Father had still been ordered to make payments to Mother for insurance, (2) Father failed to make those payments, and (3) the relevant time period occurred before, not after, the date of service citation or Father's appearance in the suit to modify.

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FACTS ADMITTED IN PLEADINGS ARE CONSIDERED JUDICIALLY ADMITTED AND THE OPPOSING PARTY IS NOT REQUIRED TO PUT ON PROOF OF THAT FACT.

¶13-5-21. ***In re A.E.A.,*** -- S.W.3d --, 2013 WL 3761309 (Tex. App.—Fort Worth 2013, no pet. h.) (07/18/13).

Facts: Father and Mother divorced in 2008. The divorce decree provided that Child was to attend Greenhill Elementary School when he reached the appropriate age. However, Child was not granted admission to Greenhill, and in 2010, Father filed a petition to modify the parent-child relationship, alleging that there had been a material and substantial change in circumstances and asking that he be appointed as the person with the exclusive right to make decisions concerning the child's education. Mother filed a counter petition, also alleging that there had been a material and substantial change in circumstances, asking that she be appointed as the person with the exclusive right to make decisions concerning the child's education, and requesting that temporary orders be made ordering Father to pay child support.

The trial court ultimately granted Mother the exclusive right to make decisions concerning the child's education. Father requested findings of fact and conclusions of law, which the trial court made. Father appealed.

Holding: Affirmed.

Opinion: Father first argued that there was no evidence of a material and substantial change in circumstances since the original divorce decree was signed to warrant a modification of the final decree. 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. The COA held that since Father himself alleged a material and substantial change in circumstances, Mother was not required to put on proof of that judicially admitted fact and that Father was barred from challenging the sufficiency of the evidence to support the fact that he judicially admitted.

Editor's comment: *Several recent cases have held similarly. Before filing that counterpetition to modify, you might consider simply filing an answer until you are sure about your strategy and positions. At the very least, have the conversation with your client about the risks, from an appellate perspective, of making the claim of material and substantial change in circumstances. And even if the other side alleges it as well, I still think the best practice is to put on evidence supporting your claim of material and substantial claim of circumstances. It's a relatively easy hurdle, and it eliminates any risk. R.T.*

Editor's comment: *When both parties file for modification, it is a judicial admission of changed circumstances. So be careful what you wish for, because you just might get it! M.M.O.*

Editor's comment: *This is an easy rule to follow: If both parties allege a material and substantial change in circumstances, then neither one has to prove it. Query: Is a mutual judicial admission of changed circumstances binding on the court? J.V.*

Editor's comment: *Beware of form pleadings with boiler plate paragraphs. Even if abandoned by amended pleadings, it may no longer be a "judicial" admission, but it is still an admission. J.V.C.*

THE TRIAL COURT'S MODIFICATION ORDER MUST CONFORM TO THE PLEADINGS; OTHERWISE THE ISSUE MUST BE TRIED BY CONSENT

¶13-5-22. ***Flowers v. Flowers,*** -- S.W.3d --, 2013 WL 3808156 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (07/23/13).

Facts: Father and Mother divorced in 2004. Mother was granted the exclusive right to determine the children's primary residence in Harris County, Texas, and contiguous counties. Under the decree, Mother also was granted five other rights after conferring with Father: (1) consent to medical, dental, and surgical treat-

ment involving invasive procedures, (2) consent to psychiatric and psychological treatment of the children, (3) represent the children in legal actions and to make other decisions of substantial legal significance concerning the children, (4) except as provided in Family Code section 264.0111, receive the services and earnings of the children, and (5) except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, to act as an agent of the children in relation to the children's respective estates if a child's action is required by a state, the United States of America, or a foreign government. Mother granted the right, subject to Father's agreement, to consent to the marriage of the children or their enlistment in the armed forces of the United States. The six rights mentioned in the prior sentences are referred to collectively as the "Six Parental Rights." Father filed a motion to modify the parent-child relationship in 2009, asking the trial court to grant him the Six Parental Rights. However, the trial court's final order reflected that: (1) Mother retained the exclusive right to determine the children's primary residence, but the geographic restriction on this right was removed; (2) Mother's Six Parental Rights, which under the divorce decree required consultation with Father or Father's agreement, were changed to exclusive rights not requiring consultation with Father or his agreement, (3) Neither parent may designate J.E. (a man Father began dating in 2007 and living within 2008) or a person with whom that parent has a dating relationship to pick up or return the children unless the other parent agrees in writing that J.E. or the third party with whom the parent has a dating relationship may pick up or return the child; (4) Father is permanently enjoined from leaving or placing the children in the care of any person not related to them by blood or adoption without the prior written approval of Mother; (5) Father is permanently enjoined from appointing any person not related to them by blood or adoption to pick up or return the children to Mother without Mother's prior written approval. Father appealed.

Holding: Reversed and Remanded.

Opinion: Father asserted the trial court abused its discretion by removing the geographic restriction on Mother's exclusive right to determine the children's primary residence because that relief was neither requested nor tried by consent. The trial court's judgment must conform to the pleadings unless tried by express or implied consent of the parties. COA held Mother's petition did not request any modification to the geographic restriction on her exclusive right to determine the children's primary residence (even though the trial court's final order deleted that restriction) and issue not tried by consent. COA also found that Mother did not request any modification in her petition to five of the Six Parental Rights, and the record did not reflect that the issue was tried by consent. Therefore, the COA concluded that the trial court abused its discretion by modifying those five rights. The pleadings were broad enough to cover the issue regarding J.E.

Editor's comment: *Attorneys should carefully draft their pleadings to either encompass everything specifically that the client seeks or in broad form to generally encompass more global relief, the latter option placing the burden on the opposing party to object by way of special exceptions or waive their complaints about pleading specificity. S.S.S.*

Editor's comment: *Form pleadings, again. When in doubt ask for a trial amendment. J.V.C.*

TEXAS TRIAL COURT CANNOT TERMINATE CHILD SUPPORT ORDERED FROM ANOTHER STATE UNLESS THAT COURT LOSES ITS CONTINUING, EXCLUSIVE, JURISDICTION

¶13-5-23. *In re J.R.S.*, 10-12-00142-CV, 2013 WL 3846352 (Tex. App.—Waco 2013, no pet. h.) (mem. op) (07/25/13).

Facts: In 2000, Father was ordered to pay child support for Child to Mother in the state of Colorado. The child support order was registered and enforced in Texas in 2003, and enforced a second time in Texas in 2007. In 2008, Father filed a petition to modify in Johnson County, Texas in which he sought the termination of his child support obligation and arrearages. The trial court entered temporary orders in January 2009 and

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then a final judgment on August 31, 2009 which terminated his child support obligation and determined that he owed no arrearages. At the temporary orders hearing the trial court was informed that Mother had moved to Colorado and left Child with Father. The Attorney General had been notified of the proceedings but did not appear. Mother did not appear because her whereabouts were unknown and she had been served by publication. In 2011, the Attorney General filed a motion to determine the controlling court order and to establish arrearages. At that hearing, evidence was admitted that showed Father's arrearages to be $6,290.17 as of September 12, 2011. The arrearages were based on Father's ongoing obligation as it had been established in the orders entered prior to 2009. The trial court denied the motion and the Attorney General appealed.

Holding: Reversed, rendered, and remanded

Opinion: The Attorney General contended that the order from August 31, 2009 was void because Texas had no subject matter jurisdiction to modify the 2000 support order from Colorado. Jurisdiction under UIFSA rests upon the concept of continuing, exclusive jurisdiction to establish and modify a child support obligation. Once a court having jurisdiction enters a support decree, that tribunal is the only one entitled to modify the decree so long as that tribunal retains continuing, exclusive jurisdiction under UIFSA. Another state may be required by UIFSA to enforce the existing support decree, but it has no authority under that Act to modify the original decree so long as one of the parties remains in the issuing state. The responding state may assume the power to modify it, as reflected in section 159.611, only if the issuing state no longer has a sufficient interest in the modification of its order. In this case, Colorado acquired and retained jurisdiction over matters regarding the child support obligation for J.R.S. by the 2000 order and Texas had acquired jurisdiction solely for purposes of enforcing that order when it was registered with the Texas court in 2003. Texas, as the responding state under UIFSA, could go beyond mere enforcement and assume jurisdiction to modify the 2000 Colorado order only if Colorado had lost its jurisdiction to modify that order. The COA held that evidence in the record from the 2009 modification proceeding did not satisfy Texas Family Code § 159.611(a) of UIFSA, which would be necessary to show that Colorado lost its continuing, exclusive, jurisdiction. Therefore, the trial court's order of August 31, 2009 was entered without subject-matter jurisdiction and was void.

MSA IN SAPCR MODIFICATION NOT SUBJECT TO SECTION 153.0071 AND TRIAL COURT NOT BOUND TO ENTER A JUDMENT IN COMPLIANCE WITH MSA.

¶13-5-24. *In re S.K.D.*, 05-11-00253-CV, 2013 WL 4528508 (Tex. App.—Dallas 2013, no pet. h.) (mem. op) (08/27/13).

Facts: In May 2006, Father and Mother divorced. Father and Mother were named JMCs of their two children, with Father having primary custody and the right to determine the residence of the children. The divorce decree further obligated Mother to pay $100 per month in child support and required Father to maintain health insurance for the children. In June 2006, Mother filed a petition to modify the parent-child relationship seeking to have herself appointed SMC with the exclusive right to designate the primary residency of the children. In November 2007, the trial court referred the case to mediation, and a mediated settlement agreement (MSA) was reached in March 2008. Under the terms of the MSA, Father and Mother remained JMCs of the children, but Mother was given primary possession of their daughter, with the exclusive right to establish her residence. Father retained primary possession of their son. The MSA further required Father to pay $1,050 per month in child support and continue to provide health insurance for the children. On November 11, 2008, Mother filed an emergency petition to modify the parent-child relationship in which she sought modification of the divorce decree and/or the MSA. On that same day, the trial court dismissed the case for want of prosecution. On November 18, 2008, Father filed a motion to reinstate, which he non-suited on December 15, 2008. The next day, the trial court dismissed the case without prejudice. On December 22, 2008, Father filed a first amended counter-petition to modify the parent-child relationship. On November 1, 2010, the trial court entered an order that provided that Father and Mother would remain JMCs, but Father was given the exclusive right, among other things, to designate the primary residence of both children and to consent to psychological and psychiatric treatment. Mother's possession of their son was roughly equal to Father's but her access to their daughter was restricted to two hours of supervised access per week. During the first six months following the entry of

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the order, Mother was ordered to submit to random drug testing three times at a time and location determined by Father. Finally, the order awarded Father $50,000 in attorney's fees against Mother. Mother appealed.
Holding: Affirmed.

Opinion: Mother first argued, relying on Section 153.0071 of the Family Code, that the trial court erred by not entering an order in accordance with the parties' March 2008 MSA. A proceeding to modify a child-custody determination is controlled by Chapter 156 of the Family Code, whereas Chapter 153 of the Family Code governs the initial determination of conservatorship, possession, and access. The COA found that the proceeding at hand was a proceeding to modify a child-custody determination and was controlled by Chapter 156 of the Family Code. Therefore, the controlling issues were whether modification was in the best interest of the child and whether the circumstances of the child or a conservator had materially and substantially changed. Since the trial court found that the circumstances of the children, a conservator, or other party had materially and substantially changed and that the requested modification was in the best interest of the children, the COA concluded that trial court was not bound to enter an order in strict compliance with a previous MSA reached under chapter 153.

Editor's comment: *Boy did the Dallas Court of Appeals get this one wrong. Neither party put forth the reasoning set forth in the opinion. Unfortunately, Mother died this past summer. Father won but he did not rely on the reasoning that the Court came with on its own. Rather, Father argued that once a case is dismissed for want of prosecution, an MSA entered in the dismissed suit is no longer viable. Rather than accepting that argument, the Court of Appeals now holds that only original suits are bound by the dictates of § 153.0071 despite the broad use of the term "SAPCR" in that statute, which means a suit filed under Title 5 in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested. Tex. Fam. Code Ann. § 101.032(a). This definition seems to include the issues raised in this case. Even though Father won, he is considering filing a Motion to Withdraw, Vacate, Reconsider, or in the alternative, Rehear to re-urge his original argument and to urge the Dallas Court of Appeals to correct its opinion. G.L.S.*

Editor's comment: *Holy Moly! I thought that the mediation provisions in TFC 153.0071 applied to all "suits affecting the parent-child relationship," probably because TFC 153.0071(c) specifically says that a court may refer "a suit affecting the parent-child relationship to mediation" which is exactly what the trial court did in this case. Further I thought that a "suit affecting parent-child relationship" included a modification proceeding under Chapter 156, probably because TFC 101.032 defines "SAPCR" as "a suit filed as provided by this title in which the appointment of [conservators] or support of a child" are requested and a Chapter 156 modification suit involving conservatorship and child support would appear to be a suit filed under the provisions of Title 5. Silly me. I guess if you practice within the Dallas appellate jurisdiction you enter into MSA's in modification cases at your peril because according to the Dallas COA there is no provision in the TFC that makes your MSA binding and enforceable in those types of SAPCR's. In light of this interpretation, just imagine how creative conservatorship and access orders could be for Dallas area families in modification cases since the terms and provisions which guide those concepts are likewise found in Chapter 153 and may not be applicable. Surely someone in Dallas will seek a rehearing on this one. S.S.S.*

Editor's comment: *Does anyone remember the original Texas Family Code prior to the 1995 recodification? Original SAPCR suits and modifications were in Tex. Fam. Code Sec. 14.03 and 14.08 respectfully. They were in the same section. Splitting them up and changing the definition to "chapter" doesn't change the fact they had the same statutory origin. The rationale of the holding is based on incorrect assumptions of statutory construction. Most of the framework for SAPCR's is in Chapter 153 (like family violence prohibitions and standard possession) and are not repeated in Chapter 156. So do they not apply to modifications either? This is one of those opinions that could have untold unintended and negative ramifications. The mother is deceased so it is unclear what happens next. J.V.C.*

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ALLEGATIONS OF SEXUAL ABUSE OF CHILD, AND SUBJECTING CHILD TO REPEATED PHYSICAL AND FORENSIC EXAMINATIONS CONSTITUTES A MATERNAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES FOR PURPOSES OF A MODIFICATION PROCEEDING.

¶13-5-25. ***In re T.M.P.,*** -- S.W.3d --, 2013 WL 4604375 (Tex. App.—El Paso 2013, no pet. h.) (08/28/13).

Facts: On May 30, 2008, Mother filed for divorce in Tarrant County, Texas. An agreed final decree of divorce was signed on August 14, 2009. Mother and Father were named JMCs of their two children. Mother was awarded the exclusive right to establish the primary residence of the children without regard to geographic location. By the time the decree was signed, Mother and the children had been living with her parents in South Carolina for approximately three months. Father continued to reside in Texas. Father's visitation was to be supervised by his parents. In November, Mother refused to relinquish the children for Father's scheduled visitation due to one child's alleged outcry of sexual abuse. As a result, Child was subjected to multiple physical examinations and forensic interviews, none of which resulted in a finding that any abuse had taken place. Mother, however, still refused to relinquish children to Father. On November 24th, Father filed a motion for enforcement and a suit for tortious interference with his possessory rights.

Father's motion to modify was granted, with Mother and Father remaining as JMCs. Mother was granted the exclusive right to establish the domicile and primary residence of the children, but was limited to Tarrant County and contiguous counties. Father was awarded standard visitation. Mother was ordered to deliver the children to the paternal grandparents until such time as Mother relocated to Texas. The court also found that Mother and the maternal grandparents had violated Section 42 of the Texas Family Code, had intentionally and knowingly interfered with Father's and the paternal grandparents' possessory rights, and held them jointly and severally liable for damages in the amount of $50,000. Mother was also ordered to pay Father's attorney's fees in the sum of $25,000. Mother and her parents appealed.

Holding: Affirmed in Part, Reversed and Rendered in Part.

Opinion: Mother argued that the trial court erred in restricting the children's primary residence to Tarrant and contiguous counties because Father failed to establish a material and substantial change in circumstances. Mother contended that a "mere allegation of sexual misconduct between [Father] and [Child]" does not rise to the level of a material and substantial change in circumstances. The COA held that there was extensive testimony demonstrating that Mother and the maternal grandmother continued to call authorities and subjected Child to repeated physical examinations and interviews, even after they had been told by multiple professionals that the accusations of sexual abuse were not credible. The Southlake, Texas, police department decided not to bring criminal charges, as did the Dallas County District Attorney's Office. There were persistent efforts to have Father's probation revoked. The trial court heard testimony that one of Mother's motives was to have Father arrested and his probation revoked so she could obtain either sole managing conservatorship or termination of Father's parental rights. There was also testimony concerning attempts by Mother and her parents to engage in parental alienation. Father agreed with the finding of the social study that the maternal grandmother had "spearheaded this crusade." Mother's husband also had "a little something" of a legal problem with previous incidents of domestic violence. Mother herself even testified that Father was not a bad parent. Based on the evidence, the COA held that a reasonable and fair minded jurist could have found a material and substantial change in circumstances sufficient to warrant modification of the prior order.

Mother and Maternal Grandparents also challenged the trial court's subject matter jurisdiction. Specifically, they contended that the paternal grandparents had no possessory rights and therefore lacked standing to file suit under Chapter 42 of the Texas Family Code. Chapter 42 of the Texas Family Code establishes a statutory cause of action for damages against: (1) a person who takes or retains possession of a child in violation of a possessory right of another person; and (2) a person who aids or assists the person in such conduct. "Possessory right" is defined in Section 42.001 as "a court-ordered right of possession of or access to a child, including conservatorship, custody, and visitation." The final decree of divorce specified "THIS VISITATION ORDER IS NOT TO BE CONSTRUED AS GRANTING GRANDPARENT'S VISITATION RIGHTS OR ANY TYPE OF CONSERVATIVE RIGHTS." The role of the paternal grandparents was merely to supervise Father's visits with the children and facilitate transportation between Texas and South Carolina. Therefore,

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the COA concluded that while paternal grandparents were certainly facilitators of Father's possessory rights, they were granted no independent rights. Because they lacked standing to bring a suit for tortious interference, they were not entitled to recover damages, causing the COA to reverse the damage award.

RELEVANT EVIDENCE OF A NON-PARTY'S HISTORY OF DOMESTIC VIOLENCE THAT OCCURRED MORE THAN 2 YEARS BEFORE THE SUIT IS ADMISSIBLE IN A MODIFICATION PROCEEDING AS THE DICTATES OF FAMILY CODE § 153.004 APPLY ONLY TO ORIGINAL SAPCRS.

¶13-5-26. ***Kittman v. Miller,*** 12-13-00097-CV, 2013 WL 4680575 (Tex. App.—Tyler 2013, no pet. h.) (mem. op) (08/29/13).

Facts: Father and Mother were divorced on July 9, 2010, and were appointed JMCs of their children. Mother was granted the exclusive right to designate the primary residence of the children within the Hemphill ISD. Mother remarried on September 25, 2010. On January 6, 2011, she filed a petition to modify requesting that the geographic restriction on the children's primary residence be removed and that Father's visitation be modified to comply with a standard possession order. On May 5, 2011, Father filed a second amended answer, a counter-petition to modify the parent-child relationship, and a motion for an immediate protective order and custody of the children. Specifically, he requested that he be appointed as the conservator with the right to designate the primary residence of the children, and that he be designated as sole managing conservator of the children. Further, Father contended that Mother's new spouse ("Husband") had a history or pattern of regularly committing family violence during the past fourteen years and a history or pattern of child, sexual, and physical abuse against his first two wives, a daughter, two adopted daughters, and an extramarital sexual consort. Thus, he requested a protective order against Husband, and that any visitation by Mother with the children be supervised.

On February 25, 2013, a jury trial was held. At trial, Mother's attorney objected when Father's attorney began cross-examining Husband about his relationship with his children and his prior marriages. The trial court ruled that it was "going to go along with Section 153.004 and limit domestic violence evidence" from the date the suit was filed. In other words, the trial court limited all domestic violence evidence allegedly committed by Husband that occurred before January 6, 2009. After the trial court's ruling, Father's attorney requested a bill of exception for the testimony of two witnesses outside the presence of the jury. The witnesses were both ex-wives of Husband and testified to numerous incidents of domestic violence that was committed in front of the children and sometimes required hospitalization. These incidents included rape and attempted murder. After the bill of exception proceeding had finished, Ex-Wife 2 was allowed to testify to the jury about an incident in which Husband forced her to have sex with him when she arrived to pick up her child support check. She also stated that Husband was cruel and had to have control over her. She testified that Husband was not a good role model for her children nor did he provide a safe and secure environment for her and her daughters. Ex-Wife 2 also stated that it was not in any child's best interest to live in the same household with Husband. Because of the trial court's evidentiary ruling, she was not allowed to provide further details to the jury.

At the conclusion of the trial, the jury found that the final decree of divorce should not be modified to appoint Father as the conservator with the exclusive right to designate the children's primary residence. The jury also found that the geographic restriction in the final decree of divorce should not be removed or changed. Father appealed.

Holding: Reversed and Remanded.

Opinion: Father argued that the trial court erred by excluding evidence of Husband's domestic violence that occurred more than two years prior to the filing of the suit and that the court improperly construed Texas Family Code § 153.004 by applying it such that it limited evidence regarding domestic violence allegedly

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committed by Husband that occurred before January 6, 2009. Section 153.004(a): "In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than eighteen years of age committed within a two year period preceding the filing of the suit or during the pendency of the suit." First, the COA found that the plain language of Section 153.004 indicates that evidence of the intentional use of abusive physical force must be used in determining whether to appoint a party as a sole or joint managing conservator. However, the statute applies to an original suit for conservatorship, possession, and access, not a modification suit. In this case, the final decree of divorce named the parties as joint managing conservators, and Father and Mother sought to modify only that order. Thus, Section 153.004 did not apply. Second, the plain language of Section 153.004 specifically states that its provision regarding evidence of the intentional use of abusive physical force applies to "parties." Husband, as Mother's new husband and stepfather to her children, was not a party to the original divorce and was not a party to the modification suit. Because Section 153.004 did not apply to the modification suit or to a nonparty, the COA concluded that the trial court abused its discretion by excluding evidence of Husband's domestic violence that occurred more than two years prior to the filing of the suit. Furthermore, the judgment turned on the excluded evidence since the jury could not properly evaluate the stability of Mother and Husband's home or the emotional and physical danger to the children without the evidence of Husband's past domestic violence. Therefore, the COA reversed the trial court's modification order and remanded the case.

Editor's comment: *Here's another court that is relying on V.L.K. to make a blanket statement that just because a statute falls within Chapter 153, it does not apply to modification suits filed under Chapter 156. Although Family Code Section 153.004 was not directly at issue in this case, the Tyler Court nevertheless holds that the provisions of that statute do not apply to modification suits. I guess domestic violence only counts if it happens in an original suit—talking about taking a huge step backwards. It wasn't even necessary to address § 153.004 in this case because it did not apply since the party accused of the domestic violence did not commit the alleged violence against a party to this suit, the spouse of a party to this suit, or a parent of child that was a party to this suit—he was Mother's new husband. Additionally, the alleged violence perpetrated by the new husband occurred more than 20 years ago, whatever happened to excluding the evidence on the basis of Texas Rule of Evidence 609. Even if the COA wanted to allow the evidence, it could always have relied on the best interest of the child mandate. I expect that a Motion for Rehearing will be forthcoming. G.L.S.*

Editor's comment: *What is this obsession with the difference between Sec. 153 and Sec. 156 (see my comments in S.K.D. above)? The Tyler CoA has answered my question about family violence. It does not applying to modifications. What's next standard possession? They had it at the step-dad wasn't a party. Prior conduct has a relevancy expiration date. J.V.C.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

★★★TEXAS SUPREME COURT ★★★

SECTION 161.001(1)(O) REQUIRES PROOF OF ABUSE OR NEGLECT, BUT THOSE TERMS CAN BE READ TO INCLUDE RISK

¶13-5-27. ***In re E.C.R.,*** 402 S.W.3d 239 (Tex. 2013) (06/14/13).

Facts: After Mother was seen punching and dragging her four-year-old daughter, Y.C., by her ponytail down the street, a witness called the authorities. After its investigation, the Department took possession of mother's other child, E.C.R. The next day, the Department filed a petition seeking conservatorship of E.C.R. and termination of Mother's parental rights. The petition was supported by a six-page affidavit describing the physi-

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cal abuse of Y.C. and also noted that Mother had a prior CPS case involving physical abuse of an older son, who was in the permanent managing conservatorship of foster parents. Mother also told a caseworker that she had twice attempted suicide while spending three days in jail for the incident involving Y.C. and that after being released from jail, she slept on the streets and left E.C.R. with her boyfriend who was physically abusive towards her, unstable, and had an extensive criminal history. The caseworker noted that E.C.R. had not been physically abused and appeared clean, healthy, and developmentally on target. The trial court granted the Department's petition, appointed the Department as temporary managing conservator, and ordered Mother to comply with the service plan. Almost a year later, the trial court held a termination hearing, found that Mother had failed to fully comply with the service plan, and terminated Mother's rights to E.C.R. under Texas Family Code Section 161.001(1)(O). Mother appealed, challenging the sufficiency of the evidence supporting termination under subsection O and the best interest finding; she argued that termination under subsection O was improper because E.C.R. was removed because of *risk* of abuse based on her conduct towards his sibling, but not *actual* abuse or neglect. Mother did not dispute that she failed to fully comply with the service plan. The COA agreed with Mother and reversed. The Department filed a petition for review.

Holding: Reverse in part and remand to COA to make a factual finding re: best interest.

Opinion: Texas Family Code Section 161.001(1)(O) authorizes termination if the court finds by clear and convincing evidence that the parent has "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[]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." Further, the SC held, after an analysis of the legislative intent, that subsection O of Section 161.001 requires proof of abuse or neglect, but those terms can be read to include risk. Since Mother had a history of abusing E.C.R.'s older siblings, and since Mother had left E.C.R. with a physically abusive boyfriend who had an extensive criminal history, the SC agreed with the trial court that, under Section 262, there was sufficient evidence to satisfy a person of ordinary prudence and caution that E.C.R. faced an immediate danger to his physical health or safety, that the urgent need to protect him required his immediate removal, and that he faced a substantial risk of a continuing danger if he were returned home. The SC also found that the *Holly* factors and the aforementioned evidence supported the trial court's finding that the termination of Mother's parental rights was in the best interest of the child.

EVIDENCE OF A CONTINUING COURSE OF CONDUCT SUFFICIENT TO SUPPORT TERMINATION

¶13-5-28. ***C.B. v. Tex. Dept. of Fam. & Protective Servs.*, --** S.W.3d --, 2013 WL 3064405 (Tex. App.—El Paso 2013, no pet. h.) (06/19/13).

Facts: Mother had four children, three of whom were the subject of a petition filed by the TDFPS ("Department") to terminate Mother's parental rights. Mother had a lengthy criminal history, a pattern of drug abuse, and often left her children with men who had a history of physical and verbal abuse towards the children, Mother, and others. Mother also often left her children with neighbors or her mother (who failed a home study conducted by the Department) while she vacationed in Mexico for days or weeks at a time. The Department filed a petition to terminate Mother's parental rights of N.O., Y.O., and D.O. The suit was resolved when the parties entered a MSA on February 25, 2011. The agreement called for the return of the children to Mother even though the Department would continue to serve as the temporary managing conservator of the children and monitor the placement to ensure the children were in a safe environment.

The children were to be returned to Mother on February 28, 2011. A caseworker testified that Mother called her on the day of the placement and expressed some concern about the children's day care and appointments interfering with her work schedule. Mother told the caseworker that she wanted to cancel some of

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the children's upcoming appointments to which the caseworker responded that the children's appointments "were very important as well, because a lot of them were therapy appointments." Mother also wanted to know why her mother could not be a caregiver, and the caseworker explained that the grandmother had received a negative home study and that she had not been approved because she had not kept doctors' appointments, had flushed N.O.'s medication down the toilet, and had a volatile relationship with Mother. According to the caseworker, Mother expressed her understanding of the situation, said she had already arranged for day care, and professed there would not be a problem. The caseworker admitted that she did not put the child care restriction in writing. However, evidence was introduced that Mother was informed that all persons not authorized by the Department needed permission before having contact with the children and all others were prohibited. Mother claimed she did not know of these restrictions. Mother also gave the Department the contact information of the daycare where the children were enrolled.

On March 3, 2011, the children were once again removed. The concerns began when the Department called to confirm the children were enrolled in the day care Mother listed on one of the placement forms, but were informed that only one child had in fact been enrolled. The Department then called Y.O.'s school and was told that he was not enrolled in their afterschool program and he would be taking the bus home. A caseworker was sent to investigate who would be picking up the kids and observed Mother's mother retrieving the children after school and then returning to Mother's apartment. After being confronted, the mother left the children alone with F.M., a man who had a criminal history relating to drugs and family violence.

Mother was told that by leaving the children with F.M., she had demonstrated her previous pattern of conduct with violent men and had misled the Department by assuring them "everything was ready." The Department filed its fourth amended petition, which sought termination based on Family Code Sections 161.001(1)(D), (E), and (O). The jury terminated Mother's parental rights, finding that the Department successfully proved all three grounds on which it sought termination and that termination was in the children's best interest. Mother appealed.

Holding: Affirmed.

Opinion: Mother appealed, challenging only the best interest finding. There is abundant authority in Texas standing for the proposition that a court order regarding placement of children is res judicata of their best interest as of the date of the order. Prior bad acts by a parent may not be dredged up thereafter as grounds for modification of permanent or temporary conservatorship. There is one well recognized exception involving a continuous course of conduct; "[E]vidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct ... since the original decree."

The COA focused on Mother's continuing course of conduct and her failure to comply with the terms of the settlement agreement. Mother had a history of leaving the children with one of her boyfriends, who had a history of physical abuse and drug use, or her mother, who failed a home study conducted by the Department. Mother was given a final chance to care for her children as a result of the mediated settlement agreement. Yet only three days later, her children were in the care of boyfriend and her mother when she was not around. Mother's conduct showed a continuous failure to put the health, safety, and welfare of her children first. Mother also violated the conditions of return. She agreed to enroll her children in day care and to provide transportation for them to school and therapy sessions. In fact, she told the Department all plans were in place before the children were returned to her. Yet she enrolled only one child in day care. And despite knowing the restrictions on caregivers, she relinquished transportation and after school care to her mother and her boyfriend. Furthermore, at the time of trial, Mother was unemployed and two weeks away from being evicted. Caseworkers also testified at trial regarding the needs of the children and that those needs were being met in foster care.

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TRIAL COURT PRESUMED TO HAVE TAKEN JUDICIAL NOTICE OF THE COURT ORDER SPECIFICALLY ESTABLISHING THE ACTIONS NECESSARY FOR MOTHER TO OBTAIN THE RETURN OF HER CHILDREN IN ITS FILE EVEN THOUGH NOT SPECIFICALLY REQUESTED TO DO SO

¶13-5-29. ***In re K.F.,*** 402 S.W.3d 497 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (06/20/13).

Facts: Caseworker testified the TDFPS ("Department") removed the children of Mother from their home after responding to a report of domestic violence in 2011. The investigator found Mother and Alleged Father of two of the children in the middle of the street having a domestic dispute with the police. Alleged Father had an extensive criminal record, involving drugs, theft, and domestic violence, in Texas and Louisiana. Caseworker testified that incidents of violence had occurred in front of the children. In 2011, Alleged Father put a gun to Mother's head in front of the children. Mother admitted that incident occurred, but claimed there were no bullets in the gun. Instances of domestic violence in front of the children also occurred between Alleged Father, Mother's mother, and Mother's sister. Caseworker testified Alleged Father engaged in conduct that endangered the children's physical and emotional health and their safety. However, according to Caseworker, Mother had attempted to cover up or protect Alleged Father. When law enforcement responded to a 2010 domestic violence call, Mother pulled out a knife and threatened to kill herself if Alleged Father was arrested. Caseworker testified the concern for domestic violence had not been eliminated because Mother did not attend her domestic violence classes as specified.

K.F., Mother's oldest child, alleged that Alleged Father sexually abused her. K.F. made an outcry to Caseworker and other professionals involved in the case. According to Caseworker, Mother refused to believe K.F. and claims that sexual abuse could not have happened because she never left K.F. alone. Caseworker believed that if the children were returned to Mother, sexual abuse would be a danger.

Mother testified that she signed the service plan and understood it. The service plan ordered Mother to stay in touch with the Department, but Caseworker had not always been able to reach her. There was a consecutive period of at least two or three months that Mother's phone was not connected. Some certified letters sent to Mother were unclaimed at the address she provided. The service plan ordered Mother to cooperate with the Department, but Caseworker felt that Mother was evasive, confrontational, uncooperative and dishonest.

Mother testified her current work hours are from 10:00 a.m. to 1:00 p.m. and that she was able to provide a stable home environment. However, during the Department's investigation, Caseworker discovered the maternal grandmother, who had a history with the Department and had been arrested for prostitution and theft, was taking care of Mother's new baby. Additionally, Mother tested positive for cocaine and missed several other appointments to be drug tested. Finally, Mother never provided support to the Department for caring for K.F. and K.A.F., and in the six months prior to the trial, Mother went through at least five different jobs.

Holding: Affirmed.

Opinion: Mother's claimed the evidence failed to support a termination finding under section 161.001(O) because the record does not contain a court order specifically establishing the actions necessary for Mother to obtain the return of the children. A termination finding under subsection (O) cannot be upheld where there is no court order that specifically establishes the actions necessary for the parent to obtain the return of the child. Mother asserted that, although an order is in the clerk's record, it constitutes no evidence because it was not admitted at trial and the trial court did not take judicial notice of it. However, a trial court may take judicial notice of the records in its own court filed in the same case, with or without the request of a party, the COA presumed that the trial court took judicial notice of its record without any request being made and without any announcement that it has done so. Because it could presume that the trial court took judicial notice of its own records, the COA held that the evidence was legally and factually sufficient to support a finding that the Department proved there is an order that specifically established the actions necessary for Mother to obtain the return of her children.

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LIMITED MENTAL CAPACITY DOES NOT, AS A MATTER OF LAW, NEGATE A PARENT'S ABILITY TO KNOWINGLY NEGLECT THEIR CHILD.

¶13-5-30. ***In re A.T.,*** -- S.W.3d --, 2013 WL 3461684 (Tex. App.—Dallas 2013, no pet. h.) (07/10/13).

Facts: CPS received a referral regarding neglectful supervision of Child by Mother and Father due to living conditions at a hotel room. CPS's investigation revealed that Child, only two weeks old, was living in "deplorable" conditions. The hotel room where Mother, Father, and Child were living was in complete disarray, clean clothes were mixed in with dirty clothes, and animal feces were visible on the floor. Other than a can of milk that Mother produced when asked what she was feeding Child, there were no other baby care essentials (such as a crib, diapers, or cleaning supplies) in the room. Despite recognizing the hotel room was not fit for a newborn, neither parent took any affirmative steps to try and remedy the deplorable conditions. Additionally, CPS's investigation revealed that Mother and Father had poor hygiene. Several witnesses testified to Mother and Father's overwhelming body odor, to the point that they left a scent after leaving the room. Mother and Father also hesitated in considering Child's medical needs; they both initially expressed a negative reaction when told that Child needed to wear a helmet because of a lump in his skull. Finally, Mother and Father did not quit smoking even though Child suffered from an upper-respiratory infection. Both Mother and Father underwent an IQ test. Mother's results fell within the lower extreme range of general intelligence, and Father's results fell into the average intelligence category.

CPS filed a petition to terminate Mother and Father's parental rights, and the trial court determined that, pursuant to Section 161.001(1)(D)-(E) of the Texas Family Code, that Mother and Father knowingly allowed Child to remain in conditions or surroundings which endangered his physical or emotional wellbeing and that they knowingly placed Child with persons who engaged in conduct which endangered Child's physical and emotional wellbeing. The trial court found that termination of Mother and Father's parental rights was in the best interest of the child. Mother and Father appealed, arguing that the evidence was factually insufficient to support the trial court's findings.

Holding: Affirmed.

Opinion: Mother and Father argued that the real problem was the mental deficiency of both parents. Limited mental capacity, however, does not, as a matter of law, negate a parent's ability to knowingly neglect their child. Therefore, the COA held that Mother and Father's argument was without merit (especially when considering that both Mother and Father scored within the "general" to "average" intelligence range on their IQ composite test).

CPS IS ALWAYS REQUIRED TO MAKE REASONABLE ATEMPTS TO ENABLE A CHILD TO RETURN HOME PENDING A FINAL HEARING ON A PETITION FOR TERMINATION OF PARENTAL RIGHTS.

¶13-5-31. ***In re Pate,*** -- S.W.3d --, 2013 WL 3694383 (Tex. App.—Houston [14th], no pet. h.) (07/15/13).

Facts: On May 9, 2013, the Department of Family and Protective Services ("the Department") removed Child from home of Mother because the Department determined that Mother had left Child in an unsafe environment. There were reports about no food in the home and illegal drug use. On May 9, 2013, the Department sent someone to the residence, and found that law enforcement officers were already speaking to two gentlemen at the residence. Mother was not at the home. Child was unsupervised, wearing an "extremely soaked" diaper, and had been sleeping in a bed also soaked with urine. One of the gentlemen admitted to using marijuana. Law enforcement officers found marijuana, scales, and a blowtorch in the residence. The Department filed a petition seeking removal of the child and termination of the parents' rights. On May 16, 2013, the trial court held a full adversary hearing. There was evidence of a prior removal, but no evidence of a prior termination. Also, there was no evidence of other aggravated circumstances as defined by section 262.2015 of the

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Family Code. At the hearing, the Department argued that no safety plan was necessary because of Mother's history with the child's previous removal. In its response filed in this court, the Department continued to rely on Mother's positive drug tests and her previous history with removal of Child. The trial court found "there was a danger to the child at the time of the removal and there is a continuing danger to the physical health of the child and that continuation of the child in the home would be contrary to the child's welfare[.]" The court further found, "the department has made those efforts as needed by statute and, under the circumstances, that there was no family placement or other places to place the child that would alleviate the necessity for the removal." Mother filed a petition for writ of mandamus.

Holding: Writ of mandamus conditionally granted.

Opinion: Mother argued that there was no evidence presented at the hearing that the Department undertook any effort to return Child to his home. Removing a child from his home and parents on an emergency basis before fully litigating the issue of whether the parents should continue to have custody of the child is an extreme measure that may be taken only when the circumstances indicate a danger to the physical health and welfare of the child and the need for his protection is so urgent that immediate removal from the home is necessary. Unless evidence demonstrates the existence of each of the requirements of section 262.201(b), the court is required to return the child to the custody of his parents pending litigation. The trial court is afforded discretion to determine what efforts are "reasonable" to enable the child to return home. This requirement may be waived "if the court finds that the parent has subjected the child to aggravated circumstances." Additionally, although previous termination of another child is considered an aggravating circumstance, the COA found no authority holding that a previous temporary removal is sufficient to waive the requirement that the Department make reasonable attempts to enable the child to return home. In this case, there was evidence of a prior removal, but no evidence of a prior termination. There was also no evidence of other aggravated circumstances as defined by section 262.2015 of the Family Code. At the hearing, the Department argued that no safety plan was necessary because of Mother's history with the child's previous removal. In its response filed with the COA, the Department continued to rely on Mother's positive drug tests and her previous history with removal of the child. Therefore, the COA held that although the Department was required to provide evidence that it had made reasonable efforts to enable the child to return home, it failed to do so.

COA REVISES OPINION AND AFFIRMS TERMINATION OF A FATHER'S PARENTAL RIGHTS BASED ON SAME EVIDENCE INTRODUCED AT PRIOR TWO TRIALS THAT HAD PREVIOUSLY BEEN FOUND INSUFFICIENT. BECAUSE ONLY FACTUAL ISSUES ARE INVOLVED, THE LAW OF THE CASE DOCTRINE DOES NOT APPLY

¶13-5-32. ***In re A.B.,*** -- S.W.3d --, 2013 WL 4017378 (Tex. App.—Fort Worth 2013, no pet. h.) (08/08/13).

Facts: A.B. and H.B. were placed with family members in September 2007 after then fifteen-month-old H.B., weighing only fifteen pounds, was admitted to the hospital after suffering a seizure. H.B. was diagnosed with failure to thrive due to malnutrition. The investigation by the Texas Department of Family and Protective Services ("Department") revealed that Father had not attended any of the children's previous doctor's visits and did not know who their pediatrician was. Father also did not ask Mother, or anyone else, about the results of the children's doctor's visits. Father did not know what developmental goals and milestones were appropriate for H.B. and the time of her seizure, and Father claimed that he was not responsible for underfeeding H.B. because he saw the children infrequently since they resided mainly with Mother. However, Father's apartment consistently had either little or no food. Additionally, H.B. had language delays that endangered her physical and emotional well-being and had gross motor skill developmental delays. After overnight visits permitted by the Department, Father often returned the children dirty, tired, and lethargic. Nonetheless, the children were eventually returned to Father. However, they were removed again one month later after it was discovered that A.B. suffered bruises on his cheek, eyelid, ear, chin, buttocks, and abdomen. A doctor testi-

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fied that A.B.'s injuries were not of a kind that a child would sustain accidentally. Although Father testified that he did not hit A.B., he pleaded guilty to a charge of injury to a child. Both of the children's foster families testified about A.B.'s nightmares and A.B.'s claims that Father injured his ear. Although Father took parenting classes as a part of the services offered by the Department, he showed no progress, and he consistently exposed the children to emotional abuse through the aggressive behavior (including frequent confrontations with CPS workers in front of the children). Father refused to recognize that he had anger issues and any discussions of improving his communication skills only served to agitate him. The Department ultimately filed a petition to terminate Father's and Mother's parental rights. After a bench trial, the trial court found that Father had knowingly placed or knowingly allowed the children to remain in conditions or surroundings that had endangered their physical or emotional well-being, that he had engaged in conduct or knowingly placed the children with persons who had engaged in conduct that endangered the children's physical or emotional well-being, and that termination of Father's parental rights was in the children's best interest.

Father appealed, challenging the legal and factual sufficiency of the evidence supporting the trial court's findings. The COA overruled Father's legal sufficiency challenges but sustained his challenge to the factual sufficiency of the evidence supporting the endangerment findings, and it remanded the case for a new trial. After a jury trial, Father's parental rights were terminated for a second time. The jury made the same endangerment and best interest findings that the trial court had made in the first trial. Father then raised five points on appeal, and the COA initially concluded that the evidence supporting the endangerment findings was again insufficient. The Department and Intervenors filed motions for en banc reconsideration.

Holding: Revised and Affirmed.

Opinion: Relying on the "law of the case" doctrine, Father first argued that the evidence was legally and factually insufficient to terminate his parental rights under subsections (D) or (E). Specifically, Father identified four allegations made by the Department and argued that the COA's holdings on these allegations in his first appeal controlled the outcome of his second appeal because the evidence presented in the second trial was substantially the same as the evidence presented at the first trial. The "law of the case" doctrine generally applies to successive appeals in the same case, but it only applies to questions of law, not questions of fact. Thus the COA held that since the resolution of Father's first three issues turned on questions of fact, the doctrine did not apply.

Father next argued that the evidence was legally and factually insufficient to support an endangerment finding. Although the Department presented the same evidence that it had in the first two trials, which the COA had found to be insufficient, the COA held that the evidence was sufficient this time to support the endangerment finding as to both children under subsection (E).

Having overruled all five of Father's issues, the COA revised its previous opinion and affirmed the trial court's judgment. The dissent, however, countered that (1) the COA had already written two opinions reversing two trial court judgment terminating Father's parental rights, and (2) no new facts were introduced between the first trial court judgment terminating Father's parental rights and the second trial court judgment terminating Father's parental rights. The dissent also felt that the majority opinion analyzed the evidence favorable to the Department, but it failed to mention, discuss, or analyze much of the evidence favorable to Father (including testimony by a nurse and a doctor that more tests needed to be conducted before a "failure to thrive" diagnosis could be made for H.B.). Noting that a correct factual sufficiency analysis must include the entire record and that the court must analyze all of the evidence favorable to each party, the dissent would have held, consistent with the COA's first two opinions, that the evidence remained factually insufficient to support termination of Father's parental rights under the Texas Family Code.

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PRENATAL TERMINATIONS BASED ON AN AFFIDAVIT OF RELINQUISHMENT DO NOT REQUIRE THAT THE AFFIDAVIT BE COMPLETED IN STRICT COMPLIANCE WITH THE TEXAS FAMILY CODE; ALSO, "BEST INTEREST" EVIDENCE MUST STILL BE PRESENTED.

¶13-5-33. ***In re A.H.*****, --** S.W.3d --, 2013 WL 4564670 (Tex. App.—San Antonio 2013, no pet. h.) (08/28/13).

Facts: Mother's parental rights to her four children were terminated. Shortly before the termination hearing, Mother executed an "Affidavit of Voluntary Relinquishment of Parental Rights to the TDFPS" ("Affidavit") as to all four children. Mother was not present when the termination trial began, but appeared after the parties had each rested. She told her attorney, who was present throughout the proceeding, she had been "upset" when she signed the Affidavit, she had "changed her feelings on it," and she wanted to revoke her relinquishment. The trial court did not allow her attorney to reopen the evidence and place Mother on the witness stand. Instead, after a short recess to consider the law, the trial court terminated Mother's parental rights on two grounds: (1) that she had "executed before or after the suit [was filed by TDFPS] an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Chapter 161, Texas Family Code," and (2) termination is in the children's best interest. The Affidavit did not state the relinquishing parent's county of residence and the county of residence of other parents. The Affidavit also had other deficiencies regarding the names of the children in relation to their fathers. In the Affidavit, Mother listed the child of Father 1 as "A.O." when no such child was the subject of the termination. However, Father 1's Affidavit for Voluntary Relinquishment identified the Child correctly. Mother also did not identify any of the children of Father 2 or Father 3. However, the Affidavit signed by Father 3 identified Child correctly.

Holding: Reversed in Part and Affirmed in Part.

Opinion: Mother asserted that the trial court erred in terminating her parental rights because her Affidavit, due to its deficiencies, did not satisfy the requirements of the Texas Family Code, and that the code should be strictly construed in her favor because no other ground supported termination. A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit. The COA found that nothing in the record indicated Mother signed the Affidavit due to fraud, duress, coercion, or that she involuntarily executed the affidavit. Therefore, the COA affirmed the trial court's finding that the evidence supported by clear and convincing evidence that Mother had executed "an unrevoked or irrevocable affidavit of relinquishment of parental rights." However, the COA ultimately still reversed the parental termination portion of the trial court's judgment since the evidence submitted was legally insufficient to support the trial court's "best interest" finding.

Miscellaneous

EXCLUSION OF FATHER'S I&A CONSTITUTED AN IMPERMISSIBLE DEATH PENALTY SANCTION

¶13-5-34. *Jordan v. Jordan*, 14-12-00114-CV, 2013 WL 2489577 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (mem. op) (06/11/13).

Facts: After Father and Mother agreed to settle the custody issues involving their children, their divorce case proceeded to trial solely on the issue of division of property. Father appeared pro se. Mother's I&A and proposed property division was admitted at trial. Mother requested a 60% disproportionate division of assets in her favor. Father offered his own I&A, but Mother's attorney objected that Father had not tendered it pursuant

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to the court's own rule requiring exhibits to be exchanged between the parties before trial. The trial court did not admit Father's I&A into evidence, but stated that it would "take judicial notice of the underlying file, the court's file, which contain[ed] [Father's] properly filed inventory and appraisement." Father responded, "So it's entered, correct? So I can talk about it?" The associate judge responded, "I can't give you any legal advice." The associate judge adopted Mother's proposed property division as a just and fair equitable division of the estate under the circumstances. The presiding judge entered a final divorce decree based on the associate judge's recommendation. Father appealed.

Holding: Reversed and remanded.

Opinion: Rule 166 permits trial courts to hold pretrial conferences and enter orders requiring the parties, among other things, to exchange prior to trial all exhibits a party may use at trial. The purpose of Rule 166 is "to assist in the disposition of the case." Although Rule 166 expressly does not provide trial courts the power to sanction for failing to obey the court's pretrial orders rules, the Texas Supreme Court has determined that such power is implicit. However, the sanctions imposed must be just and appropriate. A death penalty sanction adjudicates a claim and precludes the presentation of the merits of the case. The COA held that the trial court's exclusion of Father's I&A constituted a sanction for Father's failure to tender his exhibits to Mother's counsel before trial. The trial court excluded the only exhibit Father offered at trial–relating to his assets and liabilities and thus the just and right division of property–which precluded him from presenting the merits of his case. Therefore, the COA held that exclusion of Father's I&A was a death penalty sanction.

A direct relationship must exist between the offensive conduct and the sanction imposed, and ensure that the sanction was only visited upon the offender. Just sanctions must not be excessive; it should be no more severe than necessary to satisfy its legitimate purpose. In this case, the failure to tender the exhibit to Mother's counsel was attributable to Father, who represented himself. However, before trial, Father's counsel had filed and served Mother's counsel with Father's I&A and supporting documentation. Thus, the COA held that Mother was not surprised at trial by Father's offer of the I&A, and Mother did not show its admission would be prejudicial towards her. Under the second prong of excessiveness, the COA held that nothing in the record indicated that the trial court considered lesser sanctions or that lesser sanctions would not have been effective. The record also did not show that Father was warned, prior to trial, that failure to tender his exhibits would preclude him from presenting any documentary evidence at trial. Finally, the record did not reflect any past actions by Father that would justify the imposition of such a harsh sanction; the record did not show any bad faith or callous disregard by Father of his responsibility to comply with the trial court's rule. Thus, the COA held that the sanction was excessive, and that the trial court abused its discretion in refusing to admit Father's I&A. Further, the COA held that the trial court's sanction probably caused rendition of an improper judgment or prevented Father from properly presenting the case to the COA. Thus, the harm caused by Father's inability to present any evidence at trial, other than his own testimony, was patent.

Editor's comment: *How is this a death penalty sanction when the father could have offered oral testimony about the existence, character, and value of the marital estate? M.M.O.*

TRIAL COURT MUST CONDUCT DEATH PENALTY ANALYSIS EVEN IF A PARTY INTENTIONALLY AND BLATANTLY ABUSES THE DISCOVERY PROCESS

¶13-5-35. ***In re M.J.M.,*** -- S.W.3d --, 2013 WL 3198434 (Tex. App.—San Antonio 2013, no pet. h.) (06/26/13).

Facts: Father and Mother divorced in 2004. In 2010, Father filed a modification suit seeking appointment as the conservator with the exclusive right to designate the primary residence of one of their children, M.J.M. During the next seven months, Mother attempted to obtain discovery from Father with little success due to Father's intentional and blatant abuse of the discovery process. On May 9, 2011, Father and Mother appeared in the trial court, negotiated the terms of an agreed scheduling order, and presented their argument to the trial court. The trial court approved the agreement which (1) required both parties to provide responses to pending discovery requests no later than May 31, 2011, and (2) set Father's deposition for June 7, 2011. On June 6,

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2011, the trial court heard Father's motion for protective order, in which he sought to prevent the taking of his deposition. The trial court denied the motion, but neither Father nor his attorney appeared at the deposition the following day. On August 11, 2011, Mother filed a first amended motion to strike Father's pleadings and to dismiss Father's cause of action, in which she detailed Father's failure to respond to her discovery requests. On August 19, 2011, Father and Mother appeared for trial. Before the trial began, Mother urged her first amended motion. The trial court granted Mother's motion (1) striking all of Father's pleadings, (2) prohibiting Father from calling any witnesses, including himself, (3) prohibiting Father from introducing any documentary or other evidence, (4) dismissing Father's causes of action with prejudice, (5) denying Father's petition to modify the parent-child relationship, and (6) ordering Father to pay all expenses, court costs, and Attorney's fees borne by Mother due to Father's failure to respond to Mother's discovery request and for failure to prosecute his petition. Father appealed.

Holding: Reversed and Remanded.

Opinion: Father argued that the trial court erred in assessing death penalty sanctions against him without considering less stringent sanctions. Even when a party engaged in intentional and blatant discovery abuse, the trial court's sanctions must still be just. Whether discovery sanctions are just depends on two factors. First, a direct relationship must exist between the offensive conduct and the sanction imposed. Second, the sanction imposed must not be excessive; the record must show that the trial court considered the availability of less stringent sanctions, and in all but the most exceptional cases, the trial court tested a less stringent sanction. To show that the trial court considered less stringent sanction, the record should contain some explanation of the appropriateness of the sanctions imposed. An agreed scheduling order does not qualify as an order imposing a less stringent sanction. In this case, since the agreed scheduling order did not qualify as an order imposing a less stringent sanction, the record failed to show that the trial court tested less stringent sanctions before imposing its death penalty sanction on Father. Also, when the trial court granted Mother's motion, it failed to explain the appropriateness of imposing death penalty sanctions, and thus failed to show that it considered less stringent sanctions. Thus, the COA held that the trial court erred in imposing death penalty sanctions without first testing or considering less stringent sanctions.

IN AN EMPLOYMENT CONTRACT BETWEEN ATTORNEY AND CLIENT, ARBITRATION CLAUSE CANNOT FORCE CLIENT TO ARBITRATE WHILE ALLOWING ATTORNEY TO LITIGATE FOR RECOVERY OF FEES AND EXPENSES

¶13-5-36. ***Royston, Rayzor, Vickery & Williams, L.L.P. v. Lopez,*** -- S.W.3d --, 2013 WL 3226847 (Tex. App.—Corpus Christi 2013, no pet. h.) (06/27/13).

Facts: Client retained Law Firm to represent him regarding a common law marriage and divorce and to pursue claims against Client's alleged common law wife after she won $11 million playing the lottery. The "Employment Contract" between Client and Law Firm gave Law Firm a twenty percent contingency fee in any gross recovery before expenses, provided that Client was responsible for all costs and expenses regardless of outcome, and gave Law Firm the right to withdraw as counsel at any time for any reason. The agreement contained the following arbitration provision: "…you and the firm agree that any disputes arising out of or connected with this agreement shall be submitted to binding arbitration…(except, however, that this does not apply to any claims made by the firm for the recovery of its fees and expenses)." Client thereafter brought suit against Law Firm for malpractice, gross negligence, fraud, breach of contract, and negligent misrepresentation concerning settlement negotiations. Law Firm moved to compel arbitration under the Texas Arbitration Act ("TAA") and under the common law. Client responded that the arbitration agreement was substantially unconscionable because it required him to arbitrate but allowed Law Firm to litigate to recover its fees and expenses (which Law Firm admitted would likely be its only claim against a client). The trial court denied Law Firm's motion to compel arbitration, and Law Firm appealed.

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Holding: Affirmed.

Opinion: Law Firm contended that the arbitration agreement was not unconscionable. Whether a contract is contrary to public policy or unconscionable at the time it is formed is a question of law. Agreements to arbitrate disputes between attorneys and clients are generally enforceable under Texas law. However, a court may not enforce an arbitration agreement if the court finds the agreement was unconscionable at the time the agreement was made. The determination regarding whether a contract or term is unconscionable is made in the light of its setting, purpose, and effect. Relevant factors include weaknesses in the contracting process, fraud, and other invalidating causes. Unconscionability may be either procedural or substantive in nature. The basic test for unconscionability is whether, given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.

Given the relationship between attorney and client, the relative expertise of lawyers in understanding the differences between arbitration and litigation and the relative costs thereof as compared to their clients, the COA found, under the specific facts of this case, that the arbitration agreement, by specifically excepting claims protecting Law Firm's fees and costs, was unconscionable. The terms of the arbitration provision were very unusual and, on their face, distinctly favored Law Firm over its relatively unsophisticated client. The COA held that the arbitration agreement was not a "bilateral agreement to arbitrate" and was most definitely one-sided and oppressive.

The dissent asserted that Client claimed only substantive unconscionability, but that a party asserting unconscionability has the burden of proving both procedural and substantive unconscionability. Further, the dissent found that Client presented no unconscionability evidence at the hearing, and therefore would hold that Client failed to carry his burden.

Editor's comment: *Goose and gander…. M.M.O.*

DEATH OF CLIENT IN DIVORCE ACTION DOES NOT TERMINATE ATTORNEY-CLIENT RELATIONSHIP IF PROPERTY ISSUES STILL EXIST

¶13-5-37. *Marriage of Fannette*, 10-12-00141-CV, 2013 WL 3533238 (Tex. App.—Waco 2013, no pet. h.) (mem. op) (07/11/13).

Facts: Husband and Wife were married for 65 years when Husband filed for divorce on May 18, 2011. A couple of months after filing for divorce, Husband's health took a turn for the worse, and Husband executed a power of attorney to his brother. The trial court ordered mediation, and the divorce was mediated on September 13, 2011. Wife was present with her attorney, and Brother attended on Husband's behalf (in accordance with the previously-executed power of attorney) and an MSA was signed. The following day, on September 14, 2011, the attorneys appeared before the trial court for rendition of a judgment of divorce based on the MSA. At the conclusion of the hearing, the trial court pronounced the divorce "granted and rendered." In addition, the trial court wrote "Divorce granted. Rendered divorce" on the portion of the docket sheet corresponding with the September 14th hearing. Further, the trial court responded to a question by Husband's counsel that "[Husband] is divorced."

A few days later, on September 17, 2011, Husband passed away. By September 30, 2011, Wife had hired new counsel, and her new attorney filed a suggestion of death and a motion for withdrawal and substitution of counsel. Wife's new attorney objected to the final divorce decree asserting that the marriage terminated on Husband's death, Husband's attorney had not authority to act after Husband's death and that the proceeding should therefore be dismissed. In the meantime, Brother allegedly initiated a probate proceeding and was appointed executor of the estate. Wife filed a counter-petition against Brother and Brother's son, alleging fraud, duress, and coercion (among other things). Wife also stated that she "revoke[ed] consent to the [MSA]." On February 3, 2012, after a hearing, the trial court denied Wife's Motions. Wife appealed.

Holding: Affirmed.

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Opinion: On appeal, Wife first argued that the trial court erred in denying her Motion to Show Authority because Husband's death terminated the attorney-client relationship between Husband and his attorney; therefore, Husband's attorney was not authorized to file a motion to enter a final divorce decree, nor was he authorized to appear on Husband's behalf at any hearing subsequent to Husband's death. A marriage may only be terminated by death or court decree. A written judgment signed by the trial judge is not a prerequisite to the finality of a judgment. Here, the trial court orally pronounced that Husband and Wife were divorced at the end of the September 14th hearing. In addition, the trial court made a notation on the docket sheet that the divorce was granted and rendered on September 14, 2011. Consequently, the marriage between Husband and Wife ended when the decree of divorce was orally pronounced on September 14, 2011. Thus, the trial court's signing of the final divorce decree several months after Husband's death constituted a ministerial act. Therefore, even if Wife was correct in asserting that Husband's counsel lacked authority to act after Husband's death, it would have had no effect on the trial court's ministerial duty to sign the final written judgment granting the divorce. Further, the attorney-client relationship does not necessarily terminate upon the death of the client. When property issues remain, the attorney may still act on behalf of the client. Thus, Husband's attorney was authorized to act on behalf of Husband to finalize the property issues associated with the divorce.

TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON FRAUD CLAIMS BECAUSE AN ATTORNEY'S QUALIFIED IMMUNITY AND PROTECTION FROM LIABILITY IS NOT BOUNDLESS. AN ATTORNEY CAN BE HELD LIABLE BY A THIRD-PARTY FOR ACTIONS THAT ARE NOT PART OF THE DISCHARGE OF HIS DUTIES TO HIS CLIENT.

¶13-5-38. ***Gregory v. Vick, Carney & Smith, LLP, et al.,*** -- S.W.3d --, 2013 WL 3947815 (Tex. App.—Fort Worth 2013, no pet. h.) (08/01/13).

Facts: Husband and Wife divorced in Parker County in August 2008. The trial court signed an agreed decree on August 11, 2008 and a decree nunc pro tunc on Nov. 17, 2008. In the decree Wife was awarded the plane at issue, along with any ad valorem taxes, "liens, assessments, or other charges due or to become due on the personal property awarded to" her. Subsequently, Wife sold the plane but represented she did so as an agent of Lucy Leasing, which she was not and which had the effect of shifting the tax burden to Husband. At different times, Vick, Carney & Smith ("VCS") and Cantey Hanger ("CH") represented Wife. In Aug. 2010, Husband, Lucy Leasing Co., and PGB Air ("Appellants") sued VCS and CH for their actions during and after the divorce proceedings including claims for claims for aiding and abetting under Family Code § 42.003 (child custody interference), conspiracy, fraud, conversion, defamation, unfair debt collection practices, intentional infliction of emotional distress (IIED), unjust enrichment, and violations of the temporary orders and final decree. VCS, CH, and Wife each independently filed summary judgments or in the alternative motion to dismiss. The trial court granted all 3 MSJs. Appellants appealed.

Holding: Reversed and Remand in Part and Affirmed in Part.

Opinion: Appellants alleged in their second amended petition that CH and Wife falsified a bill of sale for a Piper Seminole No. N21113 owned by Lucy Leasing to show that Wife was a manager of Lucy Leasing and had authority to transfer ownership of the airplane. According to Appellants, CH and Wife did so to shift tax liability for the airplane sale to Lucy Leasing. CH moved for summary judgment on the fraud, aiding and abetting, and conspiracy claims on the ground that it had no duty to Husband as it was not in privity with him in the divorce, that it was immune from liability for actions taken in its representation of Wife in the divorce, and that for those reasons its alleged actions were not fraudulent as a matter of law. According to CH, all of the alleged actions it took were in the course of representing Wife in the divorce suit. CH did not allege no-evidence grounds in its motion for summary judgment.

Texas law authorizes attorneys to practice their profession, to advise their clients, and to interpose any defense or supposed defense, without making themselves liable for damages. The purpose behind this well-

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established rule is to allow an attorney to fulfill his duty and zealously represent his clients without subjecting himself to the threat of liability. An attorney who could be held liable for statements made or actions taken in the course of representing his client would be forced constantly to balance his own potential exposure against his client's best interest. Such a result would act as a severe and crippling deterrent to the ends of justice because a litigant might be denied a full development of his rights.

To promote zealous representation, courts have held that an attorney has "qualified immunity" from civil liability, with respect to nonclients, for actions taken in connection with representing a client in litigation. This qualified immunity generally applies even if conduct is wrongful in the context of the underlying lawsuit. For example, a third party has no independent right of recovery against an attorney for filing motions in a lawsuit, even if frivolous or without merit, although such conduct is sanctionable or contemptible as enforced by the statutory or inherent powers of the court. Courts have refused to acknowledge an independent cause of action in such instances "because making motions is conduct an attorney engages in as part of the discharge of his duties in representing a party in a lawsuit." Under the same reasoning, an attorney for an opposing party may not be held liable for fraud merely for making representations to the opposing party in litigation that further the best interests of his own clients. If an attorney's conduct violates his professional responsibility, the remedy is public, not private.

This rule of qualified immunity focuses on the type of conduct in which the attorney engages rather than on whether the conduct was meritorious in the context of the underlying lawsuit. "[I]t is the *kind*—not the *nature*—of conduct that is controlling." Thus, an attorney cannot be held liable to a third party for conduct that requires "the office, professional training, skill, and authority of an attorney." Incorrect, meritless, and even frivolous conduct is not actionable if it satisfies this standard.

An attorney's protection from liability is not boundless, however. An attorney can be held liable by a third-party for actions that are not part of the discharge of his duties to his client. If a lawyer participates independently in fraudulent activities, his action is "foreign to the duties of an attorney." In other words, the law does not provide absolute immunity for every tort committed by a lawyer that may be tangentially related to his professional role or which may occur during litigation. By way of extreme example, an attorney who assaults the opposing party or lawyer during trial could be held liable for that act.

An attorney who *personally* steals goods or tells lies on a client's behalf may be liable for fraud in some cases. To be held so liable for conspiracy, the attorney must have agreed to the *injury* to be accomplished, not merely the conduct ultimately resulting in injury.

Here, CH's preparation of a bill of sale to facilitate transfer of an airplane awarded to its client in an agreed divorce decree was conduct in which an attorney engages to discharge his duties to his client. But as pleaded by Appellants, the conduct complained of is the intentional misrepresentation of Wife's status in the bill of sale to a third party as a "Manager" of Lucy Leasing for the purpose of unlawfully relieving Wife of tax liability for the sale and shifting that tax liability to Lucy Leasing. The focus of the COA's analysis is on the kind—not the nature—of the attorney's alleged conduct. Although the preparation of a bill of sale to transfer an airplane is not conduct "foreign to the duties of an attorney," the intentional and knowing inclusion of false information in a bill of sale to assist a client in avoiding tax liability is. The alleged conduct here did not occur in an adversarial context vis a vis Wife and Lucy Leasing. The subsequent sale of the airplane to a third party after it had already been awarded to Wife in the agreed decree was not required by, and had nothing to do with, the divorce decree. Because of the negligence summary judgment standard of review, the COA was not concerned with whether Appellants proved or even provided evidence of their allegations regarding the bill of sale because CH did not raise that issue in its motion for summary judgment. Instead, the COA had to address the narrow issue of whether CH was immune as a matter of law for its actions *as alleged by Appellants*. Such alleged actions, if true, would not shield an attorney from liability simply because he or she undertook those actions in the course of representation of a client.

Accordingly, whether the allegations are true or not—and the COA had to consider them true for purposes of reviewing the summary judgment—the alleged actions are outside the scope of representation of a client and, thus, the trial court should not have granted summary judgment on the fraud, conspiracy, and aiding and abetting claims for that reason. Therefore, the trial court erred by granting summary judgment for CH on the specific grounds raised in its motion as to Appellants‟ fraud, conspiracy, and aiding and abetting claims.

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Editor's comment: *Be careful what you let a client talk you into doing. There is a line you can't cross in zealous representation. You can say virtually anything in court and be protected. Outside the courthouse (or on the courthouse steps to the media) no so much. J.V.C.*

DISCOVERY MASTERS MUST HAVE EXPERTISE THAT TRIAL COURTS LACK IN ORDER TO BE APPOINTED; DISCOVERY MASTERS CANNOT COLLECT SECURITY FOR COSTS THAT HAVE NOT ACCRUED

¶13-5-39. *In re King*, 01-13-00434-CV, 2013 WL 4007798 (Tex. App.—Houston [1st Dist.] 2013, no pet. h.) (mem. op) (08/06/13).

Facts: Father and Mother were married in 1998, had one child, and separated in 2005. In 2007, Father suffered a traumatic brain injury in a car accident, and, in 2011, Mother initiated divorce proceedings. Paternal Grandfather appeared in the case as the guardian of Father's person and estate. The parties contested the division of the community estate, visitation rights to the child, and the management of the child's trust fund. After Paternal Grandfather sought production of documents from the child's trust fund, the trial court, on its own motion, appointed a discovery master. In its order referring the matter to a discovery master, the trial court stated simply: "The Court finds good cause exists in this exceptional case involving at least one technical issue that D.D. be appointed discovery master in this case." The order was a "blanket" order and contained no limits or exclusions. Mother objected, and refused to participate in any proceedings before the discovery master. After hearing additional arguments, including the discovery master's motion for deposit of costs, the trial court overruled Mother's objections to appointment of the discovery master and issued an amended order appointing a discovery master. It further ordered both parties to pay the discovery master $5,000 for her initial "fees and expenses." Mother filed a petition for writ of mandamus.

Holding: Writ of mandamus conditionally granted in part, and denied in part.

Opinion: The court may, in exceptional cases, for good cause appoint a master in chancery, who shall be a citizen of this State, and not an attorney for either party to the action, nor related to either party, who shall perform all of the duties required of him by the court, and shall be under orders of the court, and have such power as the master of chancery has in a court of equity. The "exceptional condition" requirement cannot be met by showing that a case is complicated or time-consuming or that the trial court is busy. However, it is appropriate to appoint a discovery master when comprehensive analysis of highly technical data is necessary.

Here, the record did not demonstrate that the discovery matters in the dispute, including the financial records of the trust, rose to the level of technical complexity required for the delegation to a discovery master as provided in rule 171. The issues were ones in which the trial court has experience. And even though financial documents would be included in the litigation, the record did not demonstrate that the discovered material would be too complex for the trial court to consider. Additionally, there was no evidence in the record that the appointed discovery master had expertise relative to the issues that the trial court lacked.

Mother also argued that the trial court erred in requiring the parties to pay $5,000 each for the discovery master's "fees and expenses" because such "up-front security costs" were prohibited by rule 171 and were excessive. A trial court "shall award reasonable compensation to such master to be taxed as costs of suit." However, a trial court may not require the parties to pay anticipated costs or security for costs that have not accrued. Thus, the COA held that the trial court abused its discretion by requiring that each party pay $5,000 for the discovery master's "fees and expenses" because there was no evidence that any costs had accrued.

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PARTIES MUST PROVE THAT LEGAL ASSISTANTS PERFORMED "SUBSTANTIVE LEGAL WORK" IN ORDER TO RECOVER ATTORNEY'S FEES FOR WORK PERFORMED BY LEGAL ASSISTANTS

¶13-5-40. *Seabron v. Seabron*, 04-12-00482-CV, 2013 WL 4685440 (Tex. App.—San Antonio 2013, no pet. h.) (mem. op) (08/30/13).

Facts: Husband and Wife were married in 1966 and divorced in 1990. In March 2010, Wife, alleging that Husband had not complied with the provisions of the divorce decree, filed a motion for enforcement. A bench trial was held in early 2012, at which Wife, Husband, and a CPA testified. Wife's attorney testified regarding the amount of reasonable attorney's fees. Billing records were admitted in support of his testimony, showing work that another of the firm's attorney and two legal assistants did to prepare Wife's case. Wife's Attorney did not, however, provide any testimony or evidence indicating that the work performed by his legal assistants was "substantive legal work." Wife's attorney also testified as to the amount of reasonable attorney's fees. The trial court granted Wife a money judgment based on an unpleaded cause of action and further ordered Husband to pay $6,074.65 in attorney's fees and expenses. Husband appealed.

Holding: Affirmed in Part, Reversed in Part.

Opinion: Husband argued that the award of attorney's fees was improper because Wife's attorney failed to properly prove up the award for the time that legal assistants worked on the case. Texas Family Code § 9.014 provides that "the court may award reasonable attorney's fees." An award of attorney's fees may include a legal assistant's time to the extent that the work performed has traditionally been done by an attorney. To recover attorney's fees for work performed by legal assistants, the evidence must establish: (1) the qualifications of the legal assistant to perform substantive legal work; (2) that the legal assistant performed substantive legal work under the direction and supervision of an attorney; (3) the nature of the legal work performed; (4) the legal assistant's hourly rate; and (5) the number of hours expended by the legal assistant. The COA held that the award of attorney's fees was improper because Wife's attorney did not prove that the legal assistants performed "substantive legal work." Specifically, Wife's Attorney did not provide any testimony or evidence indicating that the work performed by his legal assistants was "substantive legal work." Therefore, the COA sustained Husband's complaint regarding the award of attorney's fees. Because the record contained no evidence concerning the legal assistants other than their hourly rate and number of hours expended, the COA modified the judgment to reduce the attorney's fees and expenses awarded to Wife by the sum of $1,010.

SUPREME COURT WATCH

Following are some of the cases that are related to family law that 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 the Matter of the Marriage of H.B. v. J.B.*, 11-0024,** (pet. granted, oral argument is set for November 5, 2013) 326 S.W.3d 654 (Tex. App.—Dallas Aug. 31, 2010) (reversed and remanded) (Dallas County) (amicus briefs filed by Texas State Representative Warren Chisum and the Honorable Todd Staples in support of the State of Texas).

The issue before the Court is whether a gay coupled married in another state is entitled to obtain a divorce in the State of Texas.

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***State of Texas v. Naylor and Daly*, 11-0114** (pet. granted, oral argument has been set for November 5, 2013) 330 S.W.3d 434 (Tex. App.—Austin Jan. 7, 2011) (dismissed WOJ) (Travis County) (amicus briefs filed by Texas State Representative Warren Chisum and the Honorable Todd Staples in support of the State of Texas).

The issue before the Court is whether an agreed final decree of divorce granted to a lesbian couple married in another state is void and should be set aside.

***In re Lee*, 11-0732** (oral argument held on February 28, 2012) 14-11-00714-CV, 2011 WL 4036610 (Tex. App.—Houston [14th Dist.] Sept. 13, 2011, orig. proceeding) (mem. op.) (denied) (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.

***Rosser Craig Tucker II v. Lizabeth Thomas*, 12-0183** (oral argument held on Feb. 5, 2013) __ S.W.3d __, 14-09-01081-CV, 2011 WL 6644710 (Tex. App.—Houston [14th Dist.] Dec. 20, 2011) (affirmed in part/reversed and remanded in part) (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 K.L.*, 12-0728** (oral argument held on June 24, 2013) 09-11-00083-CV, 2012 WL 1951111 (Tex. App.—Beaumont May 31, 2012) (mem. op.) (affirmed) (San Jacinto County)

Among the issues in this parental-rights termination case are (1) whether a trial court had a duty to appoint the pro se father an attorney for trial when he failed to file an indigence affidavit or request an attorney until after the trial began and (2) whether the mother's affidavit relinquishing her parental rights was voluntary, knowing and intelligent when a month later a probate court appointed a guardian for her for mental-health reasons.

Father. Despite providing an address for service, the father was served by publication for status hearings and for the termination trial and appeared for trial after being subpoenaed. He told the court he was not aware that he had a right to an attorney. At the end of the first day of trial, the court told the father an attorney would have been appointed for him if he had appeared at a pretrial hearing and requested one, but at that point it was too late.

Mother. Before the state took possession of the child, the mother and grandmother executed a guardianship by which the grandmother had responsibility for the child. Child Protective Services took the child after she fell on stairs in the grandmother's loft apartment. In June 2010 the mother irrevocably relinquished her rights to the child. In July 2010 the county court ordered the mother placed under the grandmother's guardianship on evidence that the mother had an IQ of 57 and was bipolar.

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***In re S.M.R.*, 12-0968** (oral argument set for September 11, 2013) 01-10-00999-CV, S.W.3d (Tex. App.—Houston [1st Dist.] April 20, 2012, judgment set aside, opinion not vacated June 14, 2012) (Harris County).

A principal issue is whether the appeals court erred by not considering alternative grounds to terminate parental rights that were properly pleaded and supported by conclusive evidence.

***In re Blevins*, 12-0636** (oral argument set for October 9, 2013) 10-12-00136-CV, 2012 WL 3137988 (Tex. App.—Waco Aug. 2, 2012, orig. proceeding) (mem. op) (denied) (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 Blackmore v. OAG*, 12-0545** (Briefs on the merits filed 06/19/13) 370 S.W.3d 94 (Tex. App.—Dallas May 23, 2012) (reversed and remanded) (Collin County).

The issue in this case is whether the OAG can seek child support for a mother who kidnapped the child and took the child to Guatemala, a non-Hague conference member state. The trial court initially dismissed the suit under the unclean hands provision of the UCCJEA. The Dallas Court of Appeals reversed the trial court's ruling stating that the unclean hands' provision of the UCCJEA does not apply under UIFSA, which controls because OAG only seeking child support.

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