SECTION REPORT
FAMILY LAW
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IN THIS MONTH'S REPORT

NEWSLETTER EDITOR
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Section Wear and Publications

MESSAGE FROM THE CHAIR

It's that special time of year – baseball and football! Hopefully the summer heat will soon be fading into cooler fall temperatures.

ADVANCED FAMILY LAW

In case you missed the Advanced Family Law Course in San Antonio, Charla Bradshaw and Kyle Sanders and the planning committee put together a terrific program. I heard numerous comments that this was the best Advanced Family Law Course in years.

HONORS AND AWARDS

The Advanced Family Law Course was also an opportunity for the Section to honor family lawyers who have made a significant contribution to the practice of family law: former Section Chair, Diana Friedman, was awarded the Dan Price Award; David Carlock received the Ken Fuller Pro Bono Award; Cheryl Wilson was elected to the Family Law Hall of Legends; and Beth Maultsby and Kathryn Samler received the Joseph McKnight Best CLE Article for "High Conflict Family Law Matters and Personality Disorders."

Harry Tindall received the Gay G. Cox Collaborative Law Award.

The Texas Academy of Family Law Specialists also awarded its Sam Emison Award to Kath Kinser.

UPCOMING CLE

Our upcoming CLE seminars include:

- New Frontiers in Marital Property Law – October 23-24, 2014, Lake Tahoe,
  Course Directors: Sherri Evans and Heather King
- Family Law and Technology – December 4-5, 2014, Austin at the AT&T Center,
  Course Director: Mark Unger
- Texas Academy of Family Law Specialists Trial Institute – January 16-17, 2015 in New Orleans,
  Course Directors: Cindy Tisdale and Angela Pence
- Marriage Dissolution – April 9-10, 2015, Westin Galleria, Dallas
  Course Director: Steve Naylor; 101 Course Director: Lisa Hoppes

UPCOMING COLLABORATIVE CLE

The upcoming Collaborative CLE seminars include:

- November 6-7, 2014 – Basic Interdisciplinary Training presented by the Collaborative Law Institute of Texas in Lubbock.
- February 12-13, 2015 – the Annual Collaborative Law Course presented by the State Bar of Texas, the Collaborative Law Section of the State Bar, and the Collaborative Law Institute of Texas in Austin at the Radisson Hotel & Suites.
- March 26-27, 2015 – Advanced Collaborative Law Training presented by the Collaborative Law Institute of Texas in Houston.
- May 7-8, 2015 - Basic Interdisciplinary Training presented by the Collaborative Law Institute of Texas in Dallas.

PRO BONO

The Pro Bono Committee, chaired by Dick Sutherland, continues to advance the Family Law Section's goal of providing an attorney for indigent Texans across the State. In 2014, the Pro Bono Committee has put together 6 seminars across the state in Conroe, Corpus Christi, El Paso, San Angelo, Tyler and Weatherford. The Section will continue its pro bono efforts including the development of a pro bono webinar. As with its live seminars, the goal of the webinar is to provide free CLE to attorneys willing to take on pro bono cases. With the development of the webinar, the seminars presented in 2014 will be made available to attorneys across the state resulting in almost unlimited access to justice for families in need. Also we have put together a pro bono presentation focusing on domestic violence. It is entitled "Domestic Violence 101 – Prosecuting and Defending a Domestic Violence Case." Thank you to Richard Fry for being the driving force behind this seminar. Also thank you to the Pro Bono Committee and the many volunteers who donate their time to make our pro bono efforts successful.

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TEXAS FAMILY LAW FOUNDATION

The Legislature will return to Austin in 2015. Steve Bresnen, the lobbyist for the Texas Family Law Foundation, has already begun preparing for the session. In addition, the bill review committee will soon begin reviewing proposed bills and preparing reports for Foundation's lobbying volunteers to use during the session. If you are interested in working with the Foundation's lobby team, there will be a training session in Austin in November. As you know, all of the bill review and lobbying volunteers donate their time and pay their own way. If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. The Of course, the work of the Foundation would not be possible without all of you who donated your time, who donated items to the silent auction and who attended the fashion show in San Antonio. Thank you to all of those who donated to the Texas Family Law Foundation to make our legislative efforts successful.

See you at New Frontiers in Lake Tahoe!

----------**Jimmy Vaught, Chair**

TABLE OF CASES

In the Law Reviews and Legal Publications

TEXAS ARTICLES

Lindsay Stafford Mader, *Collaborative Family Law?*, 77 Tex.B.J. 466 (June 2014).
William Herrscher, *Love for Trade*, 77 Tex. B.J. 606 (July 2014).
Kate Shearer, *Mutual Misunderstandings: How Better Communication Will Improve the Administration of the Indian Child Welfare Act in Texas*, 15 Tex. Tech Admin. L.J. 423 (Summer 2014).
Jason Nitz, *"Splitting the Baby" Internationally: Evaluating the "Least Restrictive" Conundrum When Protecting Children from International Parental Abduction*, 16 Scholar: St. Mary's L. Rev. & Soc. Just. 417 (2014).
Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction*, 49 Tex. Int'l L.J. 621 (Summer 2014).
Jessica Alexander, *Why the United States Should Define Illegal Adoption Practices as Human Trafficking*, 36 Hous. J. Int'l L. 715 (Summer 2014).

LEAD ARTICLES

Keith Lemmon & Elisabeth Stafford, *Advocating for America's Military Children: Considering the Impact of Parental Combat Deployment to Iraq and Afghanistan*, 52 Fam. Ct. Rev. 343 (July 2014).
Mark E. Sullivan, *Military Custody and Visitation: Problems and Solutions in the Twenty-First Century*, 52 Fam. Ct. Rev. 355 (July 2014).
Steven L. Sayers, Shirley M. Glynn, & Susan McCutcheon, *Family Court and a Review of Family Services in Veterans Affairs*, 52 Fam. Ct. Rev. 371 (July 2014).
Shelley A. Riggs & Angela Cusimano, *The Dynamics of Military Deployment in the Family System: What Makes a Parent Fit for Duty?*, 52 Fam. Ct. Rev. 381 (July 2014).
Glenna Tinney & April A. Gerlock, *Intimate Partner Violence, Military Personnel, Veterans, and Their Families*, 52 Fam. Ct. Rev. 400 (July 2014).
Sean Clark, James McGuire, & Jessica Blue-Howells, *What Can Family Courts Learn from Veterans Treatment Courts?*, 52 Fam. Ct. Rev. 417 (July 2014).
Annette N. Farmer, Anne M. Jackson, & Sandra L. Franklin, *Enduring Hope and Support: Helping Family Court Professionals Incorporate Programs to Build Resilient Families*, 52 Fam. Ct. Rev. 425 (July 2014).

Robert A. Simon, *Special Considerations in Conducting Psychological Custody Evaluations with Military Families*, 52 Fam. Ct. Rev. 440 (July 2014).

Evan R. Seamone, *Educating Family Court Judges on the Front Lines of Combat Readjustment: Toward the Formulation and Delivery of a Core Curriculum on Military Family Issues*, 52 Fam. Ct. Rev. 458 (July 2014).

Hon. Janice M. Rosa, *Mission Critical: A Call to Action for Juvenile and Family Courts, the U.S. Armed Forces, and Veterans Affairs*, 52 Fam. Ct. Rev. 511 (July 2014).

Linda C. Neilson, *At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases*, 52 Fam. Ct. Rev. 529 (July 2014).

Casey Schutte, *Mandating Cultural Competence Training for Dependency Attorneys*, 52 Fam. Ct. Rev. 564 (July 2014).

Charisma J. Ross, *An Alleged Father's Family Medical History: An Introduction to the Nonidentifying Paternal Information Form*, 52 Fam. Ct. Rev. 578 (July 2014).

Mayra Alicia Cataldo, *Save Haven: Granting Support to Victims of Child Abuse Who Have Been Judicially Emancipated*, 52 Fam. Ct. Rev. 592 (July 2014).

Erin D. Thorn, *Drop the Knife! Instituting Polies of Nonsurgical Intervention for Intersex Infants*, 52 Fam. Ct. Rev. 610 (July 2014).

Kathleen A. Hogan, *Sorting Out Your Finances*, 37-SUM Fam. Advoc. 2 (Summer 2014).

Jamie L. Wright, *A Snapshot of the Financial Considerations in a Divorce*, 37-SUM Fam. Advoc. 4 (Summer 2014).

Michelle Chen, *What Your Financial Disclosure Form Tells the Court About You*, 37-SUM Fam. Advoc. 8 (Summer 2014).

Melissa F. Brown, *Get Your Digital House in Order*, 37-SUM Fam. Advoc. 12 (Summer 2014).

Paulette M. Gray, *About Your Finances*, 37-SUM Fam. Advoc. 20 (Summer 2014).

Colin Gotham, *Is Bankruptcy an Option?*, 37-SUM Fam. Advoc. 24 (Summer 2014).

Lee S. Ashmore, *You're Divorced*, 37-SUM Fam. Advoc. 36 (Summer 2014).

Kathleen A. Hogan, *What Should Happen to the House?*, 37-SUM Fam. Advoc. 28 (Summer 2014).

Arin Fife, *Don't Let Divorce Derail Your Retirement Plans*, 37-SUM Fam. Advoc. 30 (Summer 2014).

Generations United, *State Educational and Health Care Consent Laws: Ensuring Children in Grandfamilies can Access Services*, 33 No. 6 Child L. Prac. 129 (June 2014).

Vivek S. Sankaran, *Foster Kids in Limbo: The Effects of the Interstate Compact on Children in Foster Care*, 33 No. 6 Child L. Prac. 140 (June 2014).

Strength-Based Child Interviewing Tips: Preschoolers, 33 No. 6 Child L. Prac. 143 (June 2014).

Ashley M. Vortuba, Sanford L. Braver, Ira Mark Ellman, William V. Fabricius, & Arizona State University and University of California, Riverside, *Moral Intuitions About Fault, Parenting, and Child Custody After Divorce*, 20 Psychol. Pub. Pol'y & L. 251 (August 2014).

Adrienne Hunger Jules & Fernanda G. Nicola, *The Contractualization of Family Law in the United States*, 62 Am. J. Comp. L. 151 (2014).

Rebecca Aviel, *A New Formalism for Family Law*, 55 Wm. & Mary L. Rev. 2003 (June 2014).

Mervate Mohammad, *The Evolution of Sharia Divorce Law: Its Interpretation and Effect on a Woman's Right to Divorce*, 7 Alb. Gov't L. Rev. 420 (2014).

Megan R. Marold, *Ice, Ice, Baby! The Division of Frozen Embryos at the Time of Divorce*, 25 Hastings Women's L.J. 179 (Summer 2014).

Kristine S. Knaplund, *Baby Without a Country: Determining Citizenship for Assisted Reproduction Children Born Overseas*, 91 Denv. U.L. Rev. 335 (2014).

Jay Milbrandt, *Adopting the Stateless*, 39 Brook. J. Int'l L. 695 (2014).

Lauren Standiford, *Mental Health Law – A Parent's Choice in Education is a Fundamental Right but the Services that Follow May Not Be – D.L. Ex. Rel K.L. v. Baltimore City Board of School Commissioners, 706 F.3D 256 (4th Cir. 2013)*, 9 J. Health & Biomedical L. 601 (2014).

ASK THE EDITOR

***Dear Editor*:** My client ("Father") and his former wife ("Mother") were divorced on **June 30, 2010**, in Sherman County. **On or before November 20, 2010,** Mother moved with their child to Moore County. On **April 20, 2011**, Father filed in Sherman County a modification suit and a motion to transfer the suit to Moore County where Mother and their child had resided for more than six months. On **May 1, 2011**, Mother moved with their child to Randall County. On **July 25, 2011**, the Sherman County trial court transferred its continuing, exclusive jurisdiction to Moore County. In **February 2012,** Father moved to Ellis County. On **August 3, 2012,** Mother moved with the Child to Nueces County. On that same date, the child went to visit Father in Ellis County, where he has been ever since as the result of a family violence protective order obtained against Mother. On August 6, 2012, Father filed a motion to transfer continuing, exclusive jurisdiction to either Randall County (where Mother and the Child had resided for the previous six months) or Ellis County (where Father had been residing six months). On **September 26, 2012,** on its own motion, the Moore County trial court transferred its continuing, exclusive jurisdiction to Nueces County. Since continuing, exclusive jurisdiction had already been transferred from Sherman County to Moore County at the initiation of Father's modification suit, did the Moore County trial court have authority to subsequently transfer its continuing, exclusive jurisdiction to Nueces County or any other County? *Confused in Corpus Christi*.

***Dear Confused in Corpus Christi*:** No. When a trial court renders a final divorce decree, it acquires continuing, exclusive jurisdiction over the matters in the decree affecting a child of the marriage. Tex. Fam. Code § 155.001(a); *In re T.J.L.*, 97 S.W.3d 257, 263 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Moore v. Brown*, 993 S.W.2d 871, 873 (Tex. App.—Fort Worth 1999, pet. denied). Once a court has acquired continuing, exclusive jurisdiction with respect to a particular suit affecting the parent-child relationship, no other court has jurisdiction over the suit unless jurisdiction has been transferred pursuant to the exclusive transfer provisions of the family code or an emergency exists. Tex. Fam. Code §§ 155.001(c), 155.201–.207 (transfer provisions), 262.002 (jurisdiction for emergency proceedings); *In re Garza*, 981 S.W.2d 438, 440 (Tex. App.—San Antonio 1998, orig. proceeding).

The Family Code's transfer provisions are exclusive and supplant the Texas Rules of Procedure venue statutes, which govern venue challenges in other types of civil cases. *Leonard v. Paxson*, 654 S.W.2d 440, 441 (Tex. 1983); *In re Leder*, 263 S.W.3d 283, 286 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding); *Kirby v. Chapman*, 917 S.W.2d 902, 907 (Tex. App.—Fort Worth 1996, no writ); *Martinez v. Flores*, 820 S.W.2d 937, 938 (Tex. App.—Corpus Christi 1991, orig. proceeding). Accordingly, reading Sections 155.201(b) and 155.202(b) together with Section 155.204(b) evidences a legislative intent to extinguish a court's authority to transfer its continuing, exclusive jurisdiction very early in the proceedings—*i.e.* immediately after the petitioner files his initial pleadings or no more than twenty days after another party receives notice of the proceedings. Tex. Fam. Code § 155.204(b). And by logical extension, the Family Code's exclusive transfer provisions effectively prevent the transferee court from transferring its continuing exclusive jurisdiction once it acquires it because no party can thereafter timely file a subsequent motion to transfer. *See* Tex. Fam. Code §§ 155.201(b), 155.202(b), 155.204(b).

In your case, the Sherman County trial court acquired continuing, exclusive jurisdiction over the Child when it rendered its June 30, 2010 divorce decree appointing Mother and Father as joint managing conservators. *See* Tex. Fam. Code 155.001(a)**.** Thereafter, the Moore County trial court acquired continuing, exclusive jurisdiction over the proceedings based upon Father's timely filed motion to transfer in conjunction with the filing of his modification suit (initial pleadings) and the Child residing in Moore county for more than six months prior to the filing of the modification suit. *See* Tex. Fam. Code §§ 155.201(b), 155.204(b). Once this initial transfer of continuing, exclusive jurisdiction from the Sherman County trial court to the Moore County trial court occurred, the Family Code provided no mechanism for the Moore County trial court to subsequently transfer its continuing, exclusive jurisdiction in the pending modification suit to any other court. *See* Tex. Fam. Code §§ 155.201-.207. Therefore, all subsequent motions to transfer, including Father's August 6, 2012 motion to transfer to Randall County or Ellis County, and the Moore County trial court's own motion, had no force and effect. *See* *Alexander v. Russell*, 699 S.W.2d 209, 210 (Tex. 1985).

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IN BRIEF

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

Alimony: The New Hampshire Supreme Court drew a distinction between motions to modify alimony and motions to extend alimony, only the former of which requires the movant to meet a "substantial change of circumstances" test. *In re Lyon*, ___ A.3d ___, 2014 WL 2440036 (N.H. 2014). A Massachusetts trial court correctly chose to award rehabilitative alimony to a wife, as opposed to one of the other three types of alimony permitted in Massachusetts (general term alimony, reimbursement alimony and transitional alimony), when the trial court found that the wife had "the ability and the desire to work." *Zaleski v. Zaleski*, 13 N.E.3d 967 (Mass. 2014). A South Carolina trial court erred when it imputed income to a wife for alimony purposes when the sixty-two-year-old wife refused to apply for Social Security benefits because she correctly reasoned that "if you start drawing it earlier, you won't receive as much as if you wait until later." *Crossland v. Crossland*, 759 S.E.2d 419 (S.C. 2014).

Child support: A North Dakota trial court did not err when it reduced an obligor's child support, even though the obligor failed to produce any documents to support her request, because she had lost some of them and "because she did not believe that [the obligee] needed to know that information about her" as to others, when the obligee failed to move to compel discovery. *Devine v. Hennessee*, 848 N.W.2d 679 (N.D. 2014). The Nevada Supreme Court, invoking the UISFA, declined to give full faith and credit to a Hawaii order that reduced an obligor's child support when the obligee and the children remained in Nevada. *Holdaway-Foster v. Brunell*, 330 P3d 471 (Nev. 2014). A North Dakota trial court erred when it mechanically applied guideline child support percentages to increase child support from $2,195 to $39,634.82 per month, following the father's post-divorce business success, rather than taking into account the children's "appropriate needs." *Shae v. Shae*, 849 N.W.2d 173 (N.D. 2014).

Retirement: The Nevada Supreme Court reversed a trial court that permitted an ex-wife to proceed with her motion to divide the ex-husband's retirement benefits when the divorce decree did not mention those benefits, but the ex-husband disclosed the benefits during the divorce proceedings, and the trial court considered them in its findings. *Doan v. Wilkerson*, 327 P3d 498 (Nev. 2014). But the Connecticut Supreme Court reversed a dismissal of an ex-wife's motion to divide pension benefits when the ex-husband failed to list them in his financial affidavit, even though the parties and their counsel had discussed the pension benefits during settlement negotiations. *Reville v. Reville*, 93 A.3d 1076 (Conn. 2014). The Utah Supreme Court held that the statute of limitations did not bar an ex-wife's request for a QDRO, filed more than eight years after the parties' divorce. *Johnson v. Johnson*, 330 P3d 704 (UT 2014). The Maryland Court of Appeals held that state law applied to a non-ERISA retirement plan in a case where the parties mistakenly believed that ERISA applied and the ex-wife argued that the parties' settlement agreement implicitly required the application of federal law. *Robinette v. Hunsecker*, 212 Md. App. 76, 66 A.3d 1093 (2014).

Third parties: A Minnesota ex-wife failed to rebut the presumption of fraudulent transfer when a bank sued her after her ex-husband defaulted on a debt to the bank, after which husband and wife entered into an agreed divorce judgment that assigned the ex-wife the bulk of the marital estate. *Citizens State Bank Norwood Young America v. Brown*, 829 N.W.2d 634 (Minn. App. 2013). A suit by a South Dakota woman and her daughter against the daughter's ex-husband, to collect a debt to the former mother-in-law that the trial court ordered him to pay upon divorce, was barred by limitations; joining the daughter as a plaintiff amounted to "a maneuver around the statute of limitations" that did not succeed because the mother had not sued the daughter for the debt. *Wichman v. Shabino*, 851 N.W.2d 202 (S.D. 2014). An Alaska trial court did not err when, upon divorce, it apportioned liability for a $100,000 loan from the husband's mother equally between the divorcing

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spouses even though the couple used the loan to pay off the wife's student loans. *Richter v. Richter*, ___ P.3d ___, 2014 WL 3766369 (Alaska 2014). A Montana court properly included half of the wife's boyfriend's bank account as part of the marital estate when the wife testified that the money in the account "is not all his, it's not all mine." *In re Marriage of Schmidt*, 239 P.3d 570 (Mont. 2014).

Too much DIY: The Supreme Judicial Court of Maine affirmed a trial court's child protection order against a father who berated and isolated his wife and children, noting that "the father's abuse was chronic, heinous and abhorrent to society," the final straw being broken when the father bought a dental drill so that he could treat his daughter's cavity himself. *In re E.L.*, ___ A.3d ___, 2014 WL 2937093 (Me. 2014).

Unfitness as parent: The Michigan Supreme Court struck Michigan's "one-parent doctrine," which divests custody of both parents even when only one has been proved unfit, as unconstitutional. *In re Sanders*, ___ N.W.2d ___, 495 Mich. 394 (Mich. 2014). A West Virginia trial court erred when it required a mother, whose parental rights to a prior child had been terminated, to show a "change of circumstances" to avoid a subsequent termination, holding that the state "retains the burden of showing by clear and convincing evidence, even in a case in which there has been a prior termination of parental rights, that the subject child is neglected or abused." *In re K.L.*, 759 S.E.2d 778 (W.V. 2014) (per curiam). A divided North Carolina Supreme Court held that a biological father, who did not know he had fathered a child, had no due process rights to contest an adoption because, even though the mother took steps to mislead the father about his paternity, had the father demonstrated more than "incuriosity and disinterest," he would have learned that he was the child's father. *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014).

What? The New Hampshire Supreme Court held that incarceration for a crime does not render an obligor ineligible for a reduction of child support, finding "no evidence in the record from which the trial court could have found that the respondent is voluntarily unemployed: he was involuntarily terminated from his employment following his arrest and incarceration. Likewise, *there is no evidence that his motive for committing the crime which led to his incarceration was to avoid his child support obligations.*" *In re State & Lounder*, ___ A.3d ___, 2014 WL 2624115 (N.H. 2014) (emphasis added).

COLUMNS

OBITER DICTA[1]
By Charles N. Geilich[2]

Have you ever read one of those stories in your local newspaper (okay, website) about someone who has just turned 100 years old? Inevitably, the reporter will ask: "What's your secret to a long life?" I always wish the subject would just say "Avoiding death" and leave it at that, but under the pressure of the press, these people feel compelled to come up with some recipe for longevity. I'm pretty sure they just rattle off some of their habits and pass that off as causation, and by darn, that's good enough for me. I read one such article about a man in his 90s who had scored something like his sixth hole in one in his life, and he attributed his good fortune to having not drunk water in 20 years, just whiskey. That's pure science, people.

Well, anyway, I may not make it to 100, but I did recently turn 50, and you may be wondering how I made it to such a ripe old age. (Yes, I know that many of you are older than that, but just play along). Using the same logic as the centenarians about whom I've read, I'll share with you my very own secrets for living a half century.

[1] Obiter dicta is Latin for a word said "by the way", that is, a remark in a judgment that is "said in passing." It is a concept derived from English common law.

[2] Mr. Geilich is a writer, family lawyer, and full-time mediator in the DFW Metroplex. He's doing what he can with what he's got and can be reached at cngeilich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

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First, avoid death. This is not as easy as it sounds, and I'm not even talking about the tragic illnesses over which one has no control. I mean, don't do the really dumb stuff that would make people laugh first, then cover their mouths and say, "Oh, no, that's terrible, just terrible. But really, what was he thinking?" When I was younger, I used to fear dying in a bizarre fashion like getting my hair caught in a blender or the worst, drowning in an inch of water, which I was repeatedly told could happen. My mother had me so worried about motorcycles that it didn't even occur to me that most motorcycle deaths occur while driving one; I was pretty sure the things just exploded when you touched them. So I've avoided blenders, shallow water and motorcycle contact.

I watch a lot of football, so obviously that has helped. Not just any football, though, by accident of birth, I'm a Cowboys fan, so I was introduced early in my life to great success, and then I watched the rug pulled out from my team. This kind of early success followed by years of mediocrity has been important to my longevity. It keeps me hanging on for one more Super Bowl, or maybe just a playoff victory. I pity the fans of successful teams who have nothing more to live for.

Golf is critical. Play as often as you can. Now, some of you may be thinking, yes, any kind of recreational activity or hobby is good, but no, I mean golf. That's what I have done, it has worked for me, *ipso facto*, golf is the way to go. (FYI, spell check really wants to make *ipso facto* into "Pismo factor," so be careful.) Don't swim in the ocean because there are bitey things in there.

Now, this next one is a bit tricky. You may have read about the importance of social contact to a long and happy life, and that may be true, up to a point. But contact with jerks will lead to the opposite result, so if the only social contact you have is with jerks, you'd be better off watching TV. Even bad TV.

There's so much more wisdom I could impart, even borrowing from Google ("Don't be evil") and the President's foreign policy mantra ("Don't do stupid stuff"), but let's leave it with the nonagenarian who advised whiskey over water. Brilliant. Of course, being 50 instead of 100, my advice can be no better than 50% correct.

EFFORTS MATTER—COLLATERAL INFORMATION IN PSYCH EVALS

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

Don’t minimize the importance of psychologists’ efforts to obtain collateral information (relevant third party interviews and records reviews) for their child custody evaluations. Three elements make up competent evaluations: interviews of the parties and children; psychological testing; and collateral information. The importance of the first two elements are obvious: Parents and children must be interviewed; psychological testing can suggest or identify emotional concerns in the parents or children that should inform final recommendations. Lawyers rightly key on these first two elements when they depose or cross examine psychologists. But evaluators sometimes neglect to inform their opinions and recommendations with sufficient, relevant collateral information. Unfortunately, lawyers pass on opportunities to explore evaluators’ efforts to gain that information. How evaluators use collateral information reflects the quality of their work: Skillful use of relevant collateral information offers key input to reliable evaluation conclusions; poor or minimal use of collateral information leads to insufficient conclusions that are subject to evaluator biases.

An evaluator’s review of relevant collateral information in a child custody evaluation serves several purposes. First, it is standard practice for forensic psychological evaluations; likewise, “obtaining information from relevant collateral sources” is required for social studies that address child custody questions. Tex. Fam. Code, § 107.0514(a)(4). Second, it broadens the evaluation from merely a “he-said/she said” battle of allegations and offers the evaluator opportunities to assess the credibility of concerns alleged by parents and children examinees. Third, it provides chances to weigh alternative explanations of the evaluation data—a key step to counter biased conclusions. In sum, the collateral information element of a competent psychological evaluation is critical to the reliability of an evaluator’s opinions and recommendations.

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[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. His second book, How to Examine Mental Health Experts: A Family Lawyer’s Guide to Issues and Strategies, is newly published by the American Bar Assn. 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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One way to gauge the importance of collateral information to an evaluator is to discover what collateral information she thought from the evaluation's early stages could contribute to the evaluation's conclusions. For example: What collateral information was part of the evaluator's initial "game plan" for conducting the evaluation? To whom and for what purposes did the evaluator ask the examinee to sign releases of information? Evaluation conclusions can be compromised when evaluators, despite asking examinees to sign releases for collateral information, end up ignoring that information when developing their conclusions.

An evaluator's efforts to pursue collateral information matter. Sometimes collateral sources resist responding to an evaluator's initial requests to talk or send records (e.g., doctors are busy; teachers don't want to get involved). Other times, evaluators try to contact collateral sources too late in the evaluation (e.g., when evaluators send the examinee-signed releases for records within one week of submitting the evaluation report to the court or to the lawyers). And other times, evaluators don't exert sufficient effort to follow-up their attempts to contact collateral sources (e.g., they mail or fax requests for information and then passively wait for the collateral sources to respond).

Insist that experts reveal all their efforts to get collateral information that they initially thought was necessary but did not obtain. Consider asking three questions:

• What collateral sources did you initially consider important to pursue?

If these sources were considered important in the evaluation's early stages, why are their omissions acceptable at the evaluation's end?

• How assertively did you pursue contacting collateral sources?

Did you attempt to contact these sources early in the evaluation and then follow-up if the initial efforts were unsuccessful? Did you wait until the end of the evaluation before attempting to contact important relevant collateral sources—too late to obtain the examinee's perspectives on the collateral information or to incorporate the information into your conclusions?

• How does the missing collateral information limit the reliability of your evaluation conclusions and recommendations?

If those collateral sources were initially considered important to develop your conclusions, in what ways are your conclusions limited or compromised by your lack of information from those collateral sources?

Don't let an evaluator's passive approach to obtaining relevant collateral information go unchallenged. Efforts matter.

BEFORE THE CLOCK STRIKES 12: TOP 5 YEAR END FINANCIAL PLANNING CHECKLIST

By Christy Adamcik Gammill, CDFA[1]

1) Charitable Giving

If you have stock or other assets that have a low cost basis or have greatly appreciated, consider giving the asset directly to the charitable organization instead of cash.

If you bought Exxon Mobil in 1985 for $5 a share and it is now worth $100 a share, you would have a gain of $95 per share (assuming for the purpose of simplicity that no dividend reinvestments or other adjustments to the cost basis) and have to pay tax on the $95 at a rate of up to 20% to liquidate the stock and donate the proceeds of only $8,100 directly. Alternatively, you can simply transfer the stock to the charity and pay no income tax on the liquidation of the investment. Here is the quick math on your savings:

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

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$5 per share cost basis for 100 shares or $500

$100 market value x 100 shares = $10,000
$95 gain per share

$10,000 - $500 = $9,500 x 20% = $1,900 in tax owed to sell the stock

2) Beneficiary Designation Review

If you have had a Life Transition occur recently or it has been more than 3 years since your last review, you may want to revisit your current beneficiary designations.

Have you recently gotten married? Had a Child? Gotten Divorced? Received an Inheritance? Have you lost your Spouse or has your former Beneficiary passed away?

These are examples of events that trigger a review of Beneficiaries on your life insurance policies, annuities and/or retirement plans such as (401(k)s, IRAs, SEP IRAs, KEOGHs, Money Purchase Plans, Defined Benefit Plans or Pensions).

3) 2014 Retirement Plan Contributions

If you have not already maximized your 2014 contributions, you may want to consider deferring more money into your retirement plan and get a deduction on your 2014 income taxes. A few funding deadlines and contributions limits for some of the most popular plans are listed below.

401(k) - If you are a participant of a 401(k) plan, you have until December 31st to defer up to $17,500 or 100% of your income, whichever is less, if you are under age 50. If you are 50 or older this year you may contribute an additional $5,500 as a catch-up contribution for a total of $23,000 pre-tax savings.

For Traditional or Roth IRA Contributions you may contribute $5,500 for this tax year or if you are under age 50 or an additional $1,000 for a total of $6,500 if you are age 50 or older. You have until April 15th or tax filing date if it is prior to that time to fund your account.

For the self-employed, if you have a SEP IRA you may defer as much as $52,000 and you have until October 15th of 2015 or your tax filing date if it is earlier to fund your plan. If you missed 2013, it may not be too late!

4) Tax Loss Harvesting*

If you have some loser positions in your portfolio that need to be sold, you may want to consider taking advantage of any unrealized losses in your portfolio and recognize the loss by selling the position(s) by year end. This can potentially offset capital gains tax due on assets that were winners or were sold and recognized a gain in 2014.

5) Income Deferral

Have more income than you have coming due to you this year? Consider asking your employer to pay you any year-end bonuses or incentive awards in January. If you have billing due, consider sending out invoices in January. If you have not maxed out your retirement plans as outlined in #3, consider doubling up now.

Exercising one or more of these tips that are applicable to you may be able to ultimately save you money in income taxes for 2014, which can potentially put more money in your pocket!

*In no way does this article represent tax or legal advice. Please consult your own tax advisor or financial advisor for year-end planning strategies and income tax calculations.

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ARTICLES

WHAT DOES SPECIAL EDUCATION HAVE TO DO WITH MY SAPCR?

By George H. Shake[1]

One hears about divorce rates as high as 70%-90% for couples with children with disabilities. However, these numbers are controversial and are very difficult to confirm. What is clear is that approximately 10% of the children in America have disabilities. Whether a child who is the subject of a Suit Affecting the Parent-Child Relationship (SAPCR) has a disability is a factor courts consider in determining child support, conservatorship and much more.

Federal and state law requires schools to identify, find and evaluate children with disabilities, regardless of whether the children attend public school or not, and at no cost to parents. For over forty years public schools have been testing children for disabilities. Your client's child between the ages of 3-21 has the right to a free evaluation that addresses whether the child has disabilities, and if so, what levels of support that child needs.

In your SAPCR case, you should have at your disposal a current and thorough evaluation of any child suspected of having a disability. Why not obtain that evaluation for free? Along with an evaluation, you will have access to the detailed education plan created just for your client's child. Finally, the professionals who evaluated the child and created the education plan might prove to be very effective, and affordable, expert witnesses as to the test results and the nature of the child's disabilities.

Deviation From Child Support Guidelines

Alice filed for divorce in Texas. Dereck responded by filing a hand-written note with the trial court that a divorce action was pending in California. When Dereck did not appear in the Texas court on the trial date, Alice received a default judgment for child support in excess of the guidelines because one of the couple's children had an intellectual disability. The court ordered Dereck to pay Alice almost $500.00 a month in support for the disabled child in addition to standard child support. Dereck appealed and the Court of Appeals affirmed because there was evidence that one of the children had an intellectual disability and required special care. Courts are permitted to deviate from child support guidelines based on the special needs of a child under the Texas Family Code Section 154.123(b). Section 154.123 permits courts to order periodic child support payments in an amount other than those established by the guideline if the evidence rebuts the presumption that their application is in the best interest of the child and justifies a departure from the guidelines. *In re Lamirault*, 2001 WL 1166373 (Tex. App.—Amarillo February 27, 2001, no pet.) (not designated for publication).

Katherine filed a modification suit against John to modify child support, conservatorship, and possession and access of their three children due, in part, to the increased needs of the children due to their disabilities. At the time of their divorce, concerns had arisen that one of the children might have some learning disabilities. To address that concern, the agreed final divorce decree included provisions to address educational testing, an educational consultant, and educational decisions and expenses. Over the course of the four years after the divorce, all three children were evaluated, diagnosed, and treated for disabilities. In this, the third, modification suit, the trial court ordered an increase in child support due, in part, to the proven increased needs of the children since the divorce. The Court of Appeals upheld the trial court's finding, stating that there was ample evidence that the children have developed special needs since the original award of child support, including various medical and dental appointments, different types of therapy, tutoring, and activities. The Court upheld the increase in support from $1,500 to $3,600, which was $1,350 above-guideline support because of the consideration of the Section 154.123(b) factors. Courts can consider these factors when determining whether there has been a material or substantial change of circumstances that warrants a modification of an existing child support order. *See* Tex. Fam. Code § 156.402; *Stritzinger v. Wright*, 2011 WL 677402 at *10 (Tex. App.—Austin February 23, 2011, pet. denied) (mem. op.).

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William and Laura persuaded one court to take the unique perspective that ordering no child support was in the best interest of their daughter with cerebral palsy. The child had been receiving Supplemental Security Income and Medicaid benefits since her infancy. William was originally ordered to pay Laura $500 each month in child support, but only in the name of the couple's other daughter. Upon that child reaching the age of majority, William ceased paying child support. The Office of the Attorney General petitioned the court to modify the child support so that the support would continue. William presented evidence, including Laura's testimony, that he supported the child informally by caring for her a significant portion of the time, purchasing clothing and other items for her, and paying half of her uninsured medical expenses. William also argued that if the child received formal child support, her government benefits would be reduced. The trial court and the Court of Appeals found these arguments persuasive and ordered no child support. The Court of Appeals relied on Section 154.123(b) for guidance. *In the Interest of B.A.L.*, 2012 WL 627985 at *4 (Tex. App.—Amarillo February 27, 2012, no pet.) (mem. op.).

Support Beyond 18

Adult children with disabilities may be entitled to support from either or both of their parents for an indefinite period. Tex. Fam. Code § 154.302(a). A court may order such support if it finds that (i) the child requires substantial care and personal supervision, (ii) that care and supervision is required due to a mental or physical disability, (iii) the child will not be capable of self-support, and (iv) the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child. Tex. Fam. Code § 154.302(a)(1)-(2).

One court found that a child suffered from muscular dystrophy and would be incapable of being self-supporting after the age of 18. The court ordered the father to pay child support beyond the child's 18th birthday. But, when the child turned 18, the father ceased paying child support. The mother sought to modify the child support order so that the child received support from the father for an indefinite period. The trial court ordered the father to pay $1,465.50 a month for the child's needs, fifty percent of the child's medical expenses, and fifty percent of all expenses to replace the wheel-chair equipped van. The father appealed because the divorce decree included the finding that the child would not be capable of self-support, it did not explicitly state that the child required substantial care and personal supervision. The father argued that the finding that the child required substantial care and personal supervision must be stated in the order to find that an adult child requires child support. The Court of Appeals disagreed and held that the omitted element of requiring substantial care and personal supervision may, under rule 299, be supplied by presumption if it is supported by the evidence. *See* Tex. R. Civ. P. 299; *In re W.M.R.*, 2012 WL 5356275 at *4-6 (Tex. App.—Fort Worth November 1, 2012, no pet.) (mem. op.).

Jillian was blind in one eye, had frequent eye doctor appointments, and used medicated eye drops. In the course of a modification suit, the court ordered Allan, Jillian's father, to pay child support for Jillian until she turned 21 due to her disability. When Jillian turned 18, Allan filed another modification suit requesting the court to decrease or terminate the child support payments because she no longer qualified as disabled under the Texas Family Code. Allan contended that because Jillian graduated from high school, was 18 years old, professed to be no different from other teens, received academic scholarships supporting her college tuition and livelihood, and received small amounts of spending money from her mother, she did not qualify as an adult disabled child. Lisa, Jillian's mother, testified that Jillian's condition is noticeable to the average person because her eyes constantly jump, and she is completely blind in one eye, preventing her from obtaining a driver's license. Lisa further testified that Jillian's disability requires regular visits to glaucoma specialists, low vision clinics, and eye drop medication. The court found that the Jillian's disability currently existed and her disability required present and future substantial care. As a result, the court ordered Allan to pay $ 500.00 per month directly to Jillian until she turned 21. Allan objected to the court's reliance on Lisa's testimony to determine that Jillian was disabled and appealed. The Court of Appeals upheld the trial court's decision to rely on Lisa's testimony because she resided in the same household as Jillian and was her conservator. The Court held that it was possible, based on these facts, that the trial court concluded Lisa was in the best position to know of Jillian's condition. Allan also contended that the trial court abused its discretion in finding that Jillian was in need of substantial care and personal supervision when there was no evidence that she needed such care and supervision as a direct result of her disability. The Court held that the record contained

sufficient evidence supporting the trial court's decision concerning all the required elements to find an adult child to be disabled. Regarding the first element, both Jillian and Lisa testified that Jillian continued to experience visual impairment. As a result of her disability, Jillian required regular doctor visits, specialists' attention, and medication. ***Therefore***, because Jillian's visual impairment existed and required medical attention, ***it is likely that*** substantial care and personal supervision are required to help Jillian with her disability. *In the Interest of J.L.F.*, 2002 WL 1625572, at *1-3 (Tex. App.—San Antonio July 24, 2002, no pet.) (not designated for publication).

Possession and Access

Michael and April's daughter was blind, wheelchair bound, fed through a tube, and was severely retarded. She required care twenty-four hours a day. April filed for divorce and the trial court denied Michael overnight visits with the child for two years. Michael appealed arguing that the evidence did not support this restriction. The appellate court found that the record supported the trial court's variance from the standard possession order in drafting the terms of the appellant's visitation. The Texas Family Code provides guidelines for the determination of the periods of possession. Tex. Fam. Code § 153.192(b). The Texas Family Code also includes a rebuttable presumption that a standard possession order: (1) provides reasonable minimum possession of a child for a parent named as a possessory conservator or joint managing conservator; and (2) is in the best interest of the child. Tex. Fam. Code § 153.252. Finally, the Code also permits a trial court to deviate from the standard possession order in consideration of: (1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named possessory conservator; and (3) any other relevant factor. Tex. Fam. Code § 153.256. The Court held that the record was replete with testimony regarding the child's severe disabilities and the type of care she requires, and contained evidence of Michael's lack of involvement in her medical care prior to his divorce. Therefore, the Court found the trial court did not abuse its discretion by denying overnight visitation. *Niskar v Niskar*, 136 S.W.3d 749,756 (Tex. App.—Dallas 2004, no pet.).

Conservatorship

Once a trial court appoints joint managing conservators and designates the parent who has the exclusive right to determine the primary residence of the child, it then has the discretion to either establish whether there will be a geographic restriction. *See* Tex. Fam. Code § 153.134(b)(1); *Yasin v. Yasin*, 2011 WL 5009895 at *3 (Tex. App.—Austin October 21, 2011, no pet.) (mem. op.). Amir and Lucy had a twelve year old daughter with autism. Leading up to the trial in their divorce, they entered into an agreement regarding child custody. Their agreement included a geographic restriction. During the course of the trial, Lucy testified that if she were not awarded spousal maintenance she would request that the geographic restriction be lifted. At the conclusion of the trial, the trial court announced that it was granting the divorce and was adopting the parties' agreement, including the geographic restriction. But, one week after the trial, the court notified Amir and Lucy that, upon further review, the court had decided that the geographic restriction would be removed from the final divorce decree. Amir objected and the trial court held a hearing to reconsider its prior ruling on the geographic restriction. The court did not modify its ruling and Amir appealed. The Court of Appeals relied on *Lenz v. Lenz* for guidance. In *Lenz v. Lenz*, the Texas Supreme Court provided a variety of factors relevant to the determination of whether a geographic restriction is in the best interest of the child. *See Lenz v. Lenz*, 79 S.W.3d 10, 15-16 (Tex. 2002). The *Lenz* factors include the accommodation of a child's special needs. Evidence at the trial included the fact that Lucy and Amir's daughter had autism and Lucy cared for her needs on a daily basis. Based on this evidence, inter alia, the Court held that the trial court's findings of fact were supported by sufficient evidence. The Court also held that the trial court could have reasonably concluded that permitting Lucy to relocate without geographic restriction was in the best interest of the child. The Court concluded that the parties' agreement was unenforceable related to the geographic limitation.

The quality of care that a child with a disability receives may be considered by courts in determining whether a modification to custody is warranted, if that care represents a material and substantial change in the circumstances of that child. When one mother asserted this issue, the court was not persuaded. Laurie and Kenneth had twin girls, one of whom had a learning disability. One month after their divorce was finalized, Laurie's boyfriend proposed and let Kenneth know that they were planning to move from Amarillo to Houston (despite a geographic restriction). Kenneth attempted to pick up the children for a scheduled visitation the next day, only to learn that they had already moved to Houston. The next day Laurie filed a Motion to

Modify, and Kenneth filed a Motion to Enforce and a Motion to Modify. The court heard evidence from Laurie that the level of care the parties' one daughter was receiving for her learning disability in Houston was greater than what she had been receiving in Amarillo. The court held that it was in the best interest of the children for Kenneth to have primary possession with the right to determine their residence and to make decisions concerning their health, education and welfare. The Court of Appeals affirmed and noted that Laurie presented no evidence that the parties' daughter with a disability received superior treatment for her learning disability in Houston than she did, or would, receive in Amarillo. *In re Cooper*, 1999 WL 97951 at *3 (Tex. App.—Amarillo February 26, 1999, no pet.) (not designated for publication).

Recall above that in *Stritzinger v. Wright*, Katherine filed a modification suit against John to modify child support, conservatorship, and possession and access of their three children due, in part, to the increased needs of the children due to their disabilities. One reason that Katherine asserted for seeking sole conservatorship was that one daughter's educational needs had changed since the last court order establishing the schools to be attended by the children. John filed a counterpetition to modify and motion for enforcement, seeking among other things, to be granted the sole right to determine the children's educational needs after consultation with certain professionals. The district court modified the joint managing conservatorship provision, appointing Katherine as sole managing conservator and John as possessory conservator. The court relied on the testimony of several experts regarding the needs of the children related to their disabilities. There was evidence presented that the parties' daughter's educational needs had changed, that she was no longer "impaired," and that she was ready to return to her regular school. There was also evidence that the parties' son had been diagnosed with dyslexia about a month before trial, but that if the boy was required to change schools, "he would be emotionally devastated." Evidence was presented that Katherine had acted in the boy's best interest by allowing him to stay at his current school with the help of a specialist working on the reading problems in combination with the classroom teacher. There were many more facts involved in the court's decision to change conservatorship other than just the changes in the children's disabilities, but the Court of Appeals determined that the evidence presented at trial amply supported the district court's conclusion that there had been a material and substantial change in circumstances and that awarding sole conservatorship to Katherine was in the children's best interest. *Stritzinger*, 2011 WL 677402 at *9.

Final Thoughts

It is important to remember that a child's local public school, whether the child attends school there or not, is obligated to test the child for any suspected disabilities at NO COST to your client. It is also helpful for parents to understand that there are government benefits for children that can be affected by various provisions in a court order, but most specifically a child support provision. Although one court in the case above, *In the Interest of B.A.L.*, found the parties' solution of awarding no child support to be the best way to protect the child's government benefit, many experts in the field would encourage the alternative solution of a special needs trust. A court can order that a parent pay child support to a special needs trust, if the proper arrangements are made. This protects the child's government benefits and allows the court to ensure that the child is properly supported by the parents. We call this a win-win!

MYTHS OF DRUG TESTING

By Jim Turnage[1]

ABSTRACT

The objectives of this article are to provide information regarding the most current drug testing nuances, technical applications and limitations of the various drug and alcohol testing methods for the reader that is not a toxicologist or chemist but needs answers in laymen's terms. It will explain the myths and truths about drug and alcohol testing including the products used, or attempted to use, with the intent to falsify, manipulate, alter or negate a test result by cleansing his or her system of all "toxins" or more commonly called…….. ILLEGAL DRUGS! The illegal drugs are still being used but many users are changing to the current or trending

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"Designer Drugs" to conceal their drug use because the lab may or may not be able to test for it. Labs have and continue to develop tests for "Designer Drugs" but if it was not requested by the attorneys to be in the court order, MSA, etc. then the drug user continues his or her drug use undetected and unabated.

INTRODUCTION

In a family law case, it is common for one party to accuse the opposing party of substance abuse. As a result, drug and alcohol testing has become a commonplace tool used to determine the accuracy of substance abuse allegations and issues related to custody and possession. When used properly, drug and alcohol testing is a valuable tool. Armed with the proper information, drug and alcohol testing can then be used to provide evidence of use and non-compliance with the court orders or abstinence and compliance with court orders. Unfortunately, judges and attorneys are often uninformed regarding the advantages and disadvantages of the various testing methods and myths, which results in drug and alcohol testing that is inappropriate to the specific circumstances of the case.

All tests referenced in this article are forensic tests therefore HIPAA regulations do not apply. Forensic means we are looking for the evidence of the drug and drug metabolites in the specimen to be tested. HIPAA regulations apply to medical or monitored drug tests. The one exception that HIPAA may apply is when using a razor blade (a medical device) to scrape the nails to collect the sample. This is discussed again under nail testing.

DRUG TESTING IN GENERAL

Most drug tests are performed by urine. The second most common is hair followed by nails, saliva and sweat.

Urine - Urine testing is the most common and has a broader window of detection than saliva testing. Urine can test for the greatest range of detectable drugs. The detection window is a few days to a week. Marijuana is the exception with a detection window up to 30 to 40 days for chronic users and less for infrequent users. The longest documented detection of marijuana after a chronic user quit is 77 days. But this is the exception and not the normal window of detection. Urine testing is best used if the person is suspected of recently ingesting or consuming drugs and for random testing.

Saliva – Oral fluid testing is becoming more popular but must be used for the right circumstances. Two types of oral fluid testing exist. One is an instant test providing results within a few minutes. This is a screen only with a high possibility of a false positive and not admissible in court proceedings. Positive saliva screens should be sent to the lab for a confirmation test. The second type is the saliva sample that is sent to the lab for initial screening and confirmation if the screen is positive. The saliva kits have a shorter window of detection than the lab based urine tests. Oral testing can detect drugs in the saliva within 10 minutes of ingestion with a window of detection up to 24-48 hours depending on the drug. The instant kits are often not beneficial in certain scenarios, not sensitive enough to detect certain drug classes and shorter windows of detection as compared to the lab based urine tests. This type of testing is good for post accidents and reasonable suspicion testing. The possibility of a false positive does exist when using the instant kit without a lab based confirmation test.

Hair - Hair testing is non-invasive and used to indicate long term use. It is not a "follicle test" since the follicle is not attached to the hair or the part of the hair that is tested. Hair test accurately describes the test being performed. It takes approximately 150 strands of hair to have sufficient quantity to perform the test not 1 or 2 strands as many believe. Drugs are captured in the core of the hair as blood passes through the hair follicle. The standard test from head hair covers a 90-day window of drug use. The most recent two weeks is eliminated since the hair is growing from follicle to above the scalp plus the thickness of the scissors. During collection of the sample, the hair is cut as close as possible to the scalp or body. The standard head test includes the first 1 ½ inches closest to the root end representing a 90 day window. Degradation starts to occur beyond 1 1/2 inches preventing an accurate test, or picture, of what actually occurred regarding drug use. Body hair may be used when head hair is too short or non-existing. The window of detection for body hair can be as long as 12 months but may be much shorter. Body hair grows for 7 to 12 months and then becomes dormant. Hair testing is accurate but caveats exist. Marijuana is harder to detect than other drugs. Admitted marijuana users occasionally have negative test results. Another explanation for a negative test for marijuana, or any drug, can result from shampoos designed specifically to remove the drug from the core of the hair. Some of

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these products help reduce the levels, some do not. Even bleaching or coloring the hair has an effect of reducing the levels of the drug in the hair. If the shampoos, bleaching, coloring, stripping, and other hair products are used frequently, this could get the level of the used drug below the cutoff level resulting in a false negative.

Nails - Fingernail and toenail testing is relatively new in drug testing. It is being used when the donor shaves his or her head and body to avoid a hair test or the use of shampoos, bleaching, stripping, and relaxers are used or suspected of being used. The detection of a drug in nails is accurate. Nail and hair are the same material, keratin, and the labs use the same methodologies with each. The window of detection in finger nail clippings is usually 3 to 6 month. Toe nails grow approximately 4 times slower than finger nails providing a window of detection that could be 8 to 12 months. Numerous variables exist regarding the growth rate of the nails.

Future testing – Breath testing for illegal drugs is in the developing stages.

COMMONLY ABUSED DRUGS

Abused drugs have many street names. A comprehensive list can be found by searching the internet with terms such as "drug street slang."

Alcohol: Alcohol, a legal drug, is often abused and habitual use can lead to addiction with significant physical and psychological health problems. Alcohol is rapidly metabolized by the liver into its principle chemical components including carbon dioxide and water. Alcohol is within the family of depressant drugs with symptoms including slurred speech, loss of motor coordination and impaired judgment. Alcohol is consumed primarily for its psychotic effects, which include a loss of inhibitions and euphoria.

Amphetamine: (AMP) Amphetamines are central nervous stimulants whose effects include alertness, wakefulness, increased energy, reduced hunger and an overall feeling of well-being. Large doses and long term usage can result in higher tolerance levels and dependence. Today, two of the most common sources for amphetamine is the prescription Adderall and Vyvanse.

Barbiturates: (BAR) Classified generally as depressants, barbiturates produce a state of intoxication that is remarkably similar to alcohol intoxication. Symptoms include slurred speech, loss of motor coordination, and impaired judgment. Depending on the dose, frequency, and duration of use, one can rapidly develop tolerance, physical dependence, and psychological dependence on barbiturates. Barbiturate abusers prefer the short-acting and intermediate-acting barbiturates pentobarbital (Nembutal), secobarbital (Seconal), and amobarbital (Amytal). Other short-and intermediate-acting barbiturates are butalbital (Fiorinal, Fioricet), butabarbital (Butisol), talbutal (Lotusate) and aprobarbital (Alurate). After oral administration, the onset of action is from 15 to 40 minutes and the effects last up to 6 hours.

Benzodiazepines: (BZO) Also classified as depressants, benzodiazepines are used therapeutically to produce sedation, induce sleep, relieve anxiety, muscle spasms, and prevent seizures. In general, benzodiazepines act as hypnotics in high doses, as anxiolytics in moderate doses and as sedatives in low doses. Like the barbiturates, benzodiazepines differ from one another in how fast they take effect and how long the effects last. Shorter acting benzodiazepines, used to manage insomnia, include estazolam (ProSom), flurazepam (Dalmane), quazepam (Doral), temazepam (Restoril) and triazolam (Halcion). Benzodiazepines with longer durations of action include alprazolam (Xanax), chlordiazepoxide (Librium), clorazepate (Tranxene), diazepam (Valium), halazepam (Paxipam), lorazepam (Ativan), oxazepam (Serax) and prazepam (Centrax). Abuse of Benzodiazepines occurs primarily because of the "high", which replicates alcohol intoxication. Approximately 50 percent of people entering treatment for narcotic or cocaine addiction also report abusing benzodiazepines.

Cocaine: (COC) Cocaine is made from coca leaves. Its effects include alertness, wakefulness, increased energy, and an overall feeling of euphoria. Cocaine may be smoked, inhaled ("snorted") or injected.

Designer Drugs: The Merriam-Webster Dictionary defines it as "a synthetic version of a controlled substance (as heroin) that is produced with a slightly altered molecular structure to avoid having it classified as an illicit drug." The new ones today are created and marketed as a safe alternative to illegal drugs to avoid the existing drug laws by altering or modifying the drugs chemical structure or creating new drugs with completely different chemical structures that gives the user similar effects to the illegal drugs. The manufacturers will label the

product “Not for human consumption” or “Does not contain synthetic marijuana” or “For aroma therapy only” or “Plant vitamin” to circumvent current drug laws. Accessibility to buy these drugs is easy for all ages. The products are sold by friends, dealers, head shops, convenient stores, and the internet.

Ecstasy: Methylenedioxymethamphetamine (MDMA) is a designer drug first synthesized in 1913 by a German drug company for the treatment of obesity. Those who take the drug frequently report adverse effects, such as increased muscle tension and sweating. MDMA is not clearly a stimulant, although it has, in common with amphetamine drugs, a capacity to increase blood pressure and heart rate. MDMA does produce some perceptual changes in the form of increased sensitivity to light, difficulty in focusing, and blurred vision in some users. Its mechanism of action is thought to be via release of the neurotransmitter serotonin. MDMA may also release dopamine, although the general opinion is that this is a secondary effect of the drug. The most pervasive effect of MDMA, occurring in almost all people who have taken a reasonable dose of the drug, is to produce a clenching of the jaws. Symptomatic and biological responses to MDMA are similar to those produced by methamphetamine.

Methadone: (MTD) Although chemically unlike morphine or heroin, methadone produces many of the same effects. Methadone is primarily used today for the treatment of narcotic addiction. It is also used as a mild pain reliever. The effects of methadone are longer lasting than those of morphine-based drugs. Methadone’s effects can last up to 24 hours, thereby permitting administration only once a day in heroin detoxification and maintenance programs. Ironically, methadone, used to control narcotic addiction, is a frequently abused narcotic, often encountered on the illicit market and methadone has been associated with a number of overdose deaths.

Methamphetamine: (MET or M-AMP) Methamphetamine is a stimulant drug. It is used in pill form or in powdered form by snorting or injecting. Crystallized methamphetamine is inhaled by smoking and is a considerably more powerful form of the drug. Some of the effects of methamphetamine use include: increased heart rate, wakefulness, physical activity, and decreased appetite. Methamphetamine use can cause irreversible damage to the brain, producing strokes and convulsions, which can lead to death.

Opiates: (OPI) Opiates are any of the addictive narcotic drugs derived from the resin of the poppy plant. Opiates are analgesics or pain reducers. Doctors often prescribe them for severe or chronic pain. Opiates are very addictive, both physically and psychologically. Some commonly used opiates are: Codeine, Heroin, Morphine, Opium, Percodan, Dilaudid, and Hydrocodone. Opiates are commonly referred to as “downers.” Opiates can appear in many forms: white powder or crystals; small white, yellow or orange pills; large colorful capsules; clear liquid and dark brown, sticky bars or balls. Heroin accounts for the majority of the illicit opiate abuse. Some physical indications of opiate use include: extreme loss of appetite and weight, needle tracks or punctures, black and blue marks from “skin popping”, scars along veins, cramps, nausea, vomiting, excessive scratching and complaint of itching, excessive sweating, constipation, raw, red nostrils from snorting, runny nose, pin-point pupils and watery eyes, reduced vision, drowsiness, euphoria, trance-like states, excessive thirst, tremors, twitching, unkempt appearance, strong body odor, irritability, chills; slight hallucinations and lethargy. Opiates reduce attention span, sensory and motor abilities, produce irrational behavior, depression, paranoia, and other psychological abnormalities.

Oxycodone: (OXY) Pharmaceutical drugs Percodan, Percocet, Roxicodone, Oxycontin. While classified as an Opiate, the chemical structure and metabolite of Oxycodone requires a separate Opiate test with a substantially higher sensitivity detection level than that of the standard Opiate drug test. Consequently, a positive test result will not only confirm Oxycodone but other prescribed opiates as well that were listed under Opiates in the previous paragraph. Oxycodone is generally prescribed in oral pill form with the analgesic buffer Acetaminophen. Acetaminophen, 4’-hydroxyacetanilide, is a non-opiate, non-salicylate analgesic and antipyretic, which occurs as a white, odorless, crystalline powder, possessing a slightly bitter taste.

Phencyclidine: Phencyclidine hydrochloride (PCP), also known as “angel dust,” is a hallucinogen. PCP is commonly taken orally, by inhalation, by snorting or injection. The effects of this drug are unpredictable and variable. Users may exhibit signs of euphoria, anxiety, relaxation, increased strength, time/space distortions, panic or hallucination. PCP use can lead to paranoia and extreme irrational behavior. Once popular, PCP use has declined dramatically in recent years and is no longer considered a major drug of abuse. However, it is still available on the streets and used by certain groups.

Propoxyphene: (PPX) is a narcotic analgesic compound bearing structural similarity to methadone. As an analgesic, propoxyphene can be from 50-75% as potent as oral codeine. Darvon and Darvocet are two of the most common brand names for the drug. Darvocet contains 50-100 mg of propoxyphene napsylate and 325-

650 mg of acetaminophen. Peak plasma concentrations of propoxyphene are achieved from 1 to 2 hours post dose. In the case of overdose, propoxyphene blood concentrations can reach significantly higher levels.

Marijuana: Tetrahydrocannibinol (THC) is an active component in marijuana. Marijuana, a hallucinogen, is commonly ingested by smoking, but it may also be eaten. Marijuana Honey Oil and liquid THC is relatively new on the streets. Marijuana may impair learning and coordination abilities. Marijuana is most commonly the drug of choice among teenagers and young adults. The hallucinogenic effect of Marijuana can lead to irrational behavior, disorientation, and paranoia. Marijuana is the most common recreational drug of abuse. All forms of cannabis have negative physical and mental effects. Several regularly observed physical effects of cannabis are a substantial increase in the heart rate, bloodshot eyes, a dry mouth and throat, and increased appetite. Use of cannabis may impair or reduce short term memory and comprehension, alter sense of time, and reduce ability to perform tasks requiring concentration and coordination, such as driving a car. Motivation and cognition may be altered, making the acquisition of new information difficult. Marijuana can also produce paranoia and psychosis. Because users often inhale the unfiltered smoke deeply and then hold it in their lungs as long as possible, marijuana is damaging to the lungs and pulmonary system. Marijuana smoke contains more cancer-causing agents than tobacco smoke. Long term users of cannabis may develop psychological dependence and require more of the drug to get the same effect. The marijuana on the streets today is much stronger than it was in the 60s and 70s. It is cultivated to be stronger and more potent every year.

Tricyclic antidepressants: (TCA) Tricyclic antidepressants have been prescribed since the 1950s for depression and compulsive disorders. Until recently TCAs were the primary choice of physicians for the vast majority of people with major depressive disorders. Ironically TCAs are often prescribed for symptomatic treatment of drug addiction and withdrawal and in particular, alcoholism. Tricyclic antidepressants work by raising the levels of serotonin and norepinephrine in the brain by slowing the rate of reuptake, or re-absorption, by nerve cells. Usually TCAs are taken over an extended period as effects from the drugs are gradual. Because of the possibility of causing serious cardiac complications, TCAs can be lethal if misused at high doses. Abuse of TCAs can be the result of fear of relapse rather than any psychopharmacological effect however the potential for TCA abuse is well established, since the drugs have clearly defined euphoric psychological and stimulatory physiological action in cases of chronic usage. Generic and brand names of the tricyclic antidepressants include Adapin, Amitriptyline, Amoxapine, Asendin, Desipramine, Doxepin, Elavil, Imipramine, Ludiomil, Maprotiline, Norpramin, Nortriptyline, Pamelor, Pertofrane, Protriptyline, Sinequan, Surmontil, Tofranil, and Vivactil.

DRUG TESTING IN GENERAL

It is common in family law cases where both parties must (or should) go to the same drug testing facility for court-ordered drug testing or by agreement between the attorneys. The donors should never be allowed to pick their on drug testing facility. Drug users know where they can get a negative drug test knowing they are positive from drug use. Some of these drug testing companies have closed but some still exist in Dallas and most cities across the US.

It is becoming common for one party to also go to a different drug testing facility for a second private test. When two labs are used by the same person with one test being positive (court ordered or agreed to use between attorneys) and the private test is negative, a controversy begins claiming the positive test is wrong. When the lab that reports the positive has done the right initial test and confirmation test, then that drug was present in that person's system. Looking at both tests side by side, one has to be wrong. And it is usually the negative test. Many variables have now entered the problem to answer why the tests are different. An expert in drug testing is now needed to look at the variables to give a valid opinion to explain the answer and 99% of the time the expert will be able to explain the difference.

First the expert must have the original or copy of the lab reports and never a Medical Review Officer (MRO) letter or regenerated report on the drug company's letterhead. The MRO letter or report on the drug company's letterhead usually omits valuable information needed to for the expert to formulate an opinion. The MRO letter is only mandated in federal testing of employees. It is also a valuable tool in non-federal testing of all other employees. If the employee has a positive test from a prescription, then the MRO will report a negative test to the employer. The employer never knows that the person is taking a certain legally prescribed

drug. But in legal cases, the Judge, the attorneys, CPS and parents need to know exactly what drug is being used by the donor. Abuse of prescription drugs is rapidly rising each year. As a attorney, you should always object to the admission as an exhibit of an MRO letter or regenerated report on the letterhead of the drug testing company.

In legal cases, you are not required to use a lab certified by SAMSHA (DOT testing) but the lab must be at least certified by the American College of Pathologist (CAP) to perform forensic drug testing. Many CAP certified labs also have SAMSHA certification which is acceptable to use but the federal regulations that DOT drug testing must follow does not apply to court orders, MSA, Rule 11 agreements, CPS or the parent testing their children. So let's discuss what happens at the lab.

A lab that does not use the "Gold Standard" for testing should never be used. The "Gold Standard" is the methodology used to test the samples. It is NOT the Federal regulations, 49 CFR Part 40, that applies only to DOT covered employee. Most labs use multiple drug test panels or screens in the initial test. It is important to let the drug testing company know before the test sample is collected or performed if prescription drugs that are not in the standard drug testing panels need be included in the test panel. Drugs tested in one panel may vary greatly from one drug testing company to the next. The following drugs are included in the most common urine test panels Amphetamines, Methamphetamines, MDMA (ecstasy); Barbiturates; Benzodiazepines; Cocaine; Marijuana (THC); Methadone; Opiates (heroin, morphine and codeine); PCP & Propoxyphene. In the nails and hair, the standard drugs tested are Methamphetamines and MDMA (ecstasy); Cocaine; Marijuana; Opiates (heroin, morphine and codeine) and PCP.

There are two primary methods used to screen or test for drugs. The "Gold Standard" initial screen is Immunoassay and confirmations performed by Gas Chromatography/Mass Spectrometry (GC/MS), Gas Chromatography/Mass Spectrometry/Mass Spectrometry (GC/MS/MS), or Liquid Chromatography/Mass Spectrometry/Mass Spectrometry (LC/MS/MS).

Immunoassay is the most commonly used method to initially screen samples. It is a rapid process that can test many samples per run. It works on the principle of antigen-antibody interaction. Antibodies are chosen that will bind selectively to drugs or their metabolites. The binding is then detected using either enzymes, radioisotopes, or fluorescent compounds. Any positive found in the screening process is confirmed by a second method that is not immunoassay.

Confirmation test by GC/MS, GC/MS/MS or LC/MS/MS is used in the event that drugs or their metabolites are detected in the initial screening test. The sample is tested again using one of the more sensitive methodologies for the confirmation test. This is the most precise tests for identifying and quantifying the parent drugs and/or their metabolites. It involves a two-step process, whereby Gas or Liquid Chromatography separates the sample into its constituent parts and Mass Spectrometry identifies the exact molecular structure of the compounds. The combination of GC or LC with MS or MS/MS is considered to be the definitive, scientifically accepted method of establishing the presence of drugs and/or their metabolites.

The Substance Abuse and Mental Health Services Association (SAMHSA) provides guidelines for what qualifies as a positive drug test. If a test does not give results higher than the guidelines or the selected cut-off level, it does not qualify as a "positive" test. If an immunoassay test gives positive results, a second confirmation test must also give positive results before the results are released as positive.

In general, cut-off levels for drug testing have been established to reduce the possibility of external or incidental exposure such as passive inhalation or over-the-counter (OTC) drugs. A true comparison of nail, hair, and urine levels are impossible. One example is the time frame differs with each type of sample from 90 days or less to 12 months to 1-3 days). Urine tests are expressed in nanograms per milliliter (ng/ml). Nail and hair levels are expressed in picograms per milligram (pg/mg).

A metabolite is any substance produced during metabolism. In drug use, the term usually refers to the end product that remains after metabolism. In other words, the body changes the parent drug to a specific metabolite.

When a sample is given for drug testing, it will usually be tested for the drug itself (parent) and the substances (metabolites) produced by the body when it processes (metabolizes) the drug. The existence of a drug's metabolite confirms that a person ingested the drug. For example, if a drug test showed a positive for benzoylecgonine and norcocaine then the person being tested ingested cocaine. The presence of the metabolite cocaethylene indicates and proves that the person consumed alcohol at the same time as the cocaine.

Commonly ingested substances such as vitamins, penicillin, aspirin, caffeine, and acetaminophen (Tylenol), will not affect the results of a confirmed drug test. The confirmation tests are drug and drug metabolite

specific. Because these commonly ingested substances are chemically and structurally different after being metabolized, they will not interfere with or compromise test results.

There are some prescription and nonprescription medications that will affect an initial drug screen including the instant kits that you can buy at stores such as CVS or Walgreens resulting in a false positive. There are prescriptions that contain the same drugs that are commonly found in street drugs. There is no easy way to distinguish between the two forms of the drug. However, the problem is not as big as it would seem.

There are no prescriptions for PCP. It is extremely rare to find cocaine used in a medical setting, although it happens occasionally, usually during nasal surgery or to control bleeding from the eye or nose. If used, it will be well documented in the person's medical file. Such use would cause the urine to test positive for cocaine metabolite for approximately 6 hours and not days or months later. It would not be sufficient quantity to cause a positive nail or hair test.

It is possible but highly unlikely that poppy seeds will be the cause of a positive morphine or codeine test. SAMSHA certified labs and most other labs test all positive morphine samples for heroin (6-AM) to help ascertain the origin or source of the positive morphine. If poppy seeds are the cause of a positive test, the morphine level will be much higher than the codeine level with a detection window in urine of 24 hours or less. Other prescribed opiates may occasionally cause a positive screen but are sorted out in a confirmation test.

There are prescription drugs that are amphetamine or methamphetamine. For example there is a drug for Parkinson's disease that contains methamphetamine. Some doctors prescribe amphetamines for ADHD. The most common prescribed amphetamine is Vyvanse and Adderall. Ecstasy is not a prescribed drug but is included in the amphetamine class of drugs. It is specifically identified by the confirmation test listed as MDMA on the lab report under the amphetamine class.

When a person submits for a drug test, he or she may provide the collection agency with a list of all prescribed medications unless it is a pre-employment test. There are literally hundreds of brand name and generic drugs being prescribed today.

If you want to test for a specific prescribed medication, you will need to know the name or classification of that medication to determine if it will test positive on any of the specific drug test panels, i.e.: opiates, amphetamine, methamphetamine, benzodiazepines, barbiturates etc. For general classifications on prescription drugs you can either ask your pharmacist, legitimate medical websites such as http://www.rxlist.com or apps for cell phones such as WebMD, Medscape, and Epocrates are sources to obtain accurate information. Enter the name of the prescription drug to determine its general classification and pharmacology. Most websites provide false information regarding drugs and drug testing to get you to buy whatever "magic" product they are trying to sell you.

Heroin, morphine, and codeine are all derived from opium or the opium chemical structure and are in the Opiate class of drugs. The difference is primarily in the manner in which opium is refined or synthetically manufactured and the form and method of delivery. Heroin quickly metabolizes to 6-AM and then to morphine in 8 to 24 hours. The cause of a morphine positive test is from prescribed morphine or heroin.

Both amphetamine and methamphetamine are potent sympathomimetic agents. Methamphetamine metabolizes into amphetamine in the body at approximately a 10 to 1 ratio. A higher level of amphetamine exceeding the 10 to 1 ratio probably indicates the donor is also taking a prescribed amphetamine at the same time as using methamphetamine. There will not be methamphetamine levels on a drug test if the person is taking only a prescribed amphetamine. For example, an amphetamine such as Adderall does not metabolize to methamphetamine.

URINE TESTING

Urine testing questions continuously occur when looking at the test results or comparing 2 or more tests... For example, why is a drug test negative when the donor is a known drug user? A negative drug test does not mean the donor is not a drug user, abuser or that the test is wrong. There is an explanation for the negative results that are expected to be positive. Just like a math equation, if part of the formula is missing, the correct answer is impossible to find. Same with a negative drug test of a known user. The missing parts of

the formula must be gathered and analyzed to answer why the test is negative. When the formula is complete, an expert in drug testing should be able to answer the question(s).

Some of the probable answers to this question are the donor may abstain from drug use long enough to be negative during the window of detection. The donor altered or manipulated the specimen (creatinine below 20) by drinking excessive liquids such as water to get the drug level below the cutoff level. A product purchased to put in the urine can also cause a negative urine test. The donor may be using a drug that is not included in the standard drug panel. It may be a legal or illegal drug that cannot be detected or was not requested to be tested by the lab.

The list of abused legal and illegal drugs is getting longer. Drugs, such as Spice, K2 (synthetic marijuana), Bath Salts (both illegal in US), and hundreds more not banned are sold at head shops, on the street, convenient stores, and the internet. These products are sold as aromatherapy or plant food and labeled not for human consumption to side step any applicable laws. But the true intent is to smoke, snort, or inject the product to get high. Many of these drugs are more dangerous, resulting in addiction to even death, than the illegal drugs. One of the most recent synthetic drugs is called “Pump It Powder.” It is sold as an “enhanced plant vitamin.” As soon as this one is banned, not one but several more will replace it.

Another common scenario and question is… “Your test is wrong! I have known my client (or child) for years and he/she is not a cocaine (pick any drug) user. What is wrong with your test?” The answer is very simple. “Your client (or child) is a liar!”

Drug testing is not as simple as it appears on the surface. The nuances and variables are many and must be known and understood to know exactly what a drug test means or does not mean.

A urine test must have a positive screen and a positive confirmation test above the cutoff level to be reported as a positive. The lowest possible cutoff levels should be used for legal cases, probation, rehab centers, etc. to increase the window of detection as much as possible. The lab can also perform a Limit of Detection (LOD) or Limit of Quantitation (LOQ) confirmation test using lower cutoff levels to determine if any presence of the drug is found.

The Federal DOT program has higher cutoff levels and should not be used as a guideline nor does the DOT drug testing regulations apply to any entity outside the covered entities clearly defined in 49 CFR Part 40.

Screening and confirmation testing are performed using different testing methodologies that precipitate different cut-off levels. The immunoassay tests used to perform initial drug screening are designed to detect a wide range of chemically similar compounds that react with the antibodies which are at the core of the chemistry making up the tests. In contrast, confirmatory testing detects specific metabolites that provide identification and quantification of a specific drug.

For example, marijuana has approximately 5 metabolites that the immunoassay will identify. The total nanogram level is the sum of all 5 metabolites. The confirmation methodology (GC/MS, LC/MS/MS, etc.) identifies only one of the 5 metabolites and reports the sum of only that metabolite. The confirmation quantitation level is reported on the lab report and never the immunoassay screening level.

The most common method of sample manipulation to avoid a positive drug screen is getting the urine creatinine below 20 mg/mL. Creatinine is the normal metabolic waste in urine. The level of creatinine is the primary means to determine if a donor is attempting to alter or manipulate his or her test results below the cutoff level. Because creatinine is excreted from the body at a constant rate, there are expected values for creatinine in normal human urine. Normal creatinine levels in urine are between 100 and 200 mg/dL. The creatinine level is considered low or abnormal if it is between 6 and 20 mg/mL. The sample is considered substituted if the creatinine value is 5 mg/dL or less meaning the sample is not consistent with human urine. To lower the creatinine level, the donor has poured something into the urine such as water or consumed excessive liquids to get the creatinine level below 20 mg/dL. This alters or cuts the concentration of a consumed drug by 10 to 24 times usually putting the drug level below the cutoff level. The result is a false-negative drug test. To eliminate this problem, the donor must provide a witnessed collection. This means a collector of the same gender actually observes the sample going into the collection cup. Also, allow a person a maximum of 3 hours or less from notification to taking a urine test. Exceptions exist, such as a doctor performing surgery or a lawyer in the middle of a trial, but never allow a person to test the next day after notification.

One study allowed the subjects to consume 1 marijuana cigarette on day one. On day 2, the subjects were given one gallon of water starting with one quart every hour. After the second quart, most subjects were producing false negative results. On day 3, the subjects consumed 40 mg of cocaine. On day 4, the subjects were

given a gallon of water starting with one quart every hour. Again, after consuming the second quart of water, most subjects were producing false negative results. Two quarts of water was enough to get the drug level below the cutoff.

Amitava Dasgupta states in his book published in 2012, "Resolving Erroneous Reports in Toxicology and Therapeutic Drug Monitoring, A Comprehensive Guide", that "A lower cut-off concentration may also be useful to identify illicit drug users because they often drink a large amount of fluid prior to drug testing to avoid a positive test. Usually a creatinine concentration below 20 mg/dL **or** a specific gravity below 1.003 should be considered an indication of diluted urine." Only in Federal mandated regulations for drug testing of DOT employees, both criteria of creatinine and specific gravity are required to be met to be considered a diluted or invalid test. All other testing such as courts or probation, only have to meet one of the criteria to be diluted resulting in a false negative if the donor has consumed illegal drugs. Other studies have recommended that 35 mg/mL should be the cut-off for creatinine to consider the urine as a diluted sample. Other forms of sample adulteration are the in-vitro addition of adulterants or additives into the specimen sample to destroy the chemical reaction properties of lateral flow.

The urine specimen may not be valid if the temperature is not within a certain range. The average temperature of a non-witnessed urine sample returned to the collector is usually 95 to 97 degrees. The temperature of the collection container will drop the temperature of the urine slightly plus the time it takes to return the sample to the collector must also be considered. Any temperature outside this range may not be the donor's specimen meaning an adulterant has been added to the sample or a substituted sample. A perceptive and properly trained collector will make a decision to reject or accept the sample if the temperature is out of range. A witnessed collection will eliminate the problem with donors attempting to substitute or alter a urine specimen. A second sample is normally requested when the first is rejected for improper temperature or suspicious activity.

Drug testing by urine is designed only to detect whether or not a specific drug or drug metabolite is present at the biological moment the sample is collected. While there are very broad estimates as to how long a particular drug may have been in the system, the drug test results will not tell you when the drug was ingested, how it was injected, or if the person is under the influence, addicted or impaired.

The urine test can only detect whether a specific drug or drug metabolite is present at the time the sample was collected. Many factors unique to the individual being tested determine the actual half-life of the particular drug including such variables as age, metabolic rate, overall health, body hydration, amount of drug consumed over what period of time, strength of the drug, etc. Therefore, no specific conclusions can be drawn as to when a particular drug was taken or how much was consumed. Only estimates can be made that the drug(s) was used within an approximate window of detection.

In reality, under normal, everyday conditions (in a car, home, or concert), a positive urine concentration above the cutoff level of the test are not possible or highly unlikely by exposure to second-hand smoke. This is not a valid claim for any smokable form of a drug.

HAIR TESTING

In hair testing, drugs are incorporated by 3 main routes. First is environmental exposure. If an individual is exposed to drug smoke or particulate matter, the drug will physically transfer the parent drug to the hair and bind to it. Second is from the sweat and oil of the scalp. The sweat and oil from the scalp contain drug and drug metabolites previously ingested by the donor. As these fluids bathe the hair shaft, they deposit the drug onto the hair where it binds and is available for analysis. Third is from the blood. As the blood travels through the follicle, it deposits drug and drug metabolites into the core of the hair.

It takes approximately 4 – 5 days from the time of drug use for the affected hair to grow above the scalp plus the thickness of the scissors used to cut the hair as close as possible to the scalp is a factor. Adding these factors to the hair growth rate, the test results will not indicate any drug use in approximately the first two (2) weeks starting with the date the hair was collected. In other words, your window of detection starts two (2) weeks before the hair was collected.

Body hair growth rates are slower and cannot be utilized in the same manner as head hair to determine a timeframe of drug use. Body hair grows for 7 to 12 months and then becomes dormant. It falls out and new

hair begins to grow. Although the lab report may state approximately 12 month window of detection, it is by no means a 12 month test in all cases. A man may shave his body and take the test six months later. The window for this body hair test is only 6 months even though the test report states approximately 12 months.

Once the drug and drug metabolites are incorporated into the hair core, the drug(s) slowly begins to leach out due to normal daily hygiene and exposure to the elements. Head hair grows on average at 0.5 inches per month. After approximately 3 months, most drugs begin to leach out below the level of detection or to a level not representing an accurate indication of drug use. As such, a standard head hair test covers a period of approximately 90 days.

A standard 5 panel initial screen and confirmation requires 60+ milligrams of hair or approximately 90 to 120 strands. The thickness of different types of head hair is one reason for this variation and the collector will usually collect 150 to 200 strands to ensure sufficient sample to complete the lab test.

The standard length of head hair tested is 1.5 inches. The hair sample is cut as close to the scalp as possible. Upon receipt at the laboratory, the root end is identified and the specimen is cut at 1.5 inches, which represents approximately 3 months of growth. The excess length of hair is sealed and remains with the original sample by most labs. 1.5 inches in length and 90 to 120 strands of hair allows for an initial immunoassay test, 2-3 confirmation tests and a small amount left over for a referee lab, if needed, for re-test.

Hair collected from a brush can be used but a timeframe of use cannot be determined. Normally the test results from a brush are not admissible in court. But if you do get a positive results for an illegal drug, it will be valuable information to how to proceed with your case or with your child.

A reputable, accredited lab will always perform a confirmation test of all positive hair results found in the initial screen. The confirmation utilizes GC/MS, GC/MS/MS or LC/MS/MS for all specimens that screen positive in the initial test.

The standard 5 panel hair test usually includes:

☐Cocaine and its metabolites
☐Methamphetamine, amphetamine, MDMA or MDA (Ecstasy)
☐Opiates (heroin/6-mam, morphine, codeine)
☐Phencyclidine (PCP)
☐Marijuana

The following additional drugs can be tested in the hair including urine and nails:

☐Benzodiazepines
☐Barbiturates
☐Opiates
☐Methadone and EDDP (metabolite)
☐Propoxyphene
☐Oxycodone
☐Meperidine
☐Tramadol
☐Fentanyl
☐Sufenanil
☐Ketamine
☐EtG Alcohol

* Other drugs may be available depending on the lab. The specific drugs under each of the drug class varies with each lab.

The cut-off level for each drug varies depending on the type of drug and the lab conducting the test. The most common unit of measurement of drugs in hair (and nails) is pictogram per milligram (pg/mg). A chart available from Omega Labs provides an approximate usage rate based on the level reported on the lab results.

Enzyme-immunoassay antibodies (EIA), similar to those used to test urine, are used for the initial screening test for drugs of abuse in hair; therefore the potential for substances such as over-the-counter medications to cause a false positive screening result does exist. To eliminate the possibility of reporting a false-positive

due to cross-reactivity, the lab should automatically confirm by GC/MS, GC/MS/MS or LC/MS/MS all positive initial tests.

All hair samples are usually washed extensively to remove external contamination before screening begins. The lab tests for the metabolite of the parent drug to rule out environmental contamination or exposure. For example, to rule out the possibility of external contamination from marijuana smoke, the labs detect only the metabolite (THC-COOH) which is only produced by the body and cannot be an environmental contaminant. If the ratio of the wash solution is greater than 10% of the confirmation result, the lab will consider this sample still contaminated. If the ratio of the wash solution is less than 10% of the confirmation result, the lab will consider the sample as positive.

A lab test is available to determine if a child has been exposed to the smoke from illegal drug use by testing what is found on the outside of the hair and also the core of the hair. If only the parent drug is found (for example cocaine) and no metabolites (cocaine metabolites benzoxyleconine and norcocaine), the report will state positive for the parent drug only. This test can be used to determine if a child or infant has been exposed to a smokable form of an illegal drug used by the parent or others. It is important not to wash the child's hair after exposure and before collecting the sample to be tested.

It usually takes multiple uses to test positive in hair under normal drug use. A one-time use of the average amount of drug will usually not be above the cutoff level. A person claiming he or she used one time is not a valid claim for a positive test results in most cases. For example, a person may claim using cocaine one time. A continuous binge on cocaine for 24 hours can be misconstrued as a one-time use by the donor.

Extensive bleaching, perming and dyeing may damage the protein matrix of hair allowing a portion of the drug within the hair to be extracted, thus lowering the final quantitative result with certain drugs. Normal hair care using common hair products (shampoos, conditioners, sprays, mousses or gels) helps to remove external contamination and has a minor effect on removing the drug from the core of the hair.

Some shampoos designed and sold with the intent to cleanse the hair of drugs and other toxins have varying degrees of effectiveness. One product on the market will cut the level of drug in half each time it is used. The chemical in the shampoo will burn the scalp or skin after several applications preventing extensive use. A chronic user can lower the level but probably cannot eliminate the drug below the cutoff level. But a recreational user, starting with a low level, will probably be below the cutoff level resulting in a false negative test results.

In side-by-side comparison studies with urinalysis, hair drug testing has uncovered significantly more drug user. In two independent studies hair drug testing uncovered 4 to 8 times as many drug users as urinalysis. The primary reason for this difference is due to the longer window of detection for hair compared to urine. Drug users are very educated on drug testing. He or she will refrain from drug use for several days when they know a urine test is imminent resulting in a negative urine test. They will substitute or adulterate the urine sample if the collection is not witnessed resulting in a negative test. Many people will buy shampoos to cleanse the hair but still fail the test as explained previously.

NAIL TESTING

Nail testing for drugs of abuse actually has been measured in nails since 1984. However, it is relatively new to the drug testing industry in the US. Several reasons can be attributed to this. One is the need for longer detection periods that nail test provides. But probably more significant was the increase number of products on the market to negate urine testing and individuals shaving their head and body to avoid a hair test or using special shampoos to remove the drug from the hair. This has brought the nail testing to the forefront as a needed and useful alternative.

Like hair, fingernails and toenails are composed of a hard protein called keratin. Drugs are incorporated into nails from the blood stream and remain locked in the nail as it grows. Nails grow in both length and thickness. Drugs enter the nail from the base (cuticle end) as the keratin is formed and via the nail bed that extends under the full length of nail.

The distal end or free end of the fingernails and toenails are clipped for testing. If length does not allow for an adequate sample to conduct the test, the person can let his or her nails grow for 2 to 3 weeks and then return for the collection of the nails. You only lose 2 to 3 week on the back end of the window of detection.

The length of the detection windows is described later. The surface of the nail can be scrapped/shaved but is not the recommended or preferred method. If the surface is scraped using a razor blade (a medical device) then this one procedure probably requires the collector to follow HIPAA requirements, usually not enough scraping is collected to complete the test and the window of detection is reduced. Any type of artificial nails, such as acrylic nails, must be removed prior to collecting the nail sample.

The method of screening, immunoassay, for drugs in nails is the same as urine and hair. The nail clippings are put in a chemical solution to remove external contaminants and then liquefied. All drugs found in the initial screen are confirmed by one of the methods previously explained for urine and hair.

Drugs can be identified in nail clippings 2-4 weeks following ingestion and can be detected from 3 to 8 months or possibly longer. The broad range is based on numerous factors. Fingernails grow (approximately .12 inches per month) faster than toenails (approximately .042 inches per month), nails on long fingers grow faster than nails on short fingers, age and gender of the person, the time of year, the food the person eats, the dominant hand grows faster than the other hand, etc.

There is one product on the market that purports to ensure that the drug abusing individual passes the nail test. It has not proven to be effective at this time.

If a person handles cocaine on a regular basis, it is possible for the person to be positive for parent cocaine. Nails are porous allowing the cocaine to absorb into the nail. It is important to remember that the nail test results will only be positive for the parent drug cocaine at a very low level and NOT the metabolites of cocaine which are norcocaine and benzoylecgonine.

If the metabolite cocaethylene (alcohol) is positive on a nail or hair test, it proves that the person consumed alcohol at the same time as the cocaine.

ETG AND ETS ALCOHOL TEST – URINE

Alcohol is rapidly eliminated from the body at a rate of approximately one drink per hour when testing breath, blood, saliva, or urine using the standard technology. The rapid elimination limits the detection of alcohol to a matter of hours.

For example, an individual who was “under the influence” of alcohol using standard technologies (breath, blood, or saliva > 0.8%) at 10 PM would likely test negative the next morning at 9 AM due to the rapid elimination of alcohol from the body.

After years of research, Ethyl Glucuronide (EtG) and Ethyl Sulfate (EtS) were found to be a direct metabolite of the alcohol (ethanol). EtG/EtS has emerged as the marker of choice for alcohol and due to the advances in technologies is now routinely available. Its presence in urine may be used to detect recent alcohol consumption, even after ethanol is no longer measurable using the older methods. The presence of EtG/EtS in urine is a definitive indicator that alcohol was ingested. Other types of alcohol, such a stearyl, acetyl, and dodecanol metabolizes differently and will not cause a positive result on an EtG/EtS test.

The EtG/EtS test has become known as the “80-hour test” for detecting any amount of consumed ethyl alcohol. This is a misnomer. It is true that EtG can be detected in chronic drinkers for 80 hours or even up to 5 days but not from a person that only consumed 2 or 3 drinks. During the period of chronic use, the EtG level can exceed 100,000 ng/mL. A level of 1.25 million was found in one sample. Two primary factors determine the window of detection—volume of alcohol consumed and the time between each drink. A person that consumes 3 drinks can only have a detectable level of EtG for approximately 20 to 24 hours. The level peaks at approximately 9 hours with an EtG level around 15,000 ng/mL.

The presence of EtG and EtS in urine indicates that ethanol was ingested with the cutoff level at 500 pg/ml. EtG/EtS is stable in urine for more than 4 days at room temperature. Recent experiments indicate that heating urine to 100°C actually increased the stability. Therefore, heat does not cause the breakdown of EtG/EtS. In addition, no artificial formation of EtG/EtS was found to occur following the prolonged storage of urine at room temperature fortified with 1% ethanol.

EtG/EtS is a direct metabolite of alcohol (ethanol), and its detection in urine is highly specific, similar to testing for other drugs. The typical lab utilizes the most sophisticated, sensitive, and specific equipment and technology available to screen, confirm, and quantify EtG/EtS. This methodology provides highly accurate results.

EtG/EtS is only detected in urine when alcohol is consumed. This is important since it is possible to have alcohol in urine without drinking. Alcohol in urine without drinking is due to the production of ethanol in vitro. Ethanol in vitro is spontaneously produced in the bladder or the specimen container itself, due to fer-

mentation of urine samples containing sugars (diabetes) and yeast or bacteria. Since the ethanol produced is not metabolized by the liver, EtG/EtS will not be produced and will therefore not be detected in a urine containing alcohol as a result of fermentation.

Tests show that "incidental exposure" to the chronic use of food products (vanilla extract), hygiene products, mouthwash, or OTC medications (cough syrups) can produce EtG/EtS concentrations in excess of 100 ng/mL. However, if EtG is detected in excess of 250 ng/mL, then this is very strong evidence that beverage alcohol was consumed.

Most labs will allow you to select 100, 250, or 500 ng/mL as the cutoff level. It is strongly recommended that only the 500 ng/mL level be used. This avoids and eliminates any claim by the donor that the positive EtG test is a result of incidental or unintentional exposure. All testing performed on products or foods classified as incidental or unintentional exposure has never produced a positive EtG level greater than 500 ng/mL.

The benefits of an EtG and EtS urine test includes:

☐Detects recent usage more accurately and for a longer period of time than standard urine, breathe, or blood testing
☐No false positives
☐No EtG and EtS found in non-drinkers
☐Ideal for zero tolerance and abstinence situations
☐Strong indicator of alcohol ingestion within the previous 3 to 5 days
☐EtG and EtS is only evident when alcohol is consumed and is not produced as a result of fermentation
☐Allows monitoring in alcohol treatment programs
☐Acts as an early warning system to detect trends towards relapse

PEth BLOOD SPOT TEST FOR ALCOHOL

The PEth (Phosphatidylethanol) blood test provides a longer window of detection when compared to the urine EtG test. After the person has stopped consuming alcohol, the window of detection is 2-3 weeks. The length of the window also depends on the volume of alcohol consumed and the time between each drink.

The volume of alcohol required to be positive is far above the level commonly consumed by incidental exposure. The sample is 5 blood drops from the finger or 5 milliliters of blood. The donor cannot alter or manipulate the results in any manner and proves that the person has consumed alcohol.

ETG AND ETS ALCOHOL TEST – HAIR & NAILS

EtG alcohol testing is now being performed in hair and nails. The window of detection is approximately 3 months for hair and nails. But be aware that bias does exist when comparing male and female hair. Recently an Italian study reported that bleaching the hair completely destroys EtG. Another study with water from a commercial pool was performed to determine the effects of chlorine. Hair exposed to the pool water found that two, 20 minute exposures reduced EtG by approximately 20%. It was found that this did not have any effect to alter or reduce the drug levels in nails. Based on these facts alone, it is recommended that only nails be used to test for EtG and EtS, not hair.

This test will not pick up casual drinking. The individual must be a binge drinker to get above the cutoff level. Binge drinking is normally defined as 4 or more drinks within a two-hour period for females and 5 or more drinks for males. It also requires a total consumption of at least 20 or more drinks per month for females and 40 or more for males.

SCRAM AND SOBERLINK ALCOHOL TESTING

Scram is an alcohol monitoring device that is worn around the ankle 24 hours a day. It transmits data regarding alcohol consumption or abstinence of consuming alcohol at intervals.

SOBERLINK is the first handheld breath analyzer that remotely monitors a person's blood alcohol content (BAC). A subject's BAC, a digital photograph of the person, GPS location and the time of the report are compiled, sent to a secure monitoring website, the data is transmitted by text and/or email to the ex-spouse, attorney or any party designated to receive the test results within two minutes. The mobile device is practical, convenient, and eliminates the need for the person to travel to a drug testing facility to give a urine sample,

which will take 1-3 days before the tests results are back from the lab. The first Soberlink (SL1) device includes a customized Smartphone that gives the individual the flexibility of sending a sobriety report wirelessly through cell connection or WI-FI. The devices are the size of two cell phones and travels easily with the individual anywhere in the US and overseas.

The second generation, SL2, combines the cell phone and DOT certified breathe device into one unit. It allows the individual to prove compliance and abstinence while maintaining their dignity and quality of life. It also provides proof when the exchange of the children occurs that the receiving parent of the children is alcohol free. If the report indicates alcohol consumption, then the exchange of the children does not occur.

CONCLUSION

New and unanswered questions will always occur in drug testing. For example, why is a drug test negative when the donor is a known drug user? A negative drug test does not mean the donor is not a drug user, abuser or that the test is wrong. There is an explanation for the negative results that are expected to be positive. Just like a math equation, if part of the formula is missing, the correct answer is impossible to find. Same with a negative drug test of a known user. The missing parts of the formula must be gathered and analyzed to answer why the test is negative. When the formula is complete, an expert in drug testing should be able to answer the question(s).

Some of the probable answers to this question are the donor may abstain from drug use long enough to be negative during the window of detection. The donor altered or manipulated the specimen (creatinine below 20) by drinking excessive liquids such as water to get the drug level below the cutoff level. A product purchased to put in the urine can also cause a negative urine test. The donor can purchase shampoos designed to get the drug(s) out of the hair. Some of the shampoos work and some do not. The donor may be using a drug that is not included in the standard drug panel or a legal drug that cannot be detected or tested by the labs.

The list of legal and illegal drugs is getting longer and more popular. Drugs, such as Spice, K2 (synthetic marijuana), Bath Salts (currently banned in US), and hundreds more are sold at head shops, on the street, convenient stores and the internet. Some of these drugs are legal and some are illegal. These products are sold as aromatherapy or plant food and labeled not for human consumption to side step any applicable laws. But the true intent is to smoke, snort, or inject the product to get high. Many of these legal drugs are more dangerous, resulting in addiction to even death, than the illegal drugs. One of the most recent legal, synthetic drug is called "Pump It Powder." It is sold as an "enhanced plant vitamin." As soon as this one is banned, not one but several more will replace it.

Another common scenario and question is…….. "Your test is wrong! I have known my client for years and he/she is not a cocaine (pick any drug) user. What is wrong with your test?' The answer is very simple. "Your client is a liar!"

Drug testing is not as simple as it appears on the surface. The nuances and variables are many and must be known and understood to know exactly what a drug test means or does not mean.

INTENTIONAL UNEMPLOYMENT: "NO SYMPATHY FOR THE DEVIL"

By: Miguel D. Trevino[2]

> Woe to my worthless shepherd, who deserts the flock! May the sword strike his arm and his right eye! Let his arm be wholly withered, his right eye utterly blinded![3]

I. Introduction

It would seem from the quotation above that even in the Old Testament it was considered immoral to abandon one's responsibilities and that each shepherd (or each parent) had a duty to care for his or her flock. Failure to carry out this duty clearly warranted harsh punishment and evoked no sympathy for the devil. Today, the Texas child support system shares the same belief that parents have an inalienable duty to care for

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[3] Zechariah 11:13 (English Standard Bible).

their children, regardless if the parent is incarcerated or unemployed. Specifically, Texas Family Code Section 154.066 authorizes trial judges to set child support orders based on a parent's earning potential when the court determines that he or she is intentionally unemployed. While drafted with the legislative intent to protect and benefit the best interest of children in Texas, this statute, along with the judicial discretion of the judges who implement it, often places unreasonable financial burdens on obligors, particularly those currently incarcerated. This article seeks to: (1) examine the recent evolution of Section 154.066, the evidentiary factors trial judges should consider when determining if a parent is intentionally unemployed/underemployed, and the economic grounds Texas courts have used to estimate obligor parents' earning potential; (2) examine current issues regarding the imputation of income to obligors, especially those currently incarcerated; and (3) propose and examine various alternatives that avoid imputing income to obligors who are financially, or physically, unable to fulfill their child support obligations.

II. Calculating a parent's child support obligation

Before directly addressing the subject of intentional unemployment/underemployment, it is important to understand conceptually how Texas courts compute obligors' child support obligations and how the imputation of income factors into this calculation.

A. Computing net resources

In order to calculate an obligor's child support obligation, Texas courts begin by determining the parent's net resources. This procedure is outlined in detail in Texas Family Code Section 154.062 and generally provides that courts shall include the following in an obligor's resources: (1) all wage and salary income and other compensation for personal services;[4] (2) dividend, royalty income, and interest from notes (not including return of capital or principal); (3) all self-employment income, including benefits imparted to an obligor from a business, less ordinary and necessary expenses incurred in order to produce that income;[5] (4) net rental income; (5) all other income actually being received including, but not limited to, severance pay, retirement benefits, social security benefits, gifts and prizes, spousal maintenance, alimony, and unemployment/disability benefits.[6] In addition, when deemed to be in the best interest of the child, courts may attribute a reasonable amount of income to an obligor's non-income producing assets.[7]

When computing the financial resources available to an obligor, courts shall exclude the following when calculating an obligor's net resources: (1) return of principal or capital on a note; (2) accounts receivable; (3) benefits paid in accordance with federal public assistance programs; and (4) payments for foster care children.[8] Finally, courts shall deduct the following when calculating an obligor's net resources: (1) social security taxes; (2) federal income tax; (3) state income tax; (4) union dues; (5) expenses for the cost of health insurance or medical support for the obligor's child, and (6) nondiscretionary retirement plan contributions (if the obligor does not pay social security taxes).[9]

B. Application of statutory guidelines

After computing an obligor's net resources, courts apply the child support guidelines outlined in Section 154.125. These guidelines generally recommend that child support payments be 20% of the obligor parent's monthly net resources for one child, 25% for two children, and an additional 5%, in increasing increments, for up to five children.[10] These guidelines are presumed to be in the best interest of the child, yet the presumption is offered no further definition. However, "a court *may* determine that the application of the guidelines would be unjust or inappropriate under the circumstances," and establish a child support order that varies from the statutory guidelines.[11]

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[4] *Stucki v. Stucki*, 222 S.W.3d 116, 121 (Tex. App.—Tyler 2006, no pet.)(holding an obligor's bonus should be included in his net resources).
[5] Tex. Fam. Code § 154.065 (West 2012).
[6] *See id.* § 154.062 (West 2012).
[7] *Id.* §§ 154.067, 154.123 (West 2012).
[8] *Id.* § 154.062(c) (West 2012).
[9] *Id.* §§ 154.062 (d), 154.182 (WL current through end of 2013 3d Called Sess., 83rd Leg.).
[10] Tex. Fam. Code § 154.125(b) (West 2012).
[11] *See id.* §§ 154. 123(b)(emphasis added),; 154.123 (West 2012).

While outside the scope of this article, it should be noted that the vacuum of evidence that a trial court may consider when deciding whether to order a child support amount other than the statutory guidelines is seemingly endless. In fact, after being afforded a laundry list of evidence to consider, including, but not limited to, any financial resources available for the support of the child, the obligee's earning potential, and any assets the obligor may have (automobile, home, or business assets), courts are topped with the discretion to consider "any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents."[12] However, the Texas Family Code limits this discretion by requiring courts to make specific findings if the amount of child support ordered by the court varies from the amount computed by applying the statutory guidelines.[13] Additionally, trial courts must provide "specific reasons" for the variance between the child support percentage guidelines and the child support awarded."[14] An obligor has the right to demand a court's findings when the order deviates from the child support guidelines, and a court's failure to respond to the request constitutes a revisable error.[15]

III. Deemed income

As previously mentioned, trial judges have the discretion to assign a reasonable amount of deemed income to an obligor when the parent owns assets that do not currently produce income.[16] Additionally, courts may assign a reasonable amount of deemed income to income-producing assets the party has voluntarily transferred or which earnings have been intentionally reduced.[17] When allocating income to an obligor's non-income producing assets, courts must consider whether the property can be liquidated without an unreasonable financial sacrifice due to cyclical or other market conditions. Furthermore, if no effective market exists for the property, all carrying costs of the investment asset shall be offset against the income attributed to the property.[18]

Trial courts cannot legally order obligors to sell any of their non-income producing assets in order to comply with their child support obligations. However, trial judges do have, and do not hesitate to exercise, the discretion to hold obligor parents in contempt of court if they fail to fulfill their duty to support their children.[19] In fact, to coerce an obligor to pay a child support order, the court may hold the parent in contempt of court indefinitely if the parent has the present ability to satisfy the child support order.[20] Furthermore, an income-withholding order may be implemented to satisfy an obligor's current child support obligation and arrearages.[21]

While outside the immediate scope of the focus of this article, it is important to note that Section 154.067 creates an immense power of judicial discretion. For example, if a trial judge finds that an obligor is the owner of a ranch that currently produces no income, the judge may attribute a reasonable amount of income to the obligor based on the fair market value of property. In theory this should not pose a threat to the obligor if he is able to sell off the land, or a portion of it, to a third party. However, problems arise if the obligor is unable to find a willing buyer to purchase the land at its fair market value, and has no other financial resources. At which point, the obligor will be faced with the ultimatum to either sell the property at a loss in order to meet his child support obligation, or risk being held in contempt of court indefinitely until he complies with his child support order.

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[12] *See id.* § 154.123 (West 2012).
[13] *See id.* § 154.130(a)(3) (West 2012).
[14] *Id.* § 154.130(b)(5) (West 2012).
[15] *Tenery v. Tenery*, 932 S.W.2d 29 (Tex. 1996).
[16] *Supra* n. 5; *Smith v. Hawkins*, 2010 WL 3718546, at *6 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. denied)(finding that the trial court properly attributed income to obligor's net resources based on his non-income producing assets, including the house he bought his parents, his vehicles, and the equipment he purchased in relation to his business.); *Goodson v. Castellanos*, 214 S.W.3d 741, 757 (Tex. App.—Austin 2007, pet. denied)(trial court was within its discretion to consider obligor's business assets and home when calculating the parent's child support obligations).
[17] Tex. Fam. Code § 154067(b) (West 2013).
[18] *See Id.* § 154.067(a) (West 2013).
[19] *See* Tex. Fam. Code § 157.001 (West 2012); *In re Davis*, 2012 WL 554761, at *7 (Tex. App.—Fort Worth Feb. 21, 2012, no pet.)(quoting *In re Gawerc*, 165 S.W.3d 314 (Tex. 2005)).
[20] *See* Tex. Gov. Code § 21.002(f); *Ex parte Proctor*, 398 S.W.2d 917, 918 (Tex. 1996); *Ex parte Rojo*, 925 S.W.2d 654, 655-56 (Tex. 1996) (court ordered parent to be held in contempt indefinitely until he paid his child support arrearages and uninsured medical expenses).
[21] Tex. Fam. Code § 158.001 (West 2012).

IV. Imputing income on the basis of intentional unemployment

A. Statutory requirements of Section 154.066

When determining an obligor's income for the purpose of computing his[22] net resources, the Texas Family Code provides that, "If the actual income of the obligor is *significantly less* than what the obligor could earn because of *intentional* unemployment or underemployment, the court may apply the support guidelines to the *earning potential* of the obligor."[23]

While this statute seems clear on its face, it leaves three important questions unanswered. First, what does the term "significantly less" mean, and can the term be quantified into a definite amount or percentage? Second, what evidence is necessary to establish that an obligor is earning significantly less due to the obligor being "intentional" unemployed or underemployed? Third, what economic basis should courts use when imputing income to an obligor upon determining that the parent is intentionally unemployed/underemployed? As will be discussed below, the Texas Supreme Court has recently addressed the requisite intent necessary to establish that an obligor is intentionally unemployed/underemployed.[24] Texas appellate courts have provided legal guidance regarding the evidentiary factors necessary to determine if an individual is earning significantly less than his earning potential, and various economic grounds for imputing income to the obligor upon determining he is intentionally unemployed/underemployed.

B. Determining whether an obligor is earning "significantly less"

Due to the absence of a definition within the Texas Family Code, Texas courts have applied subjective case-by-case determinations regarding whether an obligor is earning significantly less than his earning potential.[25] Under the common law, in order to establish that an obligor's actual income is significantly less than his earning potential, the petitioning party should present evidence regarding the obligor's work experience, education level, current income, and past income.[26] As further discussed below, these factors should be weighed in favor of the best interest of the child and the child's needs, as well as an obligor's right to pursue happiness.[27] A trial court should not narrowly interpret Section 154.066 to apply in each circumstance in which an obligor parent makes less money than he or she did in the past.[28] An obligor's refusal to seek a higher paying career, for which he is qualified, generally does not constitute evidence of underemployment if the obligor continues to earn the same amount of income he or she earned prior to the dissolution of the marriage.[29] It is also inappropriate for a court to impute income to a parent who had never been gainfully employed during the marriage.[30] Courts should give special attention when the obligor is the owner/member of a family business, and expert testimony may be used to establish whether the obligor is earning significantly less than the actual income of individuals in comparable careers.[31] This is due to the obligor's increased managerial control over how much income is "reported" as his salary/wages, and the possibility that he may be receiving income "under the table" in the form of cash. Finally, courts may also consider an obligee's earning potential if the obligee's actual income is significantly less than the parent's earning potential because the obligee is intentionally unemployed or underemployed.[32] Therefore, obligee mothers should be aware that they may not automatically decide to stay at home with their children and be free of the possibility of being

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[22] It is important to note that an obligor can be either the father or mother of a child. However, almost all published child support cases involve an obligor father. Therefore, for the purpose of discussing an "obligor," the reader is to presume that the parent is a male.
[23] Tex. Fam. Code § 154.066 (West 2012)(emphasis added).
[24] *Iliff v. Iliff*, 339 S.W.3d 74, 82 (Tex. 2011).
[25] *Kish v. Kole*, 874 S.W.2d 835, 838 (Tex. App.—Beaumont 1994, no pet.).
[26] *In re Davis*, 30 S.W.3d 609, 617-18 (Tex. App.—Texarkana 2000, no pet.); *In re A.B.A.T.W.* 266 S.W.3d 580, 585 (Tex. App.—Dallas 2008, no pet.) *disapproved on other grounds*, *Iliff*, 339 S.W.3d at 74.
[27] *Iliff*, 339 S.W.3d at 82
[28] *Id.*
[29] *Zorilla v. Wahid*, 83 S.W.3d 247 (Tex. App.—Corpus Christi 2002)(finding father not to be underemployed despite evidence that he was capable of earning a higher income in a different area of medical practice.) *disapproved on other grounds*, *Iliff*, 339 S.W.3d at 74.
[30] *In re Marriage of Braun*, 887 S.W.3d 776, 779 (Mo. App.—E.D. 1994, no writ.)(trial court erred in imputing income to mother who had been unemployed during the eight years of her marriage and only had high school diploma).
[31] *Kish v. Kole*, 874 S.W.2d at 836.
[32] Tex. Fam. Code § 154.123(b)(5) (West 2012).

deemed intentionally unemployed. However, courts take into consideration whether an obligee parent possess adequate skills or education to enter the workforce.[33]

C. Deeming an obligor to be "intentionally" unemployed/underemployed

Until recently, there was a split among Texas courts with regard to the statutory requirements of Texas Family Code Section 154.066. Twelve of the fourteen Texas courts of appeals interpreted the statute to require proof that obligors reduced their income for the specific purpose of decreasing their child support payments. The minority of appellate courts found obligor's intentions to be irrelevant, and instead required a finding that the obligor was merely "voluntarily" unemployed/underemployed.[34] Resolving the conflicts in statutory interpretation, the Texas Supreme Court settled the dispute in *Iliff v. Iliff*.[35]

In *Iliff*, the father was a chemical specialist and account manager, and had previously earned between $90,000 and $100,000 a year before he voluntarily quit his job.[36] Approximately six months later in a divorce/SAPCR the mother was appointed sole managing conservator of the children and the father was ordered to pay child support.[37] Despite having a bachelor of science and a masters of business administration, the father testified before the court that he currently worked sporadically as a consultant and a tractor operator, earning between $3,600 to $4,800 a year during the pendency of the proceedings.[38] The trial court determined the father was intentionally underemployed, applying Texas Family Code Section 154.066.[39] The father appealed the trial court's decision, arguing that there was no evidence that he was intentionally unemployed or underemployed for the primary purpose of avoiding his child support obligations.[40] The Supreme Court of Texas disagreed.

While recognizing the apparent split amongst Texas courts, in which most favored the father's position, the Supreme Court held that the language of Section 154.066, "did not include in the statute any mention of 'purpose,' 'design,' or even 'intent' to avoid or reduce child support," nor did it require "further proof of the motive or purpose behind the unemployed or underemployed."[41] Based on the statute's plain meaning, the court held that trial courts are only required to make a finding that an obligor is voluntarily unemployed or underemployed, "meaning an obligor consciously chooses to remain unemployed or underemployed."[42]

As a result of the holding in *Iliff*, trial courts no longer are required to make a finding that obligor parents are intentionally unemployed/underemployed for the specific purpose of avoiding their child support obligations. However, the court cautions trial judges to be mindful that Section 154.066 "simply states that a trial court *may* apply the child support guidelines to the earning potential of the obligor," and that such language "creates discretionary authority."[43] In addition, despite the permissive term, "the court is not vested with unlimited discretion, and is required to exercise a sound and legal discretion within the limits created by the circumstances of a particular case."[44] Furthermore, trial courts should never forget that the "paramount guiding principle" in a child support case is to adhere to best interest of the child.[45] The court rejected the presumption proffered by the Texas Attorney General that receiving more child support will always be in the best interest

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[33] *See e.g.*, *In re Z.B.P.*, 109 S.W.3d 772, 783 (Tex. App.—Fort Worth 2003, no pet.)(trial court's decision to deem a mother voluntary underemployed was an abuse of discretion since she was a high school dropout with a GED, expected to earn minimum wage, and remained unemployed to take care of her children), *disapproved on other grounds*, *Iliff v. Iliff*, 339 S.W.3d 74.

[34] *Compare*, *e.g.*, *In re Z.B.P.*, 109 S.W.3d 772, 783 (Tex. App.—Fort Worth 2003, no pet.)(holding "for a court to find that a parent is intentionally underemployed or unemployed under Section 154.066, there must be evidence the parent reduced his income for the purpose of decreasing his child support payments"); *Gaxiola v. Garcia*, 169 S.W.3d 426, 431-432 (Tex. App.—Dallas 2006, no pet.) (there was no evidence that father's decision to return to El Paso and accept alternative employment was a sham for his intention to avoid his child support obligation), *with*, *e.g.*, *Pharo v. Trice*, 711 S.W.2d 282 (Tex. App.—Dallas 1986, no writ)(trial court did not abuse its discretion in determining obligor was intentionally unemployed on the basis that she voluntarily chose to be unemployed.)

[35] *Iliff*, 339 S.W.3d at 76

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 80-81.

[42] *See id.* at 80.

[43] *Id.* at 81 (quoting Tex. Gov't Code § 311.016(1)).

[44] *Id.* (quoting *Womack v. Berry*, 291 S.W.3d 677, 683 (1956).

[45] *Id.*

of the child, and instead directs lower courts to continue engaging in case-by-case determinations when deciding whether to impute income to a parent on the basis of intentional underemployment/unemployment.[46]

1. Factors to consider when determining whether an obligor is voluntarily unemployed/underemployed

Even though the Texas Supreme Court in *Iliff* disapproved of the majority of existing case law to the extent it required proof of an obligor's intent to avoid his child support obligations, Section 154.066 still firmly requires courts to establish that an obligor is intentionally unemployed/underemployed. In this regard, *Iliff*, as well as the case law decided prior to it, continues to offer guidance in making this determination. Under the common law, this requisite intent of Section 154.066 may be inferred from circumstances such as the parent's education,[47] business background, earning potential,[48] voluntary resignation/retirement,[49] failure to actively seek employment,[50] past wages, and obligee testimony.[51] In addition, while no longer required, evidence that an obligor is attempting to become or remain unemployed for the specific purpose of reducing his or her child support obligations should be viewed as highly relevant, and even dispositive, in determining whether the obligor is intentionally unemployed/underemployed.[52]

By statute, obligors are required to furnish sufficient information concerning their current income to accurately calculate their net resources and ability to pay child support.[53] However, a trial court is not required to accept an obligor's evidence of income as true.[54] Once the obligor has offered proof of his or her current wages, the obligee bears the burden of demonstrating that the obligor is intentionally unemployed or underemployed through one or more of the factors listed above. Then, if necessary, the burden shifts to the obligor to offer rebuttal evidence, discussed further below.[55]

As previously mentioned, in *Iliff*, the Court stressed that determination of child support should always be centered on the best interest of the child. However, trials courts must also consider a parent's right to pursue his or her happiness. Thus, trial courts should properly consider rebuttal evidence depicting an obligor's legitimate reasons for currently being unemployed/underemployed. Such reasons may be based on an obligor's desire to maintain close ties to his or her family. For example, obligors may take lower paying jobs in order to spend more time with their children, live closer to their children in hopes of attending their scholastic or extracurricular events, or to provide their children with better health benefits through their new careers.[56] In addition, obligors may seek to start new business ventures, continue their education,[57] become public servants, or

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[46] *Id.* at 82

[47] *McLane v. McLane*, 263 S.W.3d 358, 367 (obligor, whose testimony concerning his financial status was unsupported by objective evidence, was found to be intentionally unemployed on the basis of his education and business background as a practicing attorney), *disapproved on other grounds*, *Iliff*, 339 S.W.3d 74.

[48] *In the Interest of A.B.A.T.W.*, 266 S.W.3d 580 (Tex. App.—Dallas 2008, no pet.)(trial court properly determined that obligor was intentionally unemployed on the basis that he could have earned an additional $60,000), *disapproved on other grounds*, *Iliff*, 339 S.W.3d 74.

[49] *In re J.D.D.*, 242 S.W.3d 916 (Tex. App.—Dallas 2008, pet. denied)(optician was found to be intentionally unemployed due to abandoning his job shortly after he was ordered to pay over $45,000 in child support arrearages).

[50] *See Friermood v. Friermood*, 25 S.W.3d 758, 760-61 (Tex. App.—Houston [14th Dist.] 2000, no pet.)(fisherman deemed to be intentionally unemployed on the basis that he did not attempt to supplement his income when bad weather conditions prevented him from fishing).

[51] *See Hardin v. Hardin*, 161 S.W.3d 14, 22-23 (Tex. App.—Houston [1st Dist.] 2004, no pet.)(obligor deemed to be intentionally unemployed on the basis of evidence and testimony presented by the obligee concerning his finances and work experience), *judgm't vacated, opinion not withdrawn*, No. 14-03-00342-CV (Tex. App.—Houston [14th Dist.] 2005, no pet.)(memo op.; 2-10-05).

[52] *Iliff*, 339 S.W.3d at 81

[53] Tex. Fam. Code § 154.064 (West 2012).

[54] *Garner v. Garner*, 200 S.W.3d 303, 308 (Tex. App.—Dallas 2006, no pet.).

[55] *Iliff*, 339 S.W.3d at 82

[56] *Id.*

[57] *In re B.R.*, 327 S.W.3d 208, 214 (Tex. App.—San Antonio 2010, no pet.)(former soldier was not intentionally unemployed due to his decision to leave the military in order to continue his education), *disapproved on other grounds*, *Iliff*, 339 S.W.3d 74.

may be suffering from a disability or health concerns.[58] Furthermore, courts should consider obligors' sincere, but failed, attempts at securing employment, as well as economic adversities[59] and job market conditions.[60]

D. Economic grounds for imputing income

Once it has been determined that an obligor parent is voluntarily unemployed or underemployed, the complex question arises regarding how to calculate the proper amount of the child support. Upon determining that an individual is intentionally unemployed or underemployed, Texas Family Code Section 154.066 states that courts "may apply the support guidelines to the *earning potential* of the obligor."[61] However, the code is silent with regard to what economic basis courts should use to determine an obligor's earning potential. Thus once again, trial judges must exercise their discretion when deciding how much income to impute to a parent they deem to be intentionally unemployed/underemployed.

In Texas courts have used a variety of methods to ascertain an unemployed or underemployed parent's earning potential, such as reviewing the parent's past earnings,[62] current earnings, work experience,[63] and educational background.[64] In addition, courts have strongly considered the testimony of experts[65] and obligees[66] concerning the earning potential of a unemployed/underemployed parent. For example, in *Kish* the trial court's determination that the obligor was underemployed was supported by a local construction manager's testimony that individuals in the obligor's career field earned an annual salary of approximately $40,000. Furthermore, when there is no evidence "of a party's resources as defined by Section 154.062(b)," under the Family Code trial courts are to "presume that the party has income equal to the federal minimum wage for a 40-hour week to which the support guidelines may be applied."[67]

E. Standard of review

When reviewing a trial court's decision to impute income to an obligor on the basis that he is intentionally unemployed or underemployed, the complaining party must show that the court committed a clear abuse of discretion.[68] In order to determine whether an abuse of discretion has occurred, appellate courts generally engage in a two-prong inquiry: (1) did the trial court have sufficient information upon which to exercise its discretion; and (2) did the court err in its application of its discretion?[69]

As previously discussed, trial judges are afforded great latitude when weighing, or rejecting, the evidence presented before the court during establishment of a child support order. Thus, a trial court's decision will not be viewed as an abuse of discretion when supported by "some evidence of a substantive and probative character."[70] It appears that most Texas appellate courts view this inquiry as having a low threshold. In fact, the Dallas Court of Appeals has stated that "legal sufficiency requires the evidence to be more than a

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[58] *See Iliff*, 339 S.W.3d at 82.

[59] *See In the Interest of J.G.L.*, 295 S.W.3d 424, 428 (Tex. App.—Dallas 2009, no pet.)(there was no evidence to support a finding that the obligor was voluntarily underemployed after his employer testified that the father's workload decreased due to adverse economic conditions).

[60] *See Stark v. Nelson*, 878 S.W.2d 302, 307 (Tex. App.—Corpus Christi 1994, no writ.)(there was no evidence to support a finding that the obligor was intentionally unemployed after being involuntarily terminated from three job positions and voluntarily resigning from one position to accept a better job).

[61] Tex. Fam. Code § 154.066 (emphasis added) (West 2012).

[62] *See Giangrosso v. Crosley*, 840 S.W.2d 765, 770 (Tex. App.—Houston [1st Dist.] 1992, no writ.)(trial court did not abuse it discretion in imputing income based on testimony from both parties that the obligor had past earnings between $18,000-$25,000 a year), *superseded by statute on other grounds*, *Office of Atty. Gen. of Tex. v. Long*, 840 S.W.2d 765 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[63] *See Tenery* v. *Tenery*, 955 S.W.2d 337, 339 (Tex. App.—San Antonio 1997, no pet.)(record supported trial court's imputation of income to obligor in the gross amount of $48,000 based on the obligor's work experience as skilled diesel mechanic).

[64] *See Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815, 827 (Tex. App.—Fort Worth 2007, no pet.)(trial court had sufficient evidence to impute income to the obligor on the basis of his master's degree in architecture and his prior work experience as a full time architect), *disapproved on other grounds*, *Iliff*, 339 S.W.3d 74.

[65] *See Kish*, 847 S.W.2d 836.

[66] *See In the Interest of N.T.*, 335 S.W.2d 660 (Tex. App.—El Paso 2011, no pet.)(trial court was within its discretion to impute yearly income to the obligor in the amount of $84,000 based on obligee's testimony that the obligor had prior earnings between $80,000-$90,000 as a basketball player in the Philippines).

[67] Tex. Fam. Code § 154.068 (West 2013).

[68] *See, e.g.*, *Iliff*, 339 S.W.3d at 78.

[69] *See, e.g.*, *Swaab v. Swaab*, 282 S.W.3d 519, 525 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd w.o.j.); *Zeifman v. Michels*, 212 S.W.3d 582, 588 (Tex. App.—Austin 2006, pet. denied).

[70] *See, e.g.*, *Swaab*, 282 S.W.3d at 525; *In the Interest of B.R.*, 327 S.W.3d at 211; *In the Interest of J.D.D.*, 242 S.W.3d at 920.

scintilla when viewed in a light most favorable to the trial court's findings," and "we are mindful of our duty not to substitute our judgment for that of the trial court."[71]

When determining if a trial court erred in its use of discretion, the key focus is to ascertain whether the court acted "arbitrarily or unreasonably, without reference to guiding rules or principles," or failed to "analyze or apply the law correctly."[72] Furthermore, the mere fact that a trial judge may exercise his or her discretion differently than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.[73]

F. A novel prisoner's dilemma[74]

Thus far, it seems clear that Texas trial courts regularly exercise their discretion in deeming obligor parents to be intentionally unemployed/underemployed whenever the parents fail to provide for their children to their established earning potential. However, the picture dramatically changes when a parent is incarcerated and is financially, and physically, unable to provide any child support to their children. More to the point, the question arises as to whether the Texas child support system show even less sympathy for absentee parents behind bars. As will be shown, incarcerated parents are afforded no special treatment due to their zero earning capacity. In fact, due in part to the Texas Family Code and the common law, incarcerated parents essentially lose a majority of their rights to participate in and challenge a trial court's determination that they are intentionally unemployed. Whether these rights are stripped away by statute or judicial discretion needs to be decided.

Consider the following hypothetical without knowing whether the incarcerated parent is a mother or father: An individual is in prison and is divorced by the spouse. The petitioning party files a petition with the court seeking to establish a parent-child relationship and a child support order against the incarcerated parent. Prior to being imprisoned, the obligor parent had obtained a bachelor's degree in English and earned a decent yearly gross salary as bank manager in the amount of $40,000 (an hourly rate of roughly $21.00). However, due to the parent's felony embezzlement conviction, it is highly unlikely that a bank is anxiously awaiting the inmate's return to the job market. May a trial judge determine that the obligor parent is intentionally unemployed? If so, on what economic basis should the court use to determine the obligor's earning potential for the purpose of establishing child support? Finally, what are the incarcerated parent's rights with regard to being able to access the courts and participate during these determinations?

1. *The incarcerated parent's "right to be heard"*

All litigants who must settle disputes through the judicial process have a fundamental right under the U.S. Constitution to be heard in a meaningful time and manner.[75] This fundamental right is founded on the belief that each litigant should have the opportunity to introduce evidence, to cross-examine witnesses, to be heard on questions of law, and to have a judgment rendered only after a full trial.[76]

However, under the common law in Texas, inmates only have a qualified right to be heard, and are not vested with the absolute right to appear in person during each court proceeding.[77] When an inmate does request to be present at a hearing, his or her "right of access to the courts must be weighed against the protection of our correctional system's integrity."[78] The key factors in deciding whether an inmate should be permitted to appear include: (1) the cost and inconvenience of transporting the inmate to court; (2) the security risk and danger to the court and the public by allowing the inmate to attend court; (3) whether the inmate's claims are substantial; (4) whether a determination of the matter can reasonably; (5) whether the inmate can and will offer admissible noncumulative testimony that cannot be offered effectively by deposition, telephone, or otherwise; (6) whether the inmate's presence is important in judging his demeanor and credibility compared with

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[71] *In re J.G.L.*, 295 S.W.3d at 427 (quoting *Gibson v. Ellis*, 126 S.W.3d 324, 335 (Tex. App.—Dallas 2004, no pet.)).
[72] *See Iliff*, 339 S.W.3d at 79.
[73] *Burney v. Burney*, 225 S.W.3d 208, 214 (Tex. App.—El Paso 2008, no pet.)(citing *Southwestern Bell Telephone Co. v. Johnson*, 389 S.W.2d 645, 648 (Tex. 1965).
[74] Please note that this section does not refer to philological theory of games [or game theory] formalized by Albert W. Tucker, in which two criminal suspects are separated and incentivized to snitch on their accomplice.
[75] *Hudson v. Palmer*, 468 U.S. 517, 523 (1984).
[76] *Jordan v. Jordan*, 653 S.W.2d 356, 358 (Tex. App—San Antonio 1983, no writ).
[77] *In the Interest of Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003).
[78] *Id.*

that of other witnesses; (7) whether the trial is to the court or to a jury; and (8) the inmate's probability of success on the merits.[79]

If a court denies an inmate's request to personally appear in court, the court should permit the inmate the opportunity to be heard by affidavit, deposition, telephone, or other means.[80] Several courts of appeals have held that a trial court's failure to respond to an inmate's request for a bench warrant to appear in court constitutes an abuse of discretion.[81] However, the Texas Supreme Court has held that inmates bear the burden to show how the factors, previously listed, weigh in favor of the inmate personally appearing before the court.[82] Failure to meet this burden does not require trial courts "to go beyond the bench warrant request and independently inquire into the necessity of the inmate's appearance, regardless of the content of the request."[83] In other words, even if a lay inmate properly files a bench warrant listing each factor supporting why he or she should be allowed to appear in person before the court, a trial court may deny the request on the grounds that the inmate failed to provide any factual information showing why his interest in appearing outweighs the impact on the correctional system.

2. *Inmates' right to counsel*

An interesting note to consider is that a key factor in deciding whether an inmate should be authorized to appear in person before the court depends on whether the prisoner has retained counsel. However, it is highly unlikely that an incarcerated parent, seeking to establish a zero earning capacity, will be able to afford legal representation. Under the Texas Family Code, an obligor parent is not entitled to a court appointed attorney unless there is possibility that the parent may be incarcerated as result of the proceeding. In *In re J.A.G.*, an incarcerated father argued that the trial court erred in establishing a child support order against him without appointing an attorney to represent him at the hearing, as required by Section 157.163.[84] The appellate court held that the inmate's argument was misplaced, and that he was only entitled to a court appointed attorney if incarceration was a potential result of the proceeding.[85] The indigent father attempted to justify his position by arguing that he may be re-incarcerated after his release from prison for failing to satisfy his child support obligations.[86] In response, the court drew the father's attention to the silver lining that if he failed to pay his child support he would "be entitled to counsel at a hearing to enforce the order and to hold him in contempt."[87]

3. *Imputing income to incarcerated parents on the basis of intentional unemployment*

To no surprise, an inmate's status does not exempt him as a parent from the duty to support his children, or from being deemed intentionally unemployed under Section 154.066. Thus, two questions arise: (1) what evidentiary factors do courts consider when determining whether an incarcerated parent is intentionally unemployed; and (2) how do courts impute income to an inmate with a zero earning potential?

3(a). Determining whether an incarcerated obligor is intentionally unemployed

Despite the numerous cases that weigh and consider the evidentiary factors laid out by Texas Supreme Court in *Iliff*, there is a rather limited number of judicial opinions that actually address how a court is to determine whether an incarcerated individual is intentionally unemployed. The issue of whether incarceration can be viewed as voluntary unemployment had been discussed by several courts of appeals, but has never been authoritatively decided.[88] Based on a survey of the Texas common law, it appears as if there is an unspoken presumption that incarcerated parents are automatically considered to be intentionally unemployed due to mere fact that they are behind bars.[89]

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[79] *Id.*
[80] *See, e.g.*, *In the Interest of R.C.R.*, 230 S.W.3d 423, 426 (Tex. App.—Fort Worth, 2007, no pet.); *Sweed v. City of El Paso*, 139 S.W.3d 450, 452 (Tex. App.—El Paso 2004, no pet.).
[81] *In re Z.L.T.*, 124 S.W.3d at 166.
[82] *Id.*
[83] *Id.*
[84] *In re J.A.G.*, 18 S.W.3d 772, 774 (Tex. App.—San Antonio 2000, no pet.).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *In the Matter of the Marriage of Lassmann.*, 2010 WL 3377773, at *2 (Tex. App.—Corpus Christi-Edinburg Aug. 25, 2010, no pet.)(mem. op.)(Yañez dissenting)(citing *In re M.M.*, 980 S.W.2d 699, 701 (Tex. App.—San Antonio 1998, no pet.); *Reyes v. Reyes*, 946 S.W.2d 627, 629 (Tex. App.—Waco 1997, no writ.); *Hollifield v. Hollifield*, 925 S.W.2d 153, 156 (Tex. App.—Austin 1996, no writ)).
[89] *See Id.*

Two Texas trial courts explicitly based their decisions to impute income to incarcerated parents on the premise that the inmates' commissions of criminal acts constituted dispositive evidence that the parents "voluntarily" decided to be unemployed.[90] The rationale is perhaps that since incarcerated parents come to courts with "unclean hands," they should not be awarded special treatment based on their status as prisoner. As will soon be shown, other courts simply ignore the intent issue completely and immediately proceed to impute income to incarcerated parents on the basis of their earning potential.

3(b). *Establishing earning potential*

Recall that the Texas Family Code requires obligors to present sufficient information concerning their current "net resources and ability to pay child support" in order for courts to properly calculate the amount of their child support obligations.[91] The code further provides "In the ***absence*** of a party's resources, as defined by Section 154.062(b), the court shall presume that the party has income equal to the federal minimum wage for a 40-hour week to which the support guidelines may be applied"[92] This statute may have been drafted in part due to the absence of most incarcerated parents at their child support hearings, but it likely a fail-safe provision for courts to base child support awards whenever a parent is absent from a child support hearing and the obligee has no evidence concerning his net resources. It is well established under the common law that incarceration alone does not rebut this minimum-wage presumption, and that "absent evidence that the obligor is unemployable, it is appropriate for the court to apply the presumption."[93] Furthermore, courts do not presume that an incarcerated parent has no assets on which to base a child support award.[94]

Given the plain language of the Texas Family Code and legal precedent established by Texas courts of appeals, it would seem that in order for an incarcerated parent to rebut the minimum wage presumption, he would simply need to present evidence to a trial court that he is (1) currently incarcerated without financial assets, (2) earns zero net income, and (3) has a diminished future earning capacity due to his status a convicted criminal. However, as the following cases will illustrate, there truly is no sympathy for the devil in Texas.

To begin, let us first examine the unfortunate tale of an incarcerated father from Bexar County. In *In re M.M.*, a petitioning mother sought to establish child support against her incarcerated spouse.[95] The father requested to be present at the child supporting hearing; however, there was no evidence in the trial record concerning whether the trial judge ever ruled on the father's request to be heard.[96] Since the father was unable to attend the hearing, the record showed that he presented no evidence regarding his zero earning capacity due to his incarceration. Due to the "absence of evidence" of the father's current income, the trial judge established a child support order against the father on the presumption that his wages equaled the federal minimum wage.[97] Upon challenging the trial court's findings, the San Antonio Court of Appeals held that the trial court's failure to rule on the inmate's request did not constitute an abuse in discretion.[98] Specifically, the court based its holding on the grounds that there was no evidence in the trial record showing that the court ever denied the inmate's request to be present at the trial; therefore, "there is no evidence that he requested the opportunity to be heard in person."[99] Ignoring the court's "hear no evil, see no evil" approach in this case, it must be conceded that the incarcerated father did not attempt very strenuously to be heard at the child support hearing. However, the same cannot be said for the inmate in the next case.

In *In re B.R.G.*, the Texas Attorney General filed a petition seeking to establish a child support order against an incarcerated father.[100] Upon receiving notice, the father filed a "Notice to the Court," wherein he

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[90] *See* *In the Matter of the Marriage of Lassmann*., 2010 WL 3377773, at *2; *In the Interest of B.R.G.*, 48 S.W.3d 812, 816 (Tex. App.—El Paso 2001, no pet.).
[91] *See* Tex. Fam. Code § 154.064 (West 2012).
[92] *Id.* § 154.068 (West 2013)(emphasis added).
[93] *See, e.g.*, *In re B.R.G.*, 48 S.W.3d at 819; *In the Interest of M.M.*, 980 S.W.2d 699, 701 (Tex. App.—San Antonio 1998, no pet.)(citing *Reyes v. Reyes*, 946 S.W.2d 627, 630 (Tex. App.—Waco 1997, no writ.).
[94] *See* *In re B.R.G.*, 48 S.W.3d at 819; *In re Marriage of Lassmann*., 2010 WL 3377773, at *1; *In the Interest of M.M.*, 980 S.W.2d at 700.
[95] *In the Interest of M.M.*, 980 S.W.2d at 700.
[96] *Id.* at 702.
[97] *Id.* at 701.
[98] *Id.* at 702.
[99] *Id.*
[100] *In the Interest of B.R.G.*, 48 S.W.3d 812, 814 (Tex. App.—El Paso 2001, no pet.).

stipulated he was the child's father and that he "absolutely has no NET MONTHLY INCOME, NO NET RESOURCES, NO SELF EMPLOYMENT INCOME, NO DEEMED INCOME POSSIBLE, NO WAGE AND SALARY PRESUMPTION POSSIBLE, AND ABSOLUTELY NO LEGAL MEANS IN WHICH TO GENERATE OR EARN ANY INCOME WHATSOEVER."[101] The trial court denied the father's request to be present at the trial, and established a child support order against the father on the basis of the minimum wage presumption, as well as ordering the father to pay $6,000 in retroactive child support upon his release.[102] Upon review, The El Paso Court of Appeals held that the trial court did not abuse its discretion in determining that the father was intentionally unemployed on the basis that his voluntary criminal acts constituted evidence of his "voluntary" choice to be unemployed.[103] In addition, the court held that since none of the father's pleadings or documents was introduced as evidence during the trial, the father "failed to present any other evidence of his net income or resources to the trial court."[104] Thus, the trial court did not abuse its discretion in imputing income to the inmate based on the minimum wage presumption.[105] When reviewing the trial court's denial of the father's request to be present at the hearing, the court held that this on its face did not constitute an abuse of discretion, because the trial court did not "bar" the father from proceeding by affidavit, deposition, telephone, or other effective means.[106]

As this point the issue arises whether there have ever been any circumstances in which an incarcerated parent has actually been heard at his child support hearing, let alone able to present evidence that he had a zero earning capacity. Rest assured that the next case illustrates just that. However, before continuing, turn back and consider the hypothetical proposed at the beginning of this section, because the answers will soon be apparent.

In *Lassmann*, the husband, "Charles," adopted his wife's teenage daughter "C.J." soon after the couple was married in April 2004.[107] Five years later Charles was incarcerated after assaulting his wife and committing a DWI offense, which constituted a violation of his parole.[108] While imprisoned, the wife filed a petition for divorce, and sought to establish a child support order against her incarcerated spouse.[109] Charles was not present at the child support hearing; however, he was represented by counsel.[110] During the hearing, the mother testified that prior to his incarceration Charles had previously earned $26.00 per hour as a directional driller; however, he currently owned no assets and owed $4000 to the IRS in tax penalties.[111] The mother sought to base Charles's child support obligation on the earning potential he had prior to being imprisoned.[112] In response, Charles's attorney argued that his client's child support obligation should be based on the minimum wage presumption since the evidence showed his client had no income earning ability and no other financial assets.[113] The trial court determined that Charles was intentionally unemployed as a result of his "voluntary" criminal acts.[114] In addition, the trial court ordered Charles to pay child support upon his release from prison in the amount of $686.00 per month based on his prior hourly wages of $26.00 per hour (roughly $50,000 annual gross income).[115] On appeal, the Corpus Christi-Edinburg Court of Appeals held that the trial court erred in determining that Charles was intentionally unemployed as a result of "voluntarily" assaulting his wife.[116] However, the court held that the trial court did not abuse its discretion in basing Charles's child support obligation on his prior earning potential.[117] In support of its holding, the court cited Section 154.123(b)(17), which permits trial courts to deviate from the statutory guidelines for "any other reason con-

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[101] *Id.*
[102] *Id.*
[103] *Id.* at 816.
[104] *Id.* at 818.
[105] *Id.*
[106] *Id.*
[107] *In the Matter of the Marriage of Lassmann.*, 2010 WL 3377773, at *1.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.; Annual Gross Income calculated by 2012 child support guidelines.*
[116] *Id.* at *2.
[117] *Id.* at *3 (citing *Pharo v. Trice*, 711 S.W.2d 282, 284 (Tex. App.—Dallas 1986, no writ)); *Wetzel v. Wetzel*, 514 S.W.2d 283, 285 (Tex. Civ. App.—San Antonio 1974, no writ).

sistent with the best interest of the child, taking into consideration the circumstances of the parents."[118] The court then justified the trial court's decision by stating the lower court could have considered that Charles's child support obligations would only be limited to two years since his adopted daughter was nearly 16 at the time of the hearing, and the mother would only be able to enforce the order upon Charles's release from prison.[119] In addition, the Court held that trial courts are afforded the discretion to take a parent's earning potential into account when determining the amount of child support the parent must pay.[120] Furthermore, the Court went on to state that "the issue of voluntary unemployment aside, there are facts in the record to support the trial court's award, and we must affirm the judgment if there is any legal theory in the record to support," and that "the most generous award was in C.J's best interests."[121]

In her dissent, Justice Yañez disagreed with the majority's holding that the trial court did not abuse its discretion by considering the obligor's earning potential for the purpose of determining the amount of child support he must pay.[122] Justice Yañez went on to illustrate that the two cases the majority cited for its holding, *Pharo v. Trice* and *Wetzel v. Wetzel*, were distinguishable from the case at bar. Specifically, each case involved circumstances in which trial courts set child support awards based on parents' *actual earnings*, rather than their *earning potential*.[123] In addition, Justice Yañez disagreed with the majority's decision to impute income to Charles on the basis of his earning potential "even though the majority concedes that the trial court could not have properly based the child support obligation on Charles's earning potential as an intentionally unemployed person."[124] According to the dissenting Justice, Charles's child support obligation should have been based on the federal minimum wage in accordance with past legal precedent and minimum wage presumption.[125] Despite the majority's assertions, Justice Yañez remained confident that she did not "overlook" any provisions in the Texas Family Code that granted trial judges the discretion to consider an obligor's earning potential for sole purpose of establishing child support."[126]

The rationale that the Corpus Christi Appellate Court used to reach its decision *in Lassman* is astonishing to say the least. Despite the trial court's record that Charles had a zero earning capacity due to his incarceration, the majority found that the lower court was justified in calculating his child support obligation based on his prior wage earnings as a free man. As Justice Yañez stated in her dissent, the majority deviated from the statutory language of the Texas Family Code by holding that the trial court had the discretion under Section 154.123(b)(17) to consider Charles's earning potential for the purpose of computing his child support obligations. By upholding the lower court's decision to impute income to Charles, despite its erroneous finding that he was intentionally unemployed, the court essentially rendered the statutory requirements of Section 154.066 nugatory. According to the majority's analysis of the Family Code, a trial judge has the ultimate discretion to consider the earning potential of an obligor for the purpose of computing his child support obligation, regardless of whether the parent meets the statutory classification requirements to be considered intentionally unemployed under Section 154.066.

Aside from the issues of judicial discretion and intentional unemployment, *Lassmann* highlights another important problem that persists within Texas family courts' practice of imputing income to incarcerated parents on the basis of the minimum wage presumption. As previously mentioned, the minimum wage presumption is an economic basis trial courts may use under Section 154.068 for computing an obligor's net resources in "absence of evidence" of the wage and salary income of the party. As stated in Justice Yañez's dissent, it was "uncontroverted that Charles is not receiving income and has no other assets on which to base a child support award."[127] However, rather than determining that the father had zero net resources to base his child support obligation on, Justice Yañez believed that such circumstances constituted an "absence of evidence"

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[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at *4.
[123] *Id.*
[124] *Id.* at *5.
[125] *See id.*
[126] *Id.*
[127] *Id.*

and warranted the application of the minimum wage presumption by the majority.[128] To support her position, Justice Yañez's cited prior case precedent established by other appellate courts, as well as the Corpus Christi Court of Appeals, which generally held that a trial court does not "abuse its discretion in awarding child support based on the federal minimum wage, where the obligor was in prison and there was no evidence of his earned income."[129] While Justice Yañez's survey of the Texas common law is accurate on this issue, her analysis is off point with the facts present in *Lassmann*, wherein Charles's attorney did present evidence of Charles's zero earning potential as an incarcerated parent. Therefore, in accordance with the statutory language of Family Code, Charles's child support obligation should have been zero during the duration of his incarceration, since he properly established that he had zero net income as an inmate and lacked any other financial resources to base his child support obligation on. However, it should be noted that Charles did not raise this issue on appeal, because his attorney argued before the trail court that Charles's child support obligation should have been based on the federal minimum wage.[130]

Returning to the hypothetical proposed at the beginning of this section, it is clear that the incarcerated parent will face an uphill battle to be heard at his or her child support hearing. Depending on how the trial court exercises its discretion, the obligor may be found to be intentionally unemployed on the basis that the parent voluntarily chose to commit a criminal act, which resulted in the parent's criminal conviction. If the parent is unable to secure council or properly present evidence regarding his or her net income as an inmate, the trial court will have the discretion to impute income to the parent on the basis of the minimum wage presumption. In addition, if the parent has the misfortune of being within the jurisdiction of the Corpus Christi-Edinburg Court of Appeals, the obligor's prior salary earnings of $40,000 per year as a bank manager may be considered as the obligor's earning potential for the purpose of calculating the parent's child support obligation, irrespective of the fact that the obligor is currently incarcerated. Finally, either child support award will accumulate interest at a rate of 6% per year during the parent's incarceration.[131]

V. Alternatives

After analyzing the substantive application of the intentional unemployment standard in conjunction with the minimum wage presumption, it is clear that an incarcerated obligor in Texas is often burdened with a child support order that he cannot possibly satisfy while in prison. In addition, the obligor will incur interest charges on his child support arrearages at a rate of 6% per year.[132] As a result, the obligor will face a large non-dischargeable judgment upon his release from prison. The prospect of paying this judgment with interest is extremely unlikely, especially due to today's competitive job market and the obligor's criminal record. If the obligor is unable to satisfy his child support order, he may be held in contempt of court for failing to satisfy his current child support obligation, past due arrearages, and interest on arrearages.[133] Thus the question arises, what alternatives may be employed in Texas in order to avoid this harsh and unjust result.

A. Suspend child support obligations while obligors are incarcerated

In order to avoid the harsh economic realities mentioned above, Texas courts should be granted the discretion to suspend an obligor's child support obligation while he is incarcerated. Many opponents may feel this solution will only benefit "deadbeat dads," and that parents should be obligated to pay child support and incur interest on their arrearages, irrespective of the fact that they're in prison. However, such a situation provides little or no benefit to anyone. The children of the incarcerated obligor do not receive the benefit of the child support proceeds during the time they require the funds, and the parent is simply confronted with a large debt upon his release coupled with the possibility of being sent directly back to jail. In many states, courts have held or recognized that an obligor parent's incarceration may justify, or at least be a factor in, a court's decisions to modify or suspend that parent's child support obligation.[134] In *Leasure v. Leasure*, the Superior Court of Pennsylvania stated, "Imposing upon the incarcerated parent a continuing obligation, beyond his

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[128] *See Id.*
[129] *See Id. (emphasis added).*
[130] *Id.*
[131] Tex. Fam. Code § 154.265 (West 2012).
[132] *Id.*
[133] *See* Tex. Fam. Code § 157.001 (West 2012);
[134] *See* Frank J. Wozniak, J.D., *Loss of Income due to incarceration as affecting child support obligation*, 27 A.L.R.5th 540, § 4 (Citing cases from Alabama, Alaska, Colorado, Connecticut, Delaware, etc.).

ability to pay, does not help the child. Rather it simply adds to an accumulating burden that falls upon the parent when he is least able to bear it."[135]

I propose that courts should be granted the discretion to suspend an obligor's obligation to pay child support when (1) the parent is incarcerated, (2) he has zero net income, and (3) he has no other assets, which may be used to satisfy his child support obligation. The parent's child support order should only be suspended until the parent is released from prison, or regains the ability to satisfy his child support obligation. In addition, the time that the obligor is reprieved from paying child support should be accumulated and added to his child support order upon being released from prison. For example, if an incarcerated parent is ordered to pay child support for a 15-year-old child, and is released from prison after the child's 18th birthday, the parent should be obligated to pay 3 years of child support. Thus, the child of the incarcerated parent will still receive the full benefit of the child support order, and the obligor will not be faced with a large debt upon being released from prison.

I believe this solution will incentivize obligors to re-enter to work force, upon their release from prison, and begin making child support payments, since they will know their contributions will go towards the benefit of their children as opposed towards paying the interest on a large debt. If an obligor has difficulty securing employment, he may be able to take advantage of, or be ordered by the court to enter, the Noncustodial Parent Choices Program (NCP) offered by the Attorney General's Office and Texas Workforce Commission. The NCP program seeks to place unemployed parents into the workforce as opposed to holding them in contempt of court for failing to satisfy their child support orders. The program (1) works with the Texas Department of Criminal Justice to provide educational resources to parents while they are incarcerated; (2) aids parents in securing employment upon their release from prison; and (3) encourages parents to remain emotionally and financially involved in their children's lives.[136] Parents who have participated in the program have shown on average to contribute a 51% increase in child support payments, and have generally been able to become more involved in their children's lives[137]

However, due to the conservative nature of the Texas Legislature and its constituents, it is highly unlikely that this proposal would ever be adopted and codified into the Texas Family Code.

B. Amend the Minimum Wage Presumption

In the alternative, I propose that the minimum wage presumption, codified in Section 154.068, be amended to include a standardized procedure for admitting evidence regarding an incarcerated parent's zero income. As previously mentioned, in the absence of any evidence of an inmate's financial recourses, the court will impute income to the incarcerated parent based on the minimum wage presumption, pursuant to Section 154.068.[138] This result often occurs because the incarcerated parent is (1) unable to appear at his child support hearing in person and testify that he earns zero net income as an inmate; (2) the parent is unable to afford legal representation; and (3) evidence submitted by the inmate to the court is often deemed inadmissible.[139] In order to circumvent this problem, I propose that Family Code Section 154.068 be amended as follows:

> In the absence of evidence of a party's resources, as defined by Section 154.062(b), the court shall presume that the party has income equal to the federal minimum wage for a 40-hour week to which the support guidelines may be applied. In the cases in which the party is incarcerated, the party may submit a standardized form to the court that states the party's current financial resources and net income. The financial information contained in the form shall constitute evidence of the "party's resources."

This amendment would ensure that an incarcerated parent would have a simple and guaranteed method for submitting evidence to the court regarding his zero net income as an inmate, consistent with his constitutional right to be heard at his child support hearing.[140] In theory, upon receipt of this form, the trial judge

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[135] *Leasure v. Leasure*, 378 Pa. Super. 613, 617 (1988).
[136] Attorney General of Texas, *Family Initiatives*, https://www.oag.state.tx.us/cs/ofi/.
[137] *See Id.*
[138] *See supra* nn. 88-90.
[139] *See supra* nn. 91-102.
[140] *See supra* nn. 70-72.

should determine that the obligor has zero net income and no earning potential as an inmate. Unless there is evidence that the obligor has other financial assets, which may be used to satisfy his obligation to support his child, the court should award a child support order against the inmate in the amount of zero dollars due to his lack of income. Upon the inmate's release, the court would modify its order based on the obligor's earning potential as a free man, which would likely be based on the minimum wage presumption. Thus, the practical effect of this amendment is the same as suspending the incarcerated obligor's child support obligation until his release from prison!

However, the likelihood of this amendment being adopted is as unlikely as the prospect of trial judges following it. Texas courts have made a clear effort to abide by the fundamental notion of ensuring that incarcerated obligors be afforded the right to be heard at their child support hearings.[141] However, these efforts have only served as a false pretense to reach the conclusion that these inmates failed to produce evidence concerning their financial resources, in order to base the parents' child support obligations under the minimum wage presumption.[142] Therefore, it seems the courts have either (1) been unaware of the economic realities that these parents face upon their release from prison; or (2) view the parents' long-term unemployment as if it were a "voluntary choice" resulting from the inmates' imprisonment. If this amendment were adopted, I hypothesize that many trial judges would still exercise their discretion to render child support orders against incarcerated parents based on the minimum wage presumption. At which point, the only way that this issue would be resolved is if the Texas Supreme Court intervened and offered a direct opinion on this inherent flaw in the Texas Child Support System.

VI. Conclusion

I am a firm believer in the Texas Child Support System's goal of ensuring that above all else, trial courts should always act in the best interest of a child. However, when the system itself imposes unreasonable and unjust debts upon parents, especially those who have already paid their debts to society, a call for change is clearly warranted. Rather than sentence incarcerated obligors to a lifetime of child support arrearages and interest charges, the Texas Legislature should strive to reconnect these parents financially and emotionally with their children. As the New Testament states:

> If anyone has caused grief, he has not so much grieved me as he has grieved all of you, to some extent—not to put it too severely. The punishment inflicted on him by the majority is sufficient for him. Now instead, you ought to forgive and comfort him, so that he will not be overwhelmed by excessive sorrow. I urge you, therefore, to reaffirm your love for him.[143]

[141] *See supra* nn. 72-77.
[142] *See supra* nn. 91-92.
[143] 2 Corinthians 2:5-8 (New International Version).

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

ANNULMENT

ANNULMENT WAS PROPER WHERE HUSBAND FALSELY CLAIMED TO LOVE AND TO WANT TO MARRY WIFE AFTER HE HAD BEEN DETAINED BY HOMELAND SECURITY FOR HIS IMMIGRATION STATUS

¶14-4-01. *Zhang v. Zhang*, No. 05-13-00389-CV, 2014 WL 3843841 (Tex. App.—Dallas 2014, no pet. h.) (mem. op.) (08-05-14).

Facts: Husband was a citizen of the People's Republic of China. Husband and Wife dated and had a Child before they married. After the Child was born, but before the marriage, Husband was detained by Homeland Security due to his immigration status. While detained, Husband professed his love for Wife, and the couple married by proxy. After they married, Husband told Wife that he did not love her and had not been faithful to her prior to marriage. Husband and Wife did not cohabitate after this confession. Wife filed for an annulment. The trial court found that Husband's pre-marriage statements were made with the intent to induce Wife to marry Husband, and but for those statements, Wife would not have married Husband. The trial court also found that the marriage provided Husband with a legal benefit, and Husband had married Wife for the purpose of that legal benefit. The trial court granted the annulment. Husband appealed, arguing the annulment was not based on legally sufficient evidence.

Holding: Affirmed

Opinion: A trial court may grant an annulment to a party if the other party used fraud, duress, or force to induce the petitioner into marriage, and the petitioner has not cohabitated with the other party since learning of the fraud or since being released from the duress or force. Fraudulent inducement is established when a false material misrepresentation was made that (1) was known to be false when made, (2) was intended to be acted upon, (3) was relied upon, and (4) caused injury.

Here, Husband professed his love for Wife and indicated that he wanted to marry her. However, after they married, Husband stated that he did not love her and had not been faithful to her before their marriage. Wife did not cohabitate with Husband after learning of his fraudulent statements. Wife would not have married Husband but for his fraudulent inducement. The trial court did not err in granting the annulment.

Editor's comment: *Are you kidding me? One spouse telling the other spouse in the midst of a failing marriage "hey, I never loved you anyway" is FRAUD? Wow! If that decision is allowed to stand, we are gonna have fraud all over the place in Texas family law cases. The new trend in Texas divorce law – fraudulent inducement claims – and here's the case law authority to support it. M.M.O.*

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ANNULMENT AFFIRMED BECAUSE CIRCUMSTANTIAL EVIDENCE OF HUSBAND'S ACTIONS DURING MARRIAGE SUPPORTED JURY'S FINDING THAT HUSBAND FRAUDULENTLY INDUCED WIFE TO ENTER INTO THE MARRIAGE SO HUSBAND COULD OBTAIN A GREEN CARD

¶14-4-02. ***Manjlai v. Manjlai,*** ___ S.W.3d ___, 2014 WL 4199201, 14-13-00463-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (08-26-14).

Facts: Wife was a U.S. citizen, and Husband was in the U.S. illegally, as was his extended family. Husband and his family retained a marriage broker, who introduced Husband and Wife. Before their marriage, Husband and Wife discussed Wife applying for a green card on Husband's behalf; however, Husband did not disclose his illegal status. The Parties married in a civil proceeding, and Wife filed a green card application for Husband. Husband's family wanted parties to wait 9 months before the religious wedding ceremony. However, Wife's family did not want to wait, and the Parties were subsequently married in a religious ceremony. Soon afterwards, the Parties moved to Boston. Husband told Wife that his family would be returning to Pakistan after the wedding, but his parents stayed and lived with the couple in a one-bedroom apartment. During this time, Husband never showed Wife any expressions of love. He did not buy her presents or flowers. Husband and his family borrowed large sums of money and gold jewelry from Wife and her family, but they failed to repay the money or return the jewelry. Wife told Husband that she wanted to return to Texas to be with her family. Soon after filing a portion of the green card application that required proof that the Parties lived together, Husband purchased a ticket for Wife to return to Texas alone. Later, Wife notified Husband that his green card was approved, so Husband travelled to Texas to retrieve the card. Husband avoided Wife for a few days, and then she received a text message from him stating "it's all over." Wife learned through a community member that Husband had divorced her according to Islamic tradition. Wife filed a petition for an annulment. During the trial, testimony revealed that Husband had discussed marriage and a green card application with another woman just before marrying Wife. Husband was formally engaged to this woman, although neither he nor his family disclosed that information to Wife. At the conclusion of the trial, the jury found that Husband had fraudulently induced Wife into the marriage and that she had not cohabitated with him after learning of the fraud. The trial court granted the annulment. Husband appealed, arguing that the evidence was legally insufficient to support the jury's findings.

Holding: Affirmed

Majority Opinion: (J. Wise and J. Jamison) Texas Family Code Section 6.107 allows for an annulment if (1) the other party used fraud, duress, or force to induce the petitioner to marry, and (2) the petitioner did not voluntarily cohabitate after learning of the fraud or since being released from the duress or force. Fraudulent inducement is shown by proving that a false material representation was made with the knowledge that the representation was false; the representation was intended to be, and was in fact, relied upon; and the representation caused injury. A party's intent is determined at the time the representation is made, but intent can be inferred from the party's subsequent acts.

Here, Husband insisted on Wife applying for a green card on his behalf. Prior to his marriage to Wife, he was informally engaged to another woman, with whom he had discussed obtaining a green card. Soon after obtaining his green card, Husband divorced Wife by Islamic tradition. Based on this evidence, coupled with Husband's poor treatment of Wife during the marriage, a jury could have reasonably determined that Husband's marriage vows were false representations when he made them.

Further, although Wife realized during the marriage that Husband lied and hid things from her, she did not become aware of the "green card fraud" until after Husband divorced her. At that point, the Parties were not living together, and they did not cohabitate again after Wife learned of the fraud.

Dissenting Opinion: (C.J. Frost) There are three ways to dissolve a marriage: divorce, annulment, and a declaration that a marriage was void. While a divorce is available under various circumstances, an annulment is only available in limited circumstances.

Here, Wife presented evidence of Husband's unseemly and abusive behavior, but all of the evidence presented included actions that occurred after the Parties' civil ceremony. Prior to the civil ceremony, Wife knew

that Husband wanted to obtain a green card and establish himself in America. Wife agreed to help in that endeavor. Additionally, Wife presented no evidence of any promises made by Husband at the civil ceremony. Further, throughout the relationship, the couple lived together, shared sexual relations, and held themselves out as husband and wife.

Husband failed to disclose his informal engagement to another woman or that he was in the U.S. illegally. However, these nondisclosures were not misrepresentations. Additionally, even if Husband's claim that his parents were going to move back to Pakistan constituted fraud supporting an annulment, Wife's continued cohabitation with Husband after discovering the falsehood vitiated any such fraud.

Therefore, the evidence was legally insufficient to support the jury's finding, and the COA should have reversed the judgment with instructions to render a divorce decree.

Editor's comment: *If making false marriage vows followed by poor treatment is sufficient evidence for an annulment, we are probably going to see more annulments. J.V.*

Editor's comment: *I find myself sympathetic for this poor woman, but also find myself swayed by a very well written dissenting opinion. I'm not sure the majority opinion got it right. R.T.*

DIVORCE
STANDING AND PROCEDURE

FATHER'S WAIVER OF SERVICE OF THE ORIGINAL PETITION DID NOT ALSO WAIVE HIS RIGHT TO RECEIVE SERVICE OF AMENDED PETITIONS SEEKING MORE ONEROUS RELIEF

¶14-4-03. *Garduza v. Castillo*, No. 05-13-00377-CV, 2014 WL 2921650 (Tex. App.—Dallas 2014, no pet. h.) (mem. op.) (06-25-14).

Facts: Mother filed a pro se fill-in-the-blank petition for divorce. Mother indicated that she and Father would attempt to reach an agreement on the custody, visitation, and support of their Child, but if they could not, she asked the court to make decisions on those issues. Mother provided Father with a copy of the Original Petition with a two-page waiver, which stated that Father agreed to waive his "right to the issuance and service of citation in this case." Father executed the waiver, and Mother filed it with the court. Subsequently, Mother hired an attorney who drafted and filed a First Amended Petition for Divorce and, later, a Second Petition for Divorce, each requesting that Mother be appointed as the conservator with the exclusive right to designate the primary residence of the child and that Father be ordered to pay medical and child support for the Child. Neither of the Amended Petitions contained a certificate of service, and neither were served on Father.

Mother appeared with her attorney to prove-up the divorce at a default hearing on the trial court's uncontested prove-up docket. Mother did not provide Father with notice of the hearing. After the hearing, the trial court entered a Final Decree of Divorce and Order Establishing Parentage, in which the trial court granted Mother the exclusive right to designate the Child's residence, ordered Father to pay child support, found Father in arrears for child support, and reserved to Mother the right to request cash medical support.

Father filed a pro se motion for new trial, seeking to "fix the child support" and to "see if [he could] get more days to see [his Child]." The trial court denied the motion as insufficient and advised Father to file a motion to modify the order. Father appealed, arguing that the trial court erred in granting a default judgment against him when he had not received service of either of the amended petitions or a notice of the final hearing.

Holding: Reversed and Remanded

Opinion: Father signed a waiver that waived his "right to the issuance and service of citation in this case." Issuance and service of citation is only required for an original petition. Thereafter, TRCP 21a requires service of each amended petition that requests more onerous relief. The language of the waiver could have been drafted to include amended petitions, but it was not. When Mother amended the petition to request more onerous relief, she was obligated under TRCP 21a to serve Father with the amended petition. The failure to do so deprived Father of actual notice of the significant change in requested relief. Because the Texas Supreme Court has held a party may raise the issue of service for the first time on appeal, the COA held that Father was entitled to further proceedings.

Editor's comment: *Yet the waiver included these statements: "This form waives all of your legal rights in this case." "I agree that the court can make decisions in this case without further notice to me." "I agree that a Judge, Associate Judge, or appointed Referee of the Court may make decisions about my divorce." J.V.*

Editor's comment: *Fill-in-the-blanks forms...I imagine this isn't the last blankety-blank case we'll read on all the ways they can go wrong... R.T.*

TESTIFYING EXPERT'S TESTIMONY AND REPORT WERE PROPERLY EXCLUDED BECAUSE FATHER FAILED TO FULLY COMPLY WITH THE DISCLOSURE REQUIREMENTS OF TRCP 194.2 WITHIN THE DISCOVERY PERIOD

¶14-4-04. ***In re T.K.D-H.,*** ___ S.W.3d ___, 2014 WL 3116396 (Tex. App.—San Antonio 2014, no pet. h.) (07-09-14).

Facts: Mother and Father were appointed JMCs of the Child. Mother filed a motion for enforcement for possession violations, and Father filed a modification. On the last day of the discovery period, Father served Mother a supplemental disclosure that included the name and contact information for a testifying expert witness. Approximately six weeks later, the expert completed a Child Custody Evaluation, which Father served on Mother approximately one week after that. During the bench trial, Father attempted to introduce testimony from the expert. The trial court sustained Mother's objection that the witness was not properly designated and refused to admit the expert's report or testimony. Father appealed.

Holding: Affirmed

Opinion: TRCP 194.2 requires, in addition to a testifying expert's name and contact information, the disclosure of a testifying expert's impressions and opinions, documents relied upon by the expert, and the expert's resume and bibliography. The purpose of this rule is to give the opposing party sufficient information to prepare for cross-examination and to prepare rebuttal evidence. Designation of a testifying expert witness requires full compliance with TRCP 194.2.

Here, prior to the discovery deadline, Father only provided the expert's name and contact information. Thus, Father's disclosure did not comply with TRCP 194.2. Further, upon appellate review of the expert's report, nothing in the expert's report indicated that she had made any observations or formed any opinions prior to the discovery deadline. TRCP 193.6 allows for the automatic exclusion of an undesignated witness. Thus, the trial court properly excluded the expert's testimony.

Editor's comment: *Hallelujah! A trial judge that actually enforces the exclusionary rule for noncompliance with discovery. The expert witness discovery rules require full disclosure or no admission. I do wonder if the lawyer offering the expert tried to move for a continuance and argue lack of surprise. M.M.O.*

Editor's comment: *In this case, the court extended the discovery deadline to three weeks before trial. Ordinarily, under TRCP 195.2, experts must be designated not later than 90 days prior to the end of the discovery period if the party is seeking affirmative relief and otherwise not later than 60 days before the end of the discovery period. J.V.*

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FATHER WAS ENTITLED TO NEW TRIAL BECAUSE TRIAL COURT FAILED TO ENSURE THAT A REPORTER'S RECORD WAS COMPLETED AT TRIAL

¶14-4-05. *Thompson v. Thompson*, No. 02-13-00292-CV, 2014 WL 3865951 (Tex. App.—Fort Worth 2014, no pet. h.) (mem. op.) (08-07-14).

Facts: Mother filed an original petition for divorce that was properly served on Father. Father did not file an answer or otherwise appear. The trial court granted Mother a default divorce, divided the marital estate, ordered Father to pay child support and back child support, and appointed Mother as the conservator with the exclusive right to designate their Child. No official reporter's record was made. Father appealed and argued that error was apparent on the face of the record because no reporter's record was taken at trial.

Holding: Reversed and Remanded

Opinion: Texas Family Code Section 105.003(c) provides that a record should be made as in civil cases generally unless waived by the parties with the consent of the court. There is reference to "contested" suits in the body of the statute. A party may waive the making of a record by express written agreement or by failing to object to a lack of a record during the hearing. If a party does not appear at a hearing, he is unable to object, and his absence cannot be construed as a waiver to the making of a record. One party cannot waive another party's right to a record. Without a reporter's record, a defendant would be unable to obtain a record of the evidence to present to an appellate court for review.

Here, Husband was not present at the trial. He did not expressly waive his right to a record, and his failure to answer or appear could not be construed as a waiver. Although Wife had the right to waive the making of a record on her own behalf, she could not waive Husband's right on his behalf. The trial court erred in failing to ensure that a reporter's record was completed at trial. Thus, Husband was entitled to a new trial.

Editor's comment: *How many times does the court of appeals have to tell us that default proveups are different than agreed divorce proveups? A default proveup requires a record and evidence, or else it will get set aside. M.M.O.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT IMPLIEDLY FOUND THAT TERMS OF AN INFORMAL SETTLEMENT AGREEMENT WERE JUST AND RIGHT BY GRANTING DIVORCE AND RENDERING JUDGMENT; HUSBAND WAS UNABLE TO REVOKE HIS CONSENT TO THE AGREEMENT AFTER TRIAL COURT RENDERED JUDGMENT

¶14-4-06. *Camerio v. Camerio*, No. 04-13-00493-CV, 2014 WL 2547607 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (06-04-14).

Facts: Wife filed a petition for divorce. A week later, the parties signed an Agreement for Divorce, which clearly stated that the agreement was not subject to revocation. On that same day, the agreement was filed with the trial court. The agreement provided that Wife was to present the agreement to the trial court as soon as possible, and the parties would coordinate securing a final decree consistent with the agreement. At the prove-up hearing, Wife testified that the parties had reached an agreement, and the terms of the agreement

were contained in the Agreement for Divorce on file with the court. Wife stated that she was asking the trial court to grant the divorce, to which the trial court responded, "Granted and rendered." Wife's attorney prepared a final Decree of Divorce and filed a motion to enter judgment. The next day, Husband filed a "Revocation of Prior Consent," attempting to revoke his consent to the Agreement for Divorce. The trial court ruled that the agreement was binding and irrevocable and that the trial court had impliedly found that the terms of the agreement were just and right when it rendered judgment at the prove-up hearing. Husband appealed, arguing the trial court erred in (1) not making an express finding that the agreement was "just and right," (2) not making an express on-the-record evaluation of the terms of the agreement, (3) not orally entering the terms of the agreement into the record or incorporating the terms by reference prior to rendering judgment, and (4) signing the decree after Husband revoked his consent.

Holding: Affirmed

Opinion: Texas Family Code Section 6.604 allows parties to a divorce to enter into an informal settlement agreement, and the terms of such an agreement will be binding on the parties if certain conditions are met. If the court determines that the terms of the agreement are just and right, the court may set forth the agreement in full or incorporate the agreement in a final decree. If the court determines that the terms are not just and right, the court may request that the parties submit a revised agreement.

Here, it was undisputed that the agreement met the requirements of Section 6.604. Nothing in Section 6.604 requires the court to evaluate the terms of the agreement on the record or to expressly find the terms to be just and right. The trial court stated on the record that Wife's request to grant the divorce was "Granted and rendered." The trial court clearly rendered judgment based on the agreement at the prove-up hearing, and therefore, the trial court impliedly found that the terms of the agreement were just and right.

Further, a party may only withdraw consent to an agreement before judgment is rendered. The trial court rendered judgment at the time it orally responded to Wife that her request was "Granted and rendered." Husband's was unable to effectively revoke his consent nearly two months later.

Editor's comment: *This case is a good reminder of the differences between an informal settlement agreement under 6.604 (which is subject to a just and right finding by the court) and an MSA (which is not). If you are concerned about one side trying to revoke their consent to the 6.604 agreement, then follow this party's lead, and get it on file with the Court, and get judgment rendered on it. Quickly. R.T.*

DIVORCE
DIVISION OF PROPERTY

HUSBAND'S MOTHER COULD NOT BE AWARDED A PORTION OF HUSBAND'S AND WIFE'S COMMUNITY ESTATE IN DIVORCE; REIMBURSEMENT AND CONTRIBUTION CLAIMS CANNOT BE ASSERTED BY THIRD-PARTIES

¶14-4-07. *In re Marriage of Allen*, 10-12-00179-CV, 2014 WL 3928800 (Tex. App.—Waco 2014, no pet. h.) (mem. op.) (06-26-14).

Facts: During the marriage, Husband and Wife decided to buy a house. However, because Wife had a low credit rating, the house was purchased in the names of Husband and his mother. The deed named Husband and his mother as grantees, and the two of them each signed the note to obtain the mortgage. When the parties separated, Husband moved out. Husband's mother had contributed to mortgage and utility payments both during the marriage and after the couple separated. Husband's mother intervened in the divorce proceedings seeking a partition of the house and asserted claims for contribution and reimbursement. During trial, Wife testified that she believed that Wife, Husband, and Husband's mother each owned a one-third interest in the house. However, on appeal, Wife argued that the community estate had a 100% interest in the house. Husband and his mother both argued at trial and on appeal that the community and Husband's mother each had a one-

half interest in the house. At trial Husband testified that it would be fair to award the house to his mother. At the conclusion of the bench trial, the trial court found that the community and Husband's mother each had a one-half interest in the house, but awarded the house to Husband's mother. The trial court ordered Wife to vacate the house by the end of the month. Wife appealed.

Holding: Reversed and Remanded

Opinion: While a spouse can make a claim for reimbursement and contribution against the other spouse, a third party may not assert such a claim. Because the house was purchased during marriage, the trial court correctly found that the community had a one-half interest in the house. The trial court also correctly found Husband's mother also had a one-half interest in the house because her name was on the deed and because she was liable for the mortgage. However, the trial court had no authority to award the parties' community interest in the house to Husband's mother. The trial court could have awarded the community's interest in the house either to Husband or to Wife.

Editor's comment: *Why didn't someone challenge mother's standing at the beginning of the case and mandamus it? That would have been way faster than going all the way through trial to raise the issue. M.M.O.*

DIVISION OF COMMUNITY ESTATE REMANDED FOR A NEW PROPERTY DIVISION BECAUSE TRIAL COURT FAILED TO PROPERLY ACCOUNT FOR FUNDS PREVIOUSLY DISTRIBUTED TO WIFE AS HER SEPARATE PROPERTY THROUGH A PRE-DIVORCE SETTLEMENT AGREEMENT. WIFE'S ATTACK OF EXPERT'S VALUATION OF BUSINESS OVERRULED BECAUSE WIFE FAILED TO PRESERVE BY MAKING A DAUBERT CHALLENGE AT TRIAL.

¶14-4-08. ***Reisler v. Reisler,*** ___ S.W.3d ___, 2014 WL 3827854 (Tex. App.—Dallas 2014, no pet. h.) (08-05-14).

Facts: Husband filed for divorce, and Wife filed a counter-petition for divorce. Both parties sought a disproportionate share of the marital estate. The parties entered a pre-divorce settlement agreement dividing a Charles Schwab account in half and assigning one-half of the account to each party, as his or her separate property. Wife transferred her share from a joint account into a separate Charles Schwab account. Later, she transferred all the funds from her Charles Schwab account to a new, separate Merrill Lynch account. This money movement was clearly established on the record. In its findings of facts, the trial court noted that the original Charles Schwab account was divided between the parties in their pre-divorce settlement agreement. However, the trial court also identified as a part of the community estate Wife's new Merrill Lynch account, which contained her portion of the pre-divorce settlement. When dividing the community estate, the trial court included both sums in its calculations. Wife appealed, arguing that the trial court made calculation errors in determining the division of the community estate. Wife argued that although the trial court attempted to make a 50/50 division of the community estate, it actually awarded nearly 70% to Husband because it accounted for Wife's portion of the pre-divorce settlement twice. Wife also challenged Husband's expert's use of an out-of-date industry risk premium in valuing the parties' business.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Wife established that the funds in her Merrill Lynch account were the funds from the pre-divorce settlement. The trial court noted the pre-divorce settlement divided a community bank account and awarded half of the total funds to each party as his or her separate property. However, the trial court also "awarded" Wife the Merrill Lynch account that she opened using those separate funds. The trial court did not treat Husband's account, which held his portion of the pre-divorce settlement, in the same manner as it treated Wife's

account. Therefore, the trial court erred in its property division because it erroneously accounted for the same funds twice in its property division. Because the COA could not modify the property division, the COA reversed and remanded the entire community estate for a new division by the trial court. The COA affirmed the portion of the final decree dissolving the parties' marriage.

The COA overruled Wife's argument regarding Husband's expert because Wife failed to make a Daubert challenge at trial and therefore did not preserve the error.

Editor's comment: *Appellate courts find waiver in 93% of the cases where preservation questions are raised. Here's one of them. To challenge an expert witness, one must make a Daubert challenge, or you failed to preserve error. This is also a good case to point out that reversal of a question about a property division always results in a remand for a new division. The court of appeals cannot enter its own version of the property division. M.M.O.*

Editor's comment: *Wife failed to object to Husband's expert's testimony at trial. As such, there is nothing the appellate court can do. Waiver should be a very real concern for every lawyer going to final trial! As a trial lawyer, you can't lose sight of these appellate issues. R.T.*

THERE WAS NO BASIS FOR A FINDING THAT WIFE'S PROPOSED DIVISION WAS "JUST AND RIGHT" BECAUSE WIFE FAILED TO PRESENT ANY EVIDENCE AS TO THE NATURE OR VALUE OF THE COMMUNITY ESTATE

¶14-4-09. *In re Marriage of Bradshaw*, No. 12-14-00056-CV, 2014 WL 3940092 (Tex. App.—Tyler 2014, no pet. h.) (mem. op.) (08-13-14).

Facts: Wife filed an original petition for divorce and asked the court to divide the community estate in a manner deemed to be just and right. Husband filed an answer and received notice of the trial. However, at the time of trial, Husband was confined in jail, and the jail's officials refused to transport Husband to the courthouse for the trial. At trial, Wife was the only witness. She testified that the marriage had become insupportable, asked the trial court to grant the divorce, and presented the trial court with her proposed property division. The proposed decree awarded all the community property in Wife's possession to her and all community property in Husband's possession to him. Wife testified that she believed this division to be fair and equitable. The trial court granted the divorce, awarded the property division as proposed, and found the proposed division to be fair and equitable. However, the final decree, in addition to the community property division, also awarded a house and real property to Wife as her separate property. Husband appealed, arguing that there was insufficient evidence to support the trial court division of the community estate or to support the trial court's award of separate property to Wife.

Holding: Reversed and Remanded

Opinion: A trial court must have an evidentiary basis for its findings. Even if a respondent fails to appear, a petitioner must still present evidence to support the material allegations in the petition.

Here, Wife presented no evidence of the assets of the community estate or of the value of those assets. Wife presented no evidence regarding the percentage of the community estate that each party would receive under her proposed division of the community estate. Further, Wife produced no evidence that any property was her separate property, much less, clear and convincing evidence to overcome the community property presumption. The trial court clearly erred in holding that Wife's proposed distribution of the community estate was fair and just and in awarding any property to Wife as her separate property.

Editor's comment: *Another default case – again, a default must be supported by evidence. This is a good reminder to trial judges that they have an affirmative duty to make sure the parties present enough evidence to support the values of the assets in the property division to justify a "just and right" finding. If the parties do not do so, it is incumbent upon the trial court to refuse to rule until there is more evidence. The judge should have denied the default judgment here. M.M.O.*

Editor's comment: *This is one of a long line of cases reversing a property division for lack of sufficient evidence for the trial court to make a just and right division of the community estate. But whether it's a prove-up or a default, we must take the time to make an adequate record. J.V.*

Editor's comment: *Even if you are defaulting the other side, it is always worth the time and effort to bring a property division spreadsheet to the prove up, enter it into evidence, and put on testimony that supports why you are asking for that property division. Without doing those things, you are opening your client up to post-trial attack. R.T.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

PROVISIONS IN DIVORCE DECREE AWARDING WIFE MAINTENANCE IN EXCESS OF THE STATUTORY ALLOWANCE FOR SPOUSAL MAINTENANCE WERE NOT VOID, BUT WERE ONLY ENFORCEABLE AS A CONTRACTUAL DEBT AND NOT AS SPOUSAL MAINTENANCE.

¶14-4-10. *Tome v. Tome*, No. 02-14-00037-CV, 2014 WL 3953638 (Tex. App.—Fort Worth 2014, no pet. h.) (mem. op.) (08-14-14).

Facts: Husband and Wife signed an agreed decree of divorce, which was approved and signed by the trial court. In the decree, Wife was awarded two lump sum payments that were characterized as "maintenance" and were intended to pay off debts of the Parties relating to a vendors' lien note and a promissory note to purchase the Parties' home. Six years after the divorce, Wife filed a motion for enforcement to enforce the payment of the maintenance by contempt. At the hearing on her motion, Wife conceded that the court did not have the authority to order the maintenance "as it was ordered." The trial court held that the provisions of the decree awarding "maintenance" were void, but it nevertheless awarded Wife a money judgment equaling the total of the two debts plus interest and attorney's fees. Wife appealed, arguing that the trial court erred in finding the maintenance orders void.

Holding: Affirmed

Opinion: When a court has jurisdiction over the parties and the subject matter, a subsequent judgment is not void, but merely voidable. Such an error may be corrected through a direct appeal. If no appeal is made, the judgment cannot be subject to a collateral attack in a subsequent suit. Here, there was no question that the trial court had jurisdiction over the parties and the subject matter. Thus, the trial court had jurisdiction to award spousal maintenance, and its judgment for maintenance was not void. However, the amount and duration of the spousal maintenance payments in the decree were not authorized by the version of TFC 8.055(a) in effect at the time of the Parties' divorce. Regardless, no appeal was taken, so the decree was no longer subject to collateral attack. Even though the awards could not be characterized as spousal maintenance, the amounts awarded in the divorce decree were enforceable as a contractual debt. Further, because debt cannot be enforced through contempt, the trial court did not err in not holding Husband in contempt.

SAPCR
STANDING AND PROCEDURE

UNDER THE HAGUE CONVENTION, PANAMA WAS CHILDREN'S HABITUAL RESIDENCE BECAUSE, ALTHOUGH MOTHER MAY HAVE INITIALLY INTENDED TO RETURN TO THE U.S., THE TRIAL COURT COULD REASONABLY HAVE FOUND THAT MOTHER LATER CHANGED HER MIND SUCH THAT SHE SHARED AN INTENT WITH FATHER TO MAKE PANAMA THE CHILDREN'S HABITUAL RESIDENCE.

¶14-4-11. ***In re S.H.V.,*** ___ S.W.3d ___, 2014 WL 2532301 (Tex. App.—Dallas 2014, no pet. h.) (06/04/14).

Facts: Mother and Father married in 2000. Shortly thereafter, Father moved to and remained in Panama to conduct a business. Mother gave birth to the parties' first child in 2002, after which she and the first child relocated to Panama to be with Father. In 2005, Mother and the first child relocated to the U.S. for nine months—returning to Panama to live with Father in 2006. Mother gave birth to the parties' second child in Panama in 2008. Father and Mother separated in March 2010. Thereafter, Mother moved to different Panamanian town located on another island. Father filed a child-custody case in a Panamanian court and obtained a court order giving Mother custody of the children and giving Father possession of the children every weekend. The order also prohibited the children from leaving Panama. In August 2012, Mother removed the Children from Panama to Texas.

In January 2013, Father filed a petition in Texas under the Hague Convention (the "Convention") seeking return of the Children to Panama. Following a hearing, the trial court, signed an order granting Father's petition finding that Panama was the Children's habitual residence. Mother appealed.

Holding: Affirmed as modified

Opinion: The Convention establishes the procedures whereby a parent can petition for the return of a child who has been wrongfully removed from the child's habitual residence to the United States. A petitioner establishes wrongful removal by proving that the removal of the child was made in breach of the rights of custody of the petitioner under the law of the country in which the child habitually resided immediately before the removal. The habitual-residence determination requires a two-part inquiry: (1) the first consideration is the last shared intent of parents—usually the last shared intent is decisive; and (2) whether the evidence unequivocally shows that the children have acclimatized to a new location and thereby acquired a new habitual residence, despite any conflict with the parents' last shared intent.

Mother did not dispute that Father adequately proved his own intention to make Panama the children's habitual residence. Rather, Mother contended that Father adduced no evidence that she ever shared that intention—contending that the only intention she ever shared with Father was their original intention to move the family back to the United States after they had established their business in Panama. Thus, the issue was whether the trial court could reasonably find that Mother's intentions later changed such that she shared an intent with Father to make Panama the children's habitual residence.

Here, Father testified that Mother told him before she and the first child returned to Panama in 2006 that it was better to live in Panama than the U.S. by herself; Mother lived in Panama continuously from 2006 to 2012; and that the parties second Child was born in 2008 in Panama and had lived their since its birth. Mother testified that she applied for and received a permanent residence card in Panama; she opened a business in Panama; lived in Panama for two years after the parties separated; and sent the older child to an international school in Panama. On this record, a trial court reasonably could have concluded that Mother agreed to make Panama the Children's habitual residence at some point between 2006 and 2012.

The next issue is whether the evidence unequivocally shows that the children have become so acclimatized to life in the U.S. that this fact should override the parents' last shared intent. Here, the second child lived in Panama from his birth in 2008 until Mother removed him to Texas in August 2012. Mother presented

no evidence that the child acclimatized to life in the U.S. in the roughly five months that passed before Father filed his petition. The first child, lived in the U.S. for much of the first four years of his life, but then he was moved to Panama in 2006 and lived there until August 2012. Again, Mother adduced no record evidence that the second acclimatized to life in the U.S. to such a strong degree, despite six years of residency in Panama, that he acquired a new habitual residence there. Accordingly, the trial court did not abuse its discretion by ruling that Panama was the children's habitual residence.

Mother next argued that the trial court erred by not denying Father's petition based on her "age and maturity" affirmative defense. Under the Convention, a trial court may refuse to order the return of a child it finds by a preponderance of the evidence that: (1) the child objects to being returned; and (2) has attained an age and degree of maturity that make it appropriate to consider the child's views.

Here, the evidence pertinent to the age-and-maturity defense consisted of a Panamanian psychological report of the first child performed in August 2012, three weeks before the child's tenth birthday. The report contained several statements allegedly made by the child, in essence, that he liked living with Mother, that Panama was not his favorite place to live because there were only three children living there (at the family resort business), and he preferred attending school in the U.S. Additionally, the psychologist opined that the child manifested "higher than average performance" with respect to growth, development, and maturation. But the psychologist did not further explain or quantify this conclusion nor did Mother adduce any evidence of the psychologist's education, training, or qualifications.

A reasonable interpretation of the psychological report is that the older child preferred the U.S. over Panama because he perceived the U.S. to offer better educational and social opportunities, but he did not find life in Panama intolerable or even unpleasant. Thus, the trial court could have properly concluded that the older child did not object to return to Panama. Additionally, on this record, the trial court could have properly concluded that the child was not old enough and mature enough for his views to be taken into account under the age-and-maturity defense. Accordingly, Mother's arguments concerning the age-and-maturity defense are without merit.

BECAUSE ALLEGED FATHER OF ADOPTED INFANT CHILD FAILED TO REGISTER WITH THE PATERNITY REGISTRY BEFORE THE BIRTH OF THE CHILD OR BY THE 31ST DAY AFTER THE CHILD WAS BORN, HE HAD NO STANDING TO FILE SUIT TO ADJUDICATE PATERNITY.

¶14-4-12. *In re O.L.R.M.*, No. 04-13-00681-CV, 2014 WL 2548349 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (06/04/14).

Facts: After the infant Child was adopted, Father filed a petition to adjudicate parentage. Adoption Agency, filed a plea to the jurisdiction and request for the trial court to dismiss Father's suit on the grounds that he lacked standing. The trial court granted Adoption Agency's motion and dismissed the case with prejudice. Father appealed.

Holding: Affirmed

Opinion: Father first argued that the Texas Paternity Registry did not require him to register his and the Child's mother's sexual encounter because he had no "reasonable belief" a child would be born of the encounter. The general standing provision for suits affecting the parent-child relationship states that a suit may be filed at any time by "a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter." TFC 160.402(a) provides that an alleged father who desires to be notified of a proceeding for the adoption of or the termination of parental rights regarding a child that he may have fathered may register with the registry of paternity: (1) before the birth of the child; or (2) not later than the 31st day after the date of the birth of the child. The parental rights of a man alleged to be the father of a child may be terminated without notice as provided by Section 161.002 if the man (1) did not timely register

with the bureau of vital statistics; and (2) is not entitled to notice under Section 160.402 or 161.002. Importantly, the statute contains no "reasonable belief" exception or requirement. Therefore, if Father wanted notice of any adoption or termination proceeding as to the Child, he was required to register. Accordingly, Father had no standing to file suit to adjudicate parentage.

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING FATHER'S WRIT OF HABEAS CORPUS PETITION SEEKING IMMEDIATE POSSESSION OF THE CHILD BECAUSE FATHER ESTABLISHED HIS RIGHT TO POSSESSION AND THERE WAS NO EVIDENCE THAT FATHER'S POSSESSION POSED A SERIOUS IMMEDIATE THREAT TO THE CHILD'S PHYSICAL OR EMOTIONAL WELFARE.

¶14-4-13. ***In re Guerrero,*** ___ S.W.3d ___, 2014 WL 2808994 (Tex. App.—Amarillo 2014, orig. proceeding) (06/13/14).

Facts: A 2012 order named Mother and Father as joint managing conservators of the Child with Mother taking primary custody and Father routinely exercising visitation and paying child support. Because Mother worked two jobs, often on overnight shifts, maternal Grandmother was the person who took the Child to and from school, helped him with homework, prepared meals, took care of his health, arranged social outings, and other general parenting tasks. Mother unexpectedly passes away in January 2014. Afterward, Grandmother filed a petition to modify the parent-child relationship seeking to be named the Child's sole managing conservator and for Father to be named possessory conservator. Father filed his plea to the jurisdiction and a writ of habeas corpus seeking immediate possession of the Child. Following a hearing, the trial court determined that Grandmother had standing to sue, rendered temporary orders appointing Father and Grandmother as the Child's temporary joint managing conservators, and denied Father's petition for writ of habeas corpus. Father filed a petition for writ of mandamus in the COA arguing that the trial court abused its discretion by denying Father's petition for writ of habeas corpus.

Holding: Writ of mandamus conditionally granted

Opinion: A trial court must hear an application for writ of habeas corpus concerning the proper legal custodian of a child and make its determination solely on the basis of who, at that time, has the bare legal right to custody. Absent evidence of a dire emergency, the trial court is required to issue a writ of habeas corpus once the relator has demonstrated the bare legal right to possession of the child; at that point, issuance of the writ should be automatic, immediate, and ministerial. The trial court has no discretion to deny the writ and issue any other temporary order unless the party opposing the return of the child to the one seeking it presents evidence raising a serious immediate question concerning the welfare of the child. Moreover, in a habeas corpus proceeding, the trial court is not permitted to consider the child's best interest and may not go beyond the immediate welfare of the child.

Generally, in a habeas corpus proceeding, if the right to possession of a child is governed by a court order, the trial court shall compel the return of a child if it finds that the party seeking relief is entitled to possession of the child under the court order. However, Texas case law precedent holds that, in conservatorship orders appointing a managing conservator and possessory conservator, the death of the managing conservator ends the conservatorship order and no longer constitutes a valid, subsisting court order in the context of a petition for writ of habeas corpus. The rationale is that because the managing conservator parent has died, someone must take immediate possession of the child, and the possessory conservator parent's right of immediate possession is superior to others' rights. Given that the prior order here appointed both Father and Mother as joint managing conservators—the applicability of the aforementioned precedent is questionable. Nevertheless, by rationale extension, a surviving joint managing conservator parent's rights to possession of a child are superior to others' rights. Thus, without regard to the survival of a prior order for habeas corpus purposes, in the event of the death of the managing conservator of the child, the surviving parent has a right to possession of the child, and a trial court should enforce this right by issuance of a writ of habeas corpus.

Here, Father is both the Child's surviving managing conservator and the Child's surviving parent. As against all others, either status gives Father superior rights to possess the Child in light of Mother's death.

Thus, the record establishes Father's bare legal right to possession of the Child unless the evidence before the trial court raised a serious, immediate question concerning the Child's welfare in Father's care. In that regard, the trial court heard that Father had provided financial support for Child since the parents' separation, maintained regular visitation with the Child, and stayed involved with the Child's school functions. Additionally, Father acted as the Child's primary caregiver for several years before the parents' separation, and no evidence suggested that any harm ever came to the Child as a result of Father's care. Moreover, Father maintained a steady job and reported that he had an adequately stocked two-bedroom house where he and the Child could live comfortably. Although the trial court heard that the Child suffered from mild autism and may need time to adjust to Father as his primary caretaker and that Father may spend too much time playing video games, such evidence does not rise to the level of a "dire emergency" or an "imminent danger" to the Child's physical or emotional well-being. That Grandmother may be a better choice as primary caretaker for the Child at this time is of no consequence to the habeas corpus analysis. Because Father established his superior legal right to possession of the Child, and in the absence of evidence raising a serious, immediate question concerning the Child's welfare, the trial court had a ministerial duty to order the return of the Child to Father and lacked any discretion to deny Father's petition for writ of habeas corpus.

Editor's comment: *That pesky Troxel raises its head again! Absent a finding of "serious and immediate question" about Father's ability to parent, Grandmother has no ability to challenge his superior right of possession in light of Mother's death. Evidence showed that Father spends too much time playing video games or that Grandmother might be a "better" caregiver is not enough to rise to the level of "imminent danger" to child's physical or emotional well-being. M.M.O.*

Editor's comment: *The court left open an interesting question: Would the temporary orders remain in effect had they given Father the right to determine the child's residence? The court's holding suggests this possibility: "To the extent that the temporary orders naming Relator and Ramirez joint managing conservators and giving Ramirez the right to designate A.J.G.'s residence are inconsistent with Relator's right to immediate possession of A.J.G., we further direct Respondent to vacate those orders." J.V.*

NOTHING IN TEXAS FAMILY CODE SECTION 155.033 PREVENTED COURT OF CONTINUING, EXCLUSIVE JURISDICTION FROM GRANTING PETITIONS TO CHANGE CHILDREN'S NAMES DESPITE THE FACT THAT THE CHILDREN AND THE PARTIES NO LONGER RESIDED IN TEXAS

¶14-4-14. *In re C.A.W.P.*, Nos. 13-13-00628-CV and 13-13-00629-CV, 2014 WL 3803148 (Tex. App.—Corpus Christi 2014, no pet. h.) (mem. op.) (07-31-2014).

Facts: The trial court rendered an order in the Mother's and Father's SAPCR, which established custody and child support obligations for the couple's two Children. Subsequently, Mother and the Children moved to Utah. Mother filed two petitions with the Texas trial court to change the names of the Children to remove the hyphen between their two last names. Father responded to the petition, arguing that the trial court lacked continuing jurisdiction over the children because their home state was Utah. After a hearing, the trial court granted the petitions and ordered the Children's names changed. Father appealed, and, citing Texas Family Code Section 155.033(b) and (c), he argued that the trial court erred in granting the name changes because none of the parties had resided in Texas for "over five years."

Holding: Affirmed

Opinion: Per Texas Family Code Section 155.001(a), a court acquires continuing, exclusive jurisdiction over matters in connection with a child after the rendition of a final order. Texas Family Code Section 155.033(a) allows a court with continuing, exclusive jurisdiction to modify orders regarding conservatorship, possession,

and support of that child. Section 155.033(b) states that a Texas court may not exercise its continuing, exclusive jurisdiction *to modify managing conservatorship* if a child's home state is not Texas. Section 155.033(c) states that a Texas court may not exercise its continuing, exclusive jurisdiction *to modify possessory conservatorship or possession of or access to a child* if Texas is not the child's home state and all parties have established residency outside of Texas.

It was undisputed that the trial court rendered a final order in the parties' SAPCR, which established the trial court was the court with continuing, exclusive jurisdiction. Nothing in Section 155.033(b) or (c) prevents the court with continuing, exclusive jurisdiction from granting a name change. Thus, the trial court did not abuse its discretion in granting Mother's petitions.

FATHER FAILED TO SHOW DILIGENT ATTEMPT TO LOCATE MOTHER BEFORE SERVING HER BY PUBLICATION; FATHER'S CITATION FAILED TO SUBSTANTIALLY COMPLY WITH TFC 102.010(c)

¶14-4-15. ***Curley v. Curley,*** ___ S.W.3d ___, 2014 WL 3867798 (Tex. App.—El Paso 2014, no pet. h.) (08-06-14).

Facts: Father and Mother were married and had one Child. After Father was arrested for domestic violence, Mother moved to Wisconsin with the Child. Soon after Mother's move, Father filed for a divorce, which included a SAPCR. Father made several unsuccessful attempts to serve Mother with the petition at Mother's ex-husband's address in Wisconsin. Father's attorney then filed an affidavit in support of service by publication. The citation was published in the town in Wisconsin, where Father believed Mother to be. The citation used the *IMOMO Father and Mother* portion of the caption but did not include the *ITIO Child* portion. The citation referred to the pending divorce proceeding but made no reference to either the child or the SAPCR. After a final hearing, the trial court entered a default decree of divorce, granting Father significant rights, including the right to designate the primary residence of the Child. Seventeen days after the order was entered, Father travelled to Wisconsin and took possession of the Child from Mother. Father located the Child by looking for Mother's address on the internet. Mother appealed, arguing that the citation failed to provide notice of the SAPCR and that Father failed to diligently attempt to locate her prior to serving her by publication.

Holding: Reversed and Remanded

Opinion: TFC 102.010 provides the form by which a citation by publication should "substantially" follow. In order to provide effective notice through publication, the citation must include the correct caption of the case and provide notice of the relief sought. Here, Father did not include the portion of the caption referring to the Child, and the citation made no reference to the Child or to the fact that the suit was a SAPCR in addition to a divorce. Father's citation did not substantially comply with TFC 102.010.

Moreover, citation by publication is only appropriate after a diligent effort to locate the whereabouts of a party without success. Here, Father's efforts included telephone calls, emails to Mother's ex-husband in Wisconsin, and attempts to serve Mother at her ex-husband's address. However, Father had other means of locating Mother that he failed to attempt. Father did not contact Mother's family in Germany or her ex-mother-in-law in Wisconsin. Father was an authorized user on Mother's telephone account, but he did not contact the phone company to obtain Mother's information. Additionally, Mother easily located her own correct address through an internet search. Father's last attempt to locate Mother through an internet search was more than three months before the citation was published. Father knew where the Child went to school and that the Child took the bus to and from school, but Father did not use that information to attempt to locate Mother. Finally, Father had no difficulty locating Mother seventeen days after the default judgment, in order to use the trial court's order to take possession of the Child. Father was not sufficiently diligent in attempting to locate Mother prior to service by publication. Therefore, the service was improper, the trial court lacked personal jurisdiction over Mother, and the default judgment was void.

FATHER'S EXECUTION OF A WAIVER IN DIVORCE PROCEEDING DID NOT PRECLUDE HIM FROM LATER BRINGING A RESTRICTED APPEAL; TRIAL COURT ERRED IN DEVIATING FROM THE CHILD SUPPORT GUIDELINES WITHOUT MAKING THE REQUIRED FINDINGS OF TFC 154.130

¶14-4-16. ***In re Marriage of Butts,*** ___ S.W.3d ___, 2014 WL 4072083 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (08-19-14).

Facts: Mother and Father were married in Florida and had one Child. The Parties separated, and Mother moved to Texas with the Child. Mother filed a petition for divorce in Texas. Father signed a waiver, stating that Father entered an appearance as a substitute for going to court and that he agreed the court could make decisions in the case without further notice to him. At trial, Mother testified she and Father lived together until the Child was 8 years old. There was no evidence Father had any continuing relationship with the Child after the separation. Mother also testified that a few months after Mother moved, she discovered her car was missing. She was informed by the police that the car had been repossessed because Father had stopped making payments on it. Mother testified that she had net resources of $600 per month. After the final hearing, at which Father did not appear, the trial court signed a final decree of divorce that appointed Mother SMC and ordered Father to pay child support of $800 per month. Nearly six months later, Father filed a notice of restricted appeal. Father argued there was no evidence to support the trial court appointing Mother SMC or ordering Father to pay $800 per month in child support. Mother argued that Father was not entitled to a restricted appeal because he had participated in the trial proceedings by signing the waiver.

Holding: Affirmed in Part / Reversed and Remanded in Part

Opinion: A restricted appeal is available to a party who (1) filed the restricted appeal within six months after the judgment of which he complains; (2) was a party to the underlying suit; (3) did not participate in the hearing that resulted in the judgment of which he complains; and (4) showed that error is apparent on the face of the record. Signing a waiver of service alone is not sufficient to constitute participation for the purposes of a restricted appeal. Here, the COA held that although the language of the waiver was broad, it was a waiver of service and nothing more. Father did not participate in the hearing and was able to bring a restricted appeal.

Judicial estoppel does not apply to an appeal in the same case as an alleged prior inconsistent statement. Additionally, a party seeking a restricted appeal is not required to show diligence or lack of negligence before his complaints may be heard. Thus, Father's execution of the waiver of service in this case did not preclude him from having his restricted appeal heard.

Texas Family Code Section 154.125 provides the statutory guideline that that court shall presume that for one child, 20% of the obligor's net resources is in the best interest of the child. Texas Family Code Section 154.068 provides that in the absence of evidence of a party's resources, the court shall presume the party has an income equal to minimum wage for a 40-hour week. Texas Family Code Section 154.130 states that if a court deviates from the child support guidelines, the court must make specific findings regarding the net resources of the obligor, the percentage applied to those resources, and the reasons for the deviation.

Here, there was no evidence of Father's net resources. Thus, the minimum wage presumption should have been used in the calculation of Father's child support obligation. Assuming the trial court determined that the evidence supported deviating from the guidelines, the trial court was required to make the specific findings per TFC 154.130. Because the trial court did not make the required findings, it erred in ordering Father to pay $800 per month in child support.

When determining whether the appointment of one parent as SMC is in the best interest of a child, a court may consider all relevant factors. Here, there was little evidence specifically addressing the best interest of the child as it related to conservatorship; however, there was evidence that Father lived in a different state from Mother and the Child, that he was unconcerned about leaving Mother without transportation, and that he waived service to the divorce proceedings rather than participating in decisions relating to conservatorship,

child support, and other matters significant to the child's well-being. Thus, trial court did not abuse its discretion in appointing Mother SMC of the Child.

Editor's comment: *This case bothers me. Seems like it creates a benefit for deadbeat fathers to sign a waiver, then disappear, and not give their income information, then if the court orders them to pay more in support than minimum, they can file a restricted appeal. I assume that the proveup had a reporter's record or there would have been no record of the evidence presented. Of course, Mom should get the last laugh here. The court of appeals reverses the child support figure, setting aside the prior divorce decree, and remands to the trial court for new trial on child support. That means now, Dad has appeared in the case and will be subject to discovery on his income information. I hope Mom's lawyer remembers that, in light of the setting aside of the decree and reverting back to the prior divorce petition, Mom can ask for child support back to the date of filing of the divorce petition. This means that the judge can set child support at the right amount based on Dad's real income figures and make it retroactive. M.M.O.*

Editor's comment: *Although the court's overall point is sound - a waiver of service should be treated only as what it purports to be - the waiver did state, "I agree that a Judge, Associate Judge, or appointed Referee of the Court may make decisions about my divorce." J.V.*

TRIAL COURT ERRED IN GRANTING GREAT-AUNT TEMPORARY POSSESSION OF THE CHILD, WHEN GREAT-AUNT INTERVENED WITHOUT FIRST SEEKING LEAVE OF COURT, AND TRIAL COURT FAILED TO FIRST DETERMINE WHETHER GREAT-AUNT HAD STANDING TO INTERVENE.

¶14-4-17. ***In re H.R.L.,*** ___ S.W.3d ___, 2014 WL 4259444 (Tex. App.—El Paso 2014, orig. proceeding) (08-29-14).

Facts: From the age of a toddler until she was about 6 years old, the Child lived primarily with Great-Aunt, who was a licensed counselor and the Clinical Director of the Juvenile Justice Center in El Paso. Mother went to school in New Mexico and visited the Child most weekends. Father also visited the Child on weekends under the supervision of Great-Aunt. When in El Paso, Mother lived with her mother, in the same neighborhood as Great-Aunt and the Child. Mother and Great-Aunt had an argument because Great-Aunt did not approve of Mother's dating habits. Great-Aunt threatened to file suit to obtain custody of the Child. Soon afterwards, Mother moved the Child out of Great-Aunt's home.

A few months later, the OAG initiated an action to establish the Child's paternity and to enter an order for payment of current and retroactive child support. Great-Aunt filed a petition to intervene seeking to be named possessory conservator without first seeking leave of court to intervene. Great-Aunt also filed a motion for temporary orders. Mother filed a plea in abatement and plea to the jurisdiction, asserting Great-Aunt lacked standing to intervene. The trial court set a hearing to hear both Mother's pleas and Great-Aunt's motion. At the hearing, Mother objected that Great-Aunt failed to seek leave of court, but the trial court overruled the objection. Great-Aunt was the only witness to testify at the hearing. The trial court recessed the hearing after granting Great-Aunt's motion to confer with the Child and ordered a social worker to meet with the Child in the presence of Great-Aunt. At the conclusion of that meeting, the social worker determined that the Child had bonded to Great-Aunt. Approximately one month later, the hearing was set to continue, but the parties instead met at the courthouse to attempt to reach an agreement. After the negotiations, the hearing proceeded. Father and Great-Aunt indicated that an agreement had been reached, but Mother stated that she no longer agreed, Great-Aunt had not met her burden to establish standing, and Mother had five witnesses to present. The trial court, entered temporary orders giving Great-Aunt access and possession per the standard possession order. Mother filed a petition for writ of mandamus.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: A party seeking conservatorship of a child must have standing to seek such relief. A party's lack of standing deprives a trial court of subject matter jurisdiction and renders any subsequent orders void. Texas Family Code Section 102.004(b) provides that a grandparent or other family member with leave to intervene may do so if there is proof that appointment of a parent as SMC or both parents as JMC would significantly impair the child's physical health or emotional development. This burden is not established by evidence that a non-parent would be a better custodian of the child or that the non-parent has an ongoing relationship with the child. In addition, a judge may not infringe on a parent's fundamental right to make decisions about a child merely because the judge believes a "better" decision could be made. The Texas Supreme Court held in *Troxel* that before relief can be granted, a non-parent must establish that the parent is unfit, the child's health and well-being would suffer, and the parent intended to exclude the non-parent's access entirely.

Here, Great-Aunt did not seek leave of the trial court to intervene. The plain language of TFC 102.004(b) states that "the court may grant … leave to intervene" in a pending suit. Because Great-Aunt did not obtain leave to intervene, the trial court lacked authority to grant relief in favor of Great-Aunt before determining whether she had standing.

Even if the trial court's temporary order could be construed as an implicit determination that Great-Aunt had standing, no evidence supported that ruling. Great-Aunt presented no evidence that the Child suffered any impairment due to Mother's actions. Additionally, Great-Aunt admitted that even after removing the Child from Great-Aunt's care, Mother continued to allow Great-Aunt contact with the Child. Thus, Great-Aunt did not establish standing under TFC 102.004(b) and did not satisfy the *Troxel* requirements.

COA STAYED ALL TRIAL PROCEEDINGS IN SAME-SEX DIVORCE, DESPITE THE INVOLVEMENT OF A CHILD, BECAUSE THE SAME ISSUES PRESENTED WERE PENDING BEFORE THE TEXAS SUPREME COURT.

¶14-4-18. *In re Marriage of A.L.F.L and K.L.L*, 2014 WL 4357457, 04-14-00364-CV (Tex. App.—San Antonio 2014, no pet. h.) (08-29-14).

Facts: This proceeding involved a same-sex divorce and a child born during the Parties' legally recognized marriage. The trial court denied Appellant's plea to the jurisdiction, which led to an interlocutory appeal. The State of Texas filed a "Motion to Stay or Abate Appeal" because the issues presented were similar to issues in two cases pending before the Texas Supreme Court. The COA abated the appeal pending further order of the court. However, because the trial court continued to conduct proceedings in the matter, Appellant filed an emergency motion to lift the abatement for the limited purpose of granting an emergency stay.

Holding: Stay Granted

Corrected Order (08-25-14): (J. Barnard and J. Alvarez) At issue in this appeal, among other things, was the trial court's subject-matter jurisdiction. Therefore, the COA stayed all proceedings in this matter, including matters relating to this interlocutory appeal and trial on the merits.

Dissenting Opinion (08-29-14): (J. Martinez) Texas Civil Practice and Remedies Code Section 51.014 provides that "[a]n interlocutory appeal …, other than an appeal … in a suit brought under the Family Code, stays the commencement of a trial in the trial court pending resolution of the appeal." The Legislature likely intended to exempt interlocutory appeals in family cases from the stay provision because a child could be involved. Here, the case involved a child, who was born during the Parties' legally recognized marriage. Because the length of the abatement was unknown, a stay of these proceedings could not be in the best interest of the Child.

Editor's comment: *The dissent has a point: If the trial court can't render temporary orders, who is going to watch out for the child until the Texas Supreme Court (and ultimately, SCOTUS) rule on the constitutionality*

of same-sex marriage bans? Moreover, the stay is too broad. There are two distinct suits pending. One is for divorce; the other is a SAPCR. Could not the court of appeals have abated the divorce suit while allowing the SAPCR to continue? J.V.

SAPCR
SPECIAL APPOINTMENTS

APPOINTMENT OF AMICUS ATTORNEY WAS IMPROPER BECAUSE THE COST TO THE PARTIES OUTWEIGHED THE FUTURE BENEFIT TO THE CHILDREN'S BEST INTEREST; STRIKING MOTHER'S SOCIAL STUDY AS A SANCTION FOR FAILURE TO PAY FEES OF AMICUS ATTORNEY WAS IMPROPER BECAUSE AMICUS ATTORNEY SHOULD NOT HAVE BEEN APPOINTED

¶14-4-19. *Hutchins v. Donley*, No. 11-12-00204-CV, 2014 WL 2767122 (Tex. App.—Eastland 2014, no pet. h.) (mem. op.) (06-12-14).

Facts: Mother and Father filed cross-SAPCRs. The parties agreed to the appointment of an attorney ad litem and that if they could not choose a counselor for the children, the attorney ad litem would decide. Later, the parties signed a mediated settlement agreement, in which they agreed that the attorney ad litem would serve as an amicus attorney and would decide two specific issues: (1) the children's counselor, and (2) the children's school. The amicus made these two recommendations to the court but, afterwards, continued to be involved in the case. Prior to the temporary orders hearings, the amicus attorney recommended to the trial court that Mother's rights and duties be limited and Father's rights and duties be expanded. The trial court agreed with the amicus attorney's recommendations and issued temporary orders reflecting the recommendation. Mother filed two separate motions to have the amicus attorney removed from the case, but the trial court denied both motions and ordered that both parties pay additional fees to the amicus attorney.

Mother filed a motion for a social study, which the trial court granted with the condition that Mother pay for the social study in full. Mother paid for the social study, which was timely completed. However, Mother did not pay all of the amicus attorney's fees. The trial court held a hearing on the amicus fees and the possibility of imposing sanctions on Mother for failure to pay fees. Mother pointed out that there had been no order entered appointing the amicus attorney and that the amicus and already completed her duties under the parties' agreement. Mother testified about her financial status and that she had had to borrow money from family, friends, and her church in order to pay her legal fees and costs. Her family and friends did not want to pay any more money to the amicus attorney because they had already paid her $22,000. The trial court found that Mother had the ability to pay the amicus attorney and informed Mother that her social study would be struck if she did not pay the amicus attorney's fees by the end of that week. Mother did not pay, and the social study was struck. The trial court noted that it did not believe striking the report would take that much away from the jury because it did not recommend a primary conservator. In her offer of proof, Mother established that the author of the social study would have recommended that the parties split their time with the children equally or that, "if push came to shove," Mother should be appointed primary conservator.

At the jury trial, the amicus attorney recommended that Father be appointed primary conservator. The jury found that Father should be granted exclusive right to designate the primary residence of the children. Mother appealed.

Holding: Reversed and Remanded

Opinion: Texas Family Code Section 107.021(a)(1) gives a trial court the authority to appoint an amicus attorney in a suit in which the best interests of a child are at issue. Per TFC 107.021(b), a court shall give due consideration to the ability of the parties to pay reasonable fees to an amicus attorney and balance the child's interest against the costs to the parties. Here, the trial court gave consideration to the parties' ability to pay for an amicus attorney and determined that Mother had the ability to pay. However, the trial court failed to per-

form the balancing test required by TFC 107.021(b) prior to appointing the amicus attorney. At the time the trial court entered an order appointing her, the amicus attorney had already satisfied her duties under the initial agreement of the parties, which included informing the trial court of the amicus attorney's opinion of what arrangement would be in the best interest of the Children. Therefore, at the time the trial court entered the order appointing the amicus attorney, the cost of the amicus attorney greatly outweighed any future benefit to the children's best interest. The trial court abused its discretion by entering the order appointing the amicus attorney.

The trial court also erred in ordering Mother to pay the amicus attorney's fees because (1) at the time of the trial court's order, the amicus had already completed her duties under the initial agreement (for which Mother had already paid); (2) Mother had revoked her consent to the amicus attorney's appointment; and (3) there was no court order in place at the time the amicus attorney's services had been rendered. Therefore, because the trial court erred in appointing the amicus attorney and in requiring Mother to pay the amicus attorney's fees, the trial court also erred in sanctioning Mother by striking the social study.

Furthermore, the trial court's errors clearly led to an improper judgment. The author of the social study recommended that "if push came to shove," Mother should be appointed the primary conservator of the children, and the amicus attorney recommended to the jury that Father be appointed the primary conservator. Without the amicus attorney's recommendation and with the recommendation of the author of the social study, the jury could have designated Mother as the primary conservator. Therefore, the COA held that Mother was entitled to a new trial.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

BECAUSE THE PARTIES' MSA WAS ONLY A "PARTIAL" MSA, TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADDRESSING ISSUES NOT ADDRESSED BY THE MSA;

¶14-4-20. ***Scruggs v. Lin,*** ___ S.W.3d ___, 2014 WL 4072070 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (08-19-14).

Facts: Father and Mother divorced. Both were doctors with sizable incomes. The final divorce decree appointed them JMCs of their three Children and ordered Father to pay child support. Later, Father filed a SAPCR, claiming that the Children lived with him most of the time. Father sought to be awarded the exclusive right to designate the Children's primary residence and to terminate his child support obligation because Mother had voluntarily relinquished actual care, control, and possession of the children. Mother filed a counter-petition, seeking retroactive child support and an increase in Father's child support. Father then filed an amended petition, seeking child support from Mother but no longer seeking to terminate his own child support obligation or alleging that Mother had voluntarily relinquished actual care, control, and possession.

The Parents entered into an MSA that required Mother to pay child support and provided that the trial court would determine any retroactive child support that may have been due. The MSA also addressed the payment of fees due to the Children's court-appointed counselor and the amicus attorney. The trial court entered a final order in the SAPCR that incorporated the MSA and rendered judgment against Father for retroactive child support, as well as attorney's fees and costs. Father appealed, arguing that the trial court's order was contrary to the MSA, that TFC did not require an award of attorney's fees against him and that the trial court erred in awarding Mother retroactive child support because the court should have terminated his child support obligation as of the date of his filing of the modification suit.

Holding: Affirmed in part / Reversed and Remanded in Part

Opinion: A trial court generally does not have discretion to decline to enter judgment on or deviate from an MSA.

Here, per the Parties' MSA, each was responsible for 50% of the counseling fees, Father would pay to Mother any fees she paid on his behalf, and Father would pay the counselor directly for any remaining fees he owed her. Mother testified that Father owed her $5,600. Thus, the trial court's award of $5,230 to Mother for counseling fees was not contrary to the MSA.

The MSA was labeled as a "partial" MSA. It specifically provided that the trial court would address the issue of child support arrears. However, it did not limit the court from considering other issues not expressly covered by the MSA. Because the MSA did not address coordinator fees, the trial court did not abuse its discretion in awarding those fees against Father.

Texas Family Code Section 157.167 provides "If the court finds that the respondent has failed to make child support payments, the court shall order the respondent to pay the movant's reasonable attorney's fees and all court costs in addition to the arrearages." TFC 156.167(c) gives a trial court the discretion to waive the requirement for the payment of attorney's fees if it finds good cause to do so. Father claimed good cause existed because both parties had failed to make child support payments. However, Father admitted that after being ordered to pay child support, he only actually made one or two payments. He claimed to have received advice from his attorney telling him he did not have to pay, but he also admitted that on one of the child support checks, he had "maybe" written the word "unfair." Trial court did not abuse its discretion in awarding attorney's fees against Father under TFC 157.167, and even if "good cause" existed to waive the requirement, the trial court was not obligated to do so.

Editor's comment: *It's now not only common sense but good legal advice not to write anything untoward in the memo section of a child support check. J.V.*

SAPCR
POSSESSION AND ACCESS

TRIAL COURT ERRED IN GRANTING PERMANENT INJUNCTION WHEN NEITHER PARTY HAD PLEADED FOR SUCH RELIEF, AND THE EVIDENCE DID NOT ESTABLISH IMMINENT HARM OR IRREPARABLE INJURY

¶14-4-21. *In re A.A.N.*, No. 02-13-00151-CV, 2014 WL 3778215 (Tex. App.—Fort Worth 2014, no pet. h.) (mem. op.) (07-31-14).

Facts: In their divorce decree, Mother and Father were appointed JMCs of their three Children. Just over a year after the divorce, Mother filed a SAPCR and application for temporary restraining order and protective order. Father filed a counter-petition in the SAPCR. Mother testified that the oldest child found racy pictures of Father's girlfriend on the internet. Mother was disgusted by the pictures and was concerned that Father's girlfriend was a bad influence on the Children. The trial court issued temporary orders enjoining the parties from having unrelated members of the opposite sex stay the night during that party's period of possession and enjoining the Children from having any contact with Father's girlfriend. After a final hearing, the trial court denied both parties' motions but ordered the two injunctions survive the finality of the judgment. Father appealed, arguing that the trial court abused its discretion by granting a permanent injunction for which Mother had not pleaded, that the evidence was legally and factually insufficient to support the injunctive relief, and that the injunction prohibiting overnight stays by members of the opposite sex was overly broad and not supported by the evidence.

Holding: Reversed and Rendered; Affirmed as Modified

Opinion: To be entitled to a permanent injunction, a party must show (1) a wrongful act, (2) imminent harm, (3) irreparable injury, and (4) the absence of an adequate remedy at law. A permanent injunction must not

grant relief which is not requested or be more comprehensive or restrictive than justified by the pleadings, the evidence, and the usages of equity.

Here, Mother did not request a permanent injunction. Further, even if Mother had pleaded for the permanent injunctions, Mother did not show that the Children suffered harm or that there was an imminent risk of harm. Mother's concern that Father's girlfriend was a bad influence on the Children was insufficient to support an injunction prohibiting Father's girlfriend from having any contact with the Children.

Neither party introduced evidence relating to the impact on the Children of having an overnight guest or that the Children would be imminently harmed or suffer irreparable injury if unrelated members of the opposite sex stayed overnight. The COA further noted that the injunction did not allow for an exception for the Children's friends from school. Thus, there was insufficient evidence to support granting a permanent injunction forbidding overnight guests.

Editor's comment: *Under very similar, but less salacious, facts and without a pleading, evidence, or showing of harm, the Dallas Court of Appeals upheld an injunction against overnight guests of the opposite sex under the rubric that "Pleadings are of little importance in child custody cases and the trial court's efforts to exercise broad, equitable powers in determining what will be best for the future welfare of a child should be unhampered by narrow technical rulings. Specifically, the trial court has discretion to place conditions on parents' visitation even if the pleadings do not request such conditions."* *Peck v. Peck, 172 S.W.3d 26, 35 (Tex. App.—Dallas 2005, pet. denied). The holding in Peck has been cited several times for this proposition. G.L.S.*

P.S.: I recall the facts in Peck differently from Michelle (see below)—Mother filed a motion requesting a permanent injunction (against father's fiancé spending over night when he had possession of child) on the day before entry of the decree, only evidence of any kind put on by Mother "at the full evidentiary hearing" in regards to the injunction was Mother answering "yes" to her lawyer's question as to whether she thought the injunction was in her child's best interest—no showing of harm, etc.). G.L.S.

Editor's comment: *Repeat after me: "The pleadings must support the judgment. The pleadings must support the judgment. The pleadings must support the judgment." Mom should have asked for a trial amendment to support the judgment. This is one of the fallouts of the new Standing Orders. Before the creation of Standing Orders, almost all contested divorces asked for TRO, temporary injunction and permanent injunctions out of course. Now, many people leave that out of the pleadings, but if you want any part of the Standing Order to survive after the final judgment, you need to plead for it. Georganna's comments that this case may conflict with the Peck decision (she and I were opposing counsel in Peck). However, in that case, Wife did file a pleading asking for a restriction on Husband's girlfriend, and the parties held a full evidentiary hearing on the merits of the injunction. While some language in Peck may conflict with the AAN decision, the cases are distinguishable on their facts. M.M.O.*

Editor's comment: *So, how "racy" must a picture be to cause irreparable harm? Just asking! J.V.*

SAPCR
CHILD SUPPORT

TRIAL COURT WAS WITHIN ITS DISCRETION IN ORDERING RETROACTIVE CHILD SUPPORT EFFECTIVE ANY DATE AFTER OBLIGOR WAS SERVED WITH CITATION IN MODIFICATION PROCEEDINGS

¶14-4-22. ***In re B.R.F.,*** ___ S.W.3d ___, 2014 WL 3943828 (Tex. App.—El Paso 2014, no pet. h.) (08-13-14).

Facts: Mother and Father were divorced with two Children. In the original order, Mother was ordered to pay child support. A few years later, Father filed a SAPCR, seeking a modification of conservatorship and child support. Mother was served with the citation about a month later. The final order was signed about a year after Father had filed his petition, and it modified Mother's child support obligation effective January 1 of that year—many months before the order was signed. Mother appealed, challenging the trial court's jurisdiction to "back date" an order for child support.

Holding: Affirmed

Opinion: TFC 156.401(b) allows a court to award child support that is retroactive to the earlier of (1) the date of service of citation, or (2) the date of the obligor's appearance. Here, Mother was served more than a week before the date on which the court ordered the child support obligation to begin. The trial court was within its discretion in choosing this date.

Editor's comment: *The court observes that there are "four 'types' of child support that a court may order one parent to pay to the other — temporary, current, medical, and retroactive." Because this support was retroactive, not "current," as Mother argued, the trial court had discretion to order it. J.V.*

SAPCR
CHILD SUPPORT ENFORCEMENT

THE OAG IS IMMUNE FROM SUIT FOR DAMAGES RESULTING FROM NEGLIGENTLY FAILING TO COLLECT PAST DUE CHILD SUPPORT

¶14-4-23. *OAG v. Parks-Cornelius*, No. 12-13-00385-CV, 2014 WL 3662552 (Tex. App.—Tyler 2014, no pet. h.) (mem. op.) (07-23-14).

Facts: Father was nearly $100,000 in arrears for past-due, court-ordered child support. Mother enlisted the OAG for assistance in collecting the past-due child support. When the OAG was unsuccessful, Mother sued the OAG for negligence and served the OAG by certified mail. The petition was received in the OAG mail room, but the OAG did not file an answer. The trial court rendered an interlocutory default judgment against the OAG and awarded Mother damages, which consisted of the past due child support and attorney's fees. The OAG filed a notice of restricted appeal.

Holding: Reversed and Rendered

Opinion: The doctrine of sovereign immunity protects the State from lawsuits for damages in all instances

where the State has not waived immunity by a constitutional or legislative provision. A waiver of immunity must be clear and unambiguous. Immunity deprives a trial court of jurisdiction. When a political subdivision performs governmental functions, the subdivision derives governmental immunity from the State's sovereign immunity.

The OAG is entitled to collect and distribute court-ordered child support for the benefit of the child. There is no statutory provision allowing a court to order the OAG to pay child support when the obligor does not. There is no constitutional or legislative provision waiving immunity for the tort Mother alleged. The trial court had no jurisdiction over Mother's suit. Therefore, the trial court erred in rendering a judgment in favor of Mother.

TRIAL COURT SEPARATELY DENIED MOTHER'S MOTION FOR ENFORCEMENT, SO IT LACKED AUTHORITY AT FINAL TRIAL IN THE MODIFICATION PROCEEDINGS TO AWARD FATHER ATTORNEY'S FEES AS ADDITIONAL CHILD SUPPORT

¶14-4-24. ***Guillory v. Boykins,*** ___ S.W.3d ___, 2014 WL 3842913 (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (08-05-14).

Facts: Mother and Father were never married. Approximately one year after the Child's birth, the parties entered an "Agreed Child Support Review Order (Establishing the Parent-Child Relationship)." In that order, the parents were appointed JMCs, Mother was granted the exclusive right to designate the primary residence of the child, and Father was ordered to pay child support. The Child was enrolled in kindergarten at a local elementary school near Father's home because the location was convenient for the parties. After the Child had been in school for a few years, the parties began to dispute custody, child support, and which parent had been exercising actual care, control, and possession of the child since the Child had begun school. Father asserted that Mother had relinquished custody to him, and Mother alleged that she exercised regular custody at all relevant times. Father filed a SPACR, seeking to modify the prior order to name him as the conservator with the exclusive right to designate the primary residence of the Child. Father also asked the trial court to order Mother to pay child support. Mother filed a counter-petition for modification and a motion to enforce the prior child support order, claiming Father was in arrears. Father answered the motion to enforce, disputing the amounts claimed by Mother and claiming that he was entitled to an offset. The trial court entered an enforcement order finding that Father was not in violation of the prior order and denying all of Mother's requested relief. Separately, the trial court entered temporary orders in the modification proceedings. After a final trial, the trial court entered a final order appointing Father as SMC and ordering Mother to pay child support. In addition, the trial court awarded Father his attorney's fees and ordered Mother to pay those fees as additional child support, which would be garnished from her paycheck. Mother appealed, arguing that the trial court erred in awarding attorney's fees as child support. Mother argued that although she had filed a motion for enforcement, the only issues before the trial court at the final hearing were related to the modification.

Holding: Reversed in Part

Opinion: In a proceeding to modify child support, a trial court may award attorney's fees that may be enforced as a debt. Contrarily, per TFC 157.167, in child support enforcement proceedings, attorney's fees are permissibly taxed as child support. When attorney's fees are awarded as child support, they may be enforced through contempt proceedings and may result in garnishment of the obligor's wages. In non-enforcement proceedings, a trial court lacks the authority to deem attorney's fees as necessaries or award attorney's fees as additional child support.

Here, Mother filed a motion for enforcement, which the trial court denied in a separate order. The only issue before the trial court at the time of trial was the modification sought by Father. Thus, the proceeding was not an enforcement proceeding, but rather a modification proceeding. Therefore, the trial court lacked the

authority to deem Father's attorney's fees as additional child support and to withhold them from Mother's earnings.

FATHER WAS NOT OBLIGATED TO REIMBURSE MOTHER FOR 50% OF UNREIMBURSED MEDICAL EXPENSES BECAUSE MOTHER FAILED TO PROVIDE FATHER WITH ANY DOCUMENTS RELATED TO THE EXPENSES WITHIN 30 DAYS OF THEIR RECEIPT.

¶14-4-25. *In re I.O.K.*, No. 05-13-01201-CV, 2014 WL 3939379 (Tex. App.—Dallas 2014, no pet. h.) (mem. op.) (08-13-14).

Facts: Mother and Father divorced and an agreed final decree was entered pursuant to an MSA. The agreement provided that each Party would be responsible for 50% of the Children's unreimbursed medical expenses, unless the medical provider was out-of-network. In that case, the Party incurring the expenses would be fully responsible for those expenses, unless both Parties agreed otherwise in writing. The Party incurring reimbursable medical expenses was responsible for providing receipts, etc. to the other Party, and the other Party would then reimbursed the first Party as necessary. Also in the Decree, the Parties agreed that the Children would continue seeing their psychologist, Dr. Beckloff.

Mother filed a motion for enforcement, seeking repayment of medical expenses related to the Children's treatment by Dr. Beckloff. Mother testified that she had not turned over to Father any forms related to the expenses, but Father was aware of the charges. Father testified that he did not know about any expenses until receiving a $5000 bill directly from Dr. Beckloff. The trial court held Father in contempt for 59 claims for unreimbursed expenses but suspended any jail time. Father appealed, arguing that he was not responsible for the expenses because Dr. Beckloff was an out-of-network provider, and because Mother failed to turn over the required forms within 30 days.

Holding: Reversed and Rendered

Opinion: The final decree provided that each party would be responsible for 50% of the Children's unreimbursed medical expenses, with an exception if the Parties agreed otherwise in writing. Here, although Father did not sign the final decree, the final decree was based on a MSA. A MSA must be in writing and signed by each party. Thus, the provision in the decree that provided that the Children would continue therapy with Dr. Beckloff, an out-of-network provider, was an agreement between the Parties in writing. Therefore, under the terms of the decree, both Parties were equally responsible for payment of Dr. Beckloff's fees.

In addition, the final decree required that Mother provide all forms, receipts, etc. to Father within 30 days of receiving them and required Father to reimburse Mother for his portion of the expenses within 30 days of receiving the forms from Mother. At trial, Mother admitted that she had not provided Father with any forms related to Dr. Beckloff's expenses. Mother testified that Father knew about the expenses through email communications with Mother, responses to discovery requests, and EOB forms received from the insurance company. However, the COA held that the final decree explicitly required Mother to provide the necessary documents to Father. Father was not required to seek out the information. Because Mother did not comply with her obligation, Father's obligation was never triggered.

SAPCR
MODIFICATION

AN AFFIDAVIT COMPLYING WITH TFC 156.102 MUST INCLUDE FACTS TO SUPPORT AN ALLEGATION THAT THE CHILD'S PRESENT ENVIRONMENT MAY ENDANGER THE CHILD'S PHYSICAL HEALTH OR SIGNIFICANTLY IMPAIR THE CHILD'S EMOTIONAL DEVELOPMENT; A CONCLUSORY STATEMENT BY ITSELF IS INSUFFICIENT

¶14-4-26. *In re C.G.*, No. 04-13-00749-CV, 2014 WL 2548356 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (08-13-14) (op. on rhrng.).

Facts: During their divorce proceedings, Mother and Father entered into a settlement agreement that appointed both parents JMC and granted Mother the right to designate the primary residence of their two Children with a geographical restriction requiring them to live in Bexar County, Texas or within 100 miles of Delaware County, New York, where the Children's paternal grandparents resided. After entering this agreement, but before the divorce was finalized, Mother moved to Philadelphia, which she had calculated to be 96 miles from Delaware County. Subsequently, Father filed a motion to modify the geographical restriction to 75 miles of Delaware County, which was the restriction ultimately imposed by the final decree.

Five months later, Father filed a SAPCR, seeking to be designated as the conservator with the right to designate the primary residence of the Children and seeking to modify child support. Father attached a supporting affidavit stating that Mother had excluded Father "from active participation in the lives of the children and from access to and possession of them." He alleged that Mother had alienated the Children from him and "failed to facilitate, encourage, nurture, or support a relationship between the children and [him]." Father also claimed that "the children's present environment with [Mother] may endanger their physical health or substantially impair their emotional development, especially if allowed to continue."

In addition, Father filed a motion for enforcement, alleging several violations of the decree by Mother, including her move to Philadelphia. During a two-day bench trial, Father entered evidence that Mother failed to provide him with copies of school records and progress reports as required by the decree. Mother also failed to deliver the children to Father for all of his allowed periods of visitation, and she did not always allow the Children to come to the phone when Father called. However, Father also testified that the Children were great, happy kids and that they had done well in school while in their Mother's possession. At the conclusion of the trial, the trial court granted Father's SAPCR and held Mother in contempt for, among other violations, moving to Philadelphia in violation of the 75-mile geographical restriction imposed by the final decree.

Holding: Reversed and Rendered in Part / Affirmed in Part

Opinion: TFC 156.102 applies when a SAPCR is filed less than a year after a prior order and seeks to modify the designation of the person with the right to designate the primary residence of a child. TFC 156.102(b)(1) requires the movant to attach to the SAPCR an affidavit with facts to support an "allegation that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development[.]" Per TFC 156.102(c), a trial court shall set a hearing only after determining that the supporting affidavit is sufficient.

Here, Father's supporting affidavit merely contained a conclusory statement regarding the Children's physical and emotional well-being. Rather than addressing effects on the Children, the facts presented in Father's affidavit focused on how Mother's actions and omissions affected him. Thus, Father's affidavit was insufficient to support an allegation that the Children's present environment may endanger their physical health or significantly impair their emotional development. The trial court erred in not refusing to set a hearing.

The trial court noted that such an error would have been harmless if the testimony admitted during the hearing supported an allegation that the Children's present environment may endanger their physical health or significantly impair their emotional development. However, during the hearing, no evidence was presented to support such an allegation. Therefore, Father failed to meet his burden under TFC 156.102, and the trial court erred in granting Father's SAPCR.

A party can only be held in contempt for a failure to comply with a decree or order that existed at the time of the alleged contemptuous act or omission. Here, the final decree with the 75-mile geographical restriction did not exist at the time of Mother's move. However, the Children did not join Mother at her new home until after the entry of the final decree and after the 75-mile geographical restriction was in effect. Thus, the trial court did not err in finding Mother in contempt for violating the geographical restriction.

Editor's comment: *The court reviewed a finding of contempt on appeal. But Texas law is well-settled that contempt of court must be reviewed by a petition for writ of habeas corpus (if the relator is restrained) or by a petition for writ of mandamus (if the relator is not restrained). J.V.*

Editor's comment: *Father attaches an affidavit to his petition to modify within one year that describes how mom alienates the children from father, and yet this appellate court found it insufficient under Tex. Fam. Code Section156.102 because it concentrated on how the alienation affected HIM, instead of the CHILDREN. The court appears to be drawing a very fine distinction on what would, or would not, pass muster on the affidavit. Anyone practicing in the San Antonio area should absolutely read this case, and carefully construct your 156.102 affidavits. R.T.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

★★★TEXAS SUPREME COURT★★★

A COA MAY NOT IMPLY FINDINGS TO SUPPORT A GROUND FOR PARENTAL RIGHTS TERMINATION REQUESTED BY A GOVERNMENT ENTITY, BUT NOT INCLUDED IN THE JUDGMENT AS GROUNDS FOR TERMINATION

¶14-4-27. ***In re S.M.R.,*** ___ S.W.3d ___, 2014 WL 2535986 (Tex. 2014) (06/06/14).

Facts: Mother and Father separated in 2007, and the Children remained with Mother. After the separation, Mother had difficulty providing the Children a stable home. Ultimately, Mother and the Children moved in with a maternal aunt. In September 2008, TDFPS received a referral alleging negligent supervision and medical neglect of the Children. Subsequently, the maternal aunt reported to TDFPS that the Children had become ill and that she did not have the financial resources to care for the Children. In April 2009, TDFPS filed a petition seeking temporary conservatorship of the Children. Following a hearing, in which Father was not present, the trial court signed temporary orders appointing the TDFPS as the Children's temporary managing conservator. In June 2009, the trial court signed orders incorporating a family-service plan that established various requirements for Father to regain custody of the Children.

Several months later, TDFPS amended its pleadings to seek termination of both parents' parental rights. Following trial, the court terminated both parents' rights, finding by clear and convincing evidence that each parent had endangered the Children pursuant to TFC 161.001(1)(D) and (E). Although raised by TDFPS, the trial court's judgment did not include TFC 161.001(1)(O) (failure to comply with court order specifically establishing actions necessary for parent to obtain return of child) as a termination ground. Father appealed. On appeal, the COA reversed and remanded, holding the evidence factually insufficient to support the endangerment grounds. TDFPS appealed to the Texas Supreme Court.

Holding: Affirmed

Opinion: TFC 161.001(1)-(2) provides two prerequisites for termination: (1) the proponent must establish one or more of the recognized grounds for termination; and (2), termination must be in the child's best interest. The statute sets out twenty different courses of parental conduct, any one of which may serve as a ground that satisfies the statute's first prerequisite for termination. Here, TDFPS alleged endangerment of the Children under TFC 161.001(1)(D) and (E) and Father's failure to comply with family-service plan's conditions to regain custody under TFC 161.001(1)(O).

TDFPS argued that, under TRCP 299, the COA should have affirmed the trial court's judgment pursuant to TFC 161.001(1)(O) because, although the trial court omitted that ground from its judgment, it should nevertheless be implied in support of termination given that the trial court found that termination was in the Children's best interest. TRCP 299 provides that "omitted unrequested elements" of a ground of recovery or defense may be presumed to support a judgment, when evidence supports the omitted element, and the trial court has found one or more elements of the ground of recovery or defense.

Contrary to TDFPS's position, TRCP 299 does not apply because the rule's presumption extends only to "omitted unrequested elements"—TDFPS in fact requested termination under TFC 161.001(1)(O). Instead, the applicable rule is TRCP 306, which provides that a judgment in a suit filed by a governmental entity to terminate parental rights "must state the specific grounds for termination." Here, the judgment conforms to the TFC 161.001's requirements by stating the specific termination grounds and determining the Children's best interests. Accordingly, the trial court's judgment was complete on its face, no element was omitted, and nothing needed to be implied in support of the judgment under Rule 299.

TDFPS argued next that the COA erred by reversing the trial court's judgment terminating Father's parental rights because the evidence supporting termination under TFC 161.001(1)(O) was conclusive. TFC 161.001(1)(O) provides for termination of the parent-child relationship if by clear and convincing evidence 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 [TDFPS] 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[.]

Here, the record conclusively established that: (1) the Children were in TDFPS's custody for more than nine months; and (2) that such custody was the result of an order under Chapter 262 for the Children's abuse or neglect. Thus, the issue is whether Father failed to comply with the provisions of the trial court's family-service plan specifically establishing the actions necessary for Father to obtain the return of the Children.

The family-service plan required Father to remain drug free, submit to random drug tests, refrain from criminal activity, and maintain stable housing and employment. The plan also required Father to submit to a psychological examination, which Father completed. The psychological report, in turn, recommended referral for vocational counseling, stress management, substance abuse, parent education, and family therapy. At trial, Father testified he substantially complied with the plan, including his submission to the psychological exam, attending several AA meetings, and about his difficulty finding a sponsor. TDFPS offered no proof showing that Father violated the plan's drug or criminal-activity prohibitions. Father also testified that he worked in construction and intended to move in with a girlfriend and that such housing would provide a bedroom for the Children. Nevertheless, TDFPS argued that Father failed to complete material parts of the family-service plan, including (1) failing to complete anger management classes, (2) failing to advance beyond the first step of AA or find a sponsor; (3) failing to provide proof that he participated in parenting classes; and (4) failing to attend vocational-counseling classes.

Parents frequently fall short of strict compliance with a family-service plan's requirements. TDFPS's argument, however, accepts nothing less and thus would require termination for a parent's imperfect compliance with the plan. But whether a parent has done enough under a trial court's family-service plan to defeat termination under TFC 161.001(1)(O) is ordinarily a fact question. When questions of compliance and degree

are raised, as they were here, and the trial court declines to terminate on this ground, the evidence is not a conclusive ground for termination as contended by TDFPS.

THE EVIDENCE WAS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT THE JURY'S FINDING THAT PARENTS HAD ENGAGED IN CONDUCT THAT ENDANGERED THE CHILD'S PHYSICAL OR EMOTIONAL WELL-BEING AND THAT TERMINATION OF PARENTS' PARENTAL RIGHTS WAS IN THE CHILD'S BEST INTEREST.

¶14-4-28. ***In re J.D.B.,*** ___ S.W.3d ___, 2014 WL 2735670 (Tex. App.—Dallas 2014, no pet. h.) (06/17/14).

Facts: Following a jury trial, the jury found that both Mother and Father had allowed the Child to remain in an endangering environment and had engaged in conduct that endangered the Child's physical or emotional well-being. The jury also found that it was in the Child's best interest for Mother's and Father's parental rights to be terminated and conservatorship to be granted to TDFPS for the purpose of placing the Child with a relative. The trial court signed a final judgment adopting the jury's findings and terminating Mother's and Father's parental rights. Mother and Father appealed challenging the legal and factual sufficiency of the evidence supporting the judgment.

Holding: Affirmed.

Opinion: A trial court may terminate the parent-child relationship if the fact-finder finds by clear and convincing evidence that (1) the parent committed one or more of the enumerated acts or omissions justifying termination under TFC 161.001(1) and (2) termination of parental rights is in the child's best interest.

Here, the jury heard testimony that after the Child was born, the parents had actual care of the Child for only 41 days. During this brief period, the parents sought medical care for the Child based on concerns related to swelling in the Child's shoulder. The Child was examined by multiple physicians from various disciplines, including radiologists, a surgeon from the trauma service, an orthopedic surgeon, and pediatricians in the REACH clinic. Based on three skeletal surveys, the physicians identified a total of twenty-six bone fractures throughout the Child's body including his arm, which was a new fracture, and multiple healing fractures of his clavicle, ribs, feet, and femur that were in different stages of healing. The Child underwent extensive testing to rule out the possibility that his fractures were caused by a bone disease, vitamin deficiency, or some other underlying medical condition that caused unusual bone fragility. A REACH physician testified that the frenulum underneath the Child's tongue had been "ripped open" and was in stages of healing. The physician testified that the frenulum injury was "indicative of something happening to the child" because a 41-day old infant would not be able to self-inflict this injury; it means that someone had to forcefully shove something into his mouth to cause the injury. The court-ordered therapist who counseled the parents testified to her concerns that parents refused to consider any causes for the Child's injuries other than medical explanations and appeared to lack empathy for the Child when discussing his injuries. Additionally, the jury heard evidence that TDFPS placed the Child with a relative, that the Child was thriving in his new environment, and that the Child sustained no further bone fractures or other serious injuries after he was removed from the parents' care.

Although the parents denied any knowledge of the source of the Child's injuries, they tendered expert testimony that the injuries could have a medical explanation, and presented evidence calling into question the character of the relative with whom TDFPS place the child, the record contained legally and factually sufficient evidence to support the jury's finding that both Mother and Father had endangered the Child pursuant to TFC 161.001(1)(D), and that termination of Mother's and Father's parental rights was in the Child's best interest.

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THE RECORD CONTAINED LEGALLY AND FACTUALLY SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS THAT MOTHER HAD ENGAGED IN CONDUCT THAT ENDANGERED THE CHILD'S PHYSICAL OR EMOTIONAL WELL-BEING AND THAT TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS IN THE CHILD'S BEST INTEREST.

¶14-4-29. ***In re J.D.,*** ___ S.W.3d ___, 2014 WL 2583784 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (06/10/14).

Facts: Following a bench trial, the trial court found by clear and convincing evidence that the Mother had engaged in conduct that endangered the Child's physical or emotional well-being pursuant to TFC 161.001(1)(D) and (E) and that termination of Mother's parental rights was in the Child's best interest pursuant to TFC 161.001(2). Mother appealed challenging the legal and factual sufficiency of the evidence to support the trial court's judgment.

Holding: Affirmed

Opinion: The trial court heard evidence that, while in Mother's sole care, the Child suffered a broken left arm. Further examination revealed that the Child had also suffered a fracture to the end of her thigh bone approximately two weeks before the broken arm. Testing also showed possible rib injuries. Evidence tendered at trial revealed that Mother initially stated she did not know how the Child was injured, but reported after further questioning that her five-year-old daughter ("Sister") may have injured the Child. A child abuse expert testified that the Child's leg fracture required excessive force or excessive shaking and that that the leg injury was most likely the result of abuse. The expert testified further that Child's arm required either a "direct impact" or a "forceful break," and that most children would scream in pain upon application of such force. The Mother testified that she never heard the Child cry out and denied abusing the Child. Sister, who was six years old at the time of trial, testified that she broke the Child's arm when she pushed it or hit it. But Sister also testified that the Child had fallen out of a swing and/or that she had fallen on the Child. Expert testimony revealed that a five-year-old child could not have caused the Child's injuries. Finally, the trial court heard evidence that Mother had previously been convicted and jailed on drug charges, that Mother was unemployed at the time the Child was injured as well as at the time of trial, that the Child had been in foster care for most of her life by the time of trial, that the Child was happy and healthy in her foster home, and that the foster parent intended to adopt the Child. On this record, the evidence was legally and factually sufficient to support the trial court's judgment terminating the Mother's parental rights.

★★★TEXAS SUPREME COURT★★★

MOTHER'S CONDUCT, BOTH IN THE MORE RECENT AND MORE DISTANT PAST, TOGETHER WITH EVIDENCE OF THE STABILITY OF THE CHILD'S CURRENT PLACEMENT SUPPORTED THE JURY'S FINDING THAT APPOINTMENT OF MOTHER AS A CONSERVATOR WOULD SUBSTANTIALLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT.

¶14-4-30. ***Danet v. Bhan,*** ___ S.W.3d ___, 2014 WL 2896005 (Tex. 2014) (per curiam) (06/27/14)**.**

Facts: In March 2006, Mother and Father had physical altercation with the seven-month-old Child present. Afterward, the police took possession of the Child and instructed Mother to pick the Child up at the police station. Instead of retrieving the Child, Mother spent the weekend in a hotel room using cocaine with an ex-inmate she had just met. Thereafter, TDFPS placed the Child with Foster Parents and Mother moved out-of-state. In June 2006, TDFPS informed Mother it planned to seek a termination of her parental rights in the Child and to arrange an adoption by Foster Parents. Mother returned to Texas to comply with the provisions

of a family service plan such as attending scheduled visitation with the Child, attending parenting courses and drug treatment. After, TDFPS decided not to terminate Mother's parental rights, Foster Parents filed suit seeking appointment as the Child's joint managing conservators. In August 2010, the matter proceeded to trial and the issue of conservatorship was tried to a jury.

At trial, Foster Parents testified to Mother's more recent history including that she was routinely late for her scheduled appointments and that, on one occasion, she was late for a visit at a museum and when she did arrive, she sneaked past the reception desk to avoid paying an entrance fee. On another occasion, Mother failed to call the Child for three weeks because she travelled to New Orleans where she was eventually stranded. Foster Parents also testified that the Child had bonded with them and that the Child would become scared prior to Mother's visits. The jury also heard evidence regarding Mother's more remote past including her history of arrests and charges relating to heroin and marijuana possession and for battery. The jury also heard that Mother had used cocaine in 2006 when she was pregnant with another child, causing her to fail a court-ordered narcotics test.

Following the trial, the jury found that Mother's appointment as the Child's conservator would significantly impair the Child's physical health or emotional development. The trial court therefore appointed Foster Parents as the Child's sole managing conservators. Mother appealed. The COA reversed, concluding that that the evidence was legally insufficient to support the jury's finding because, although the evidence would support a finding that Mother had engaged in parental misconduct during the early months of the Child's life, there was no evidence to establish that Mother's past misconduct was sufficiently linked to her present fitness to be the Child's custodian at the time of trial. Foster Parents appealed to the Texas Supreme Court.

Holding: Reversed and remanded

Opinion: Here, the jury heard substantial evidence regarding Mother's conduct in the more distant past, two or three years before the August 2010 trial, such as her drug use, criminal record, failure to provide stability in the home, and abandonment of the Child. But it also includes evidence of Mother's more recent conduct prior to trial, such as her failures to visit the Child, her inconsistent communication with the Child, and her misconduct, such as "sneaking" into the a museum during visitation. Additionally, the evidence was presented that the Child has bonded with Foster Parents in a stable environment and the emotional harm that could result from the Child's separation from those who have cared for him most of his life. Such evidence of Mother's specific actions and omissions, both in the more recent and more distant past, together with evidence of the stability of the Child's current placement support the jury's finding that appointment of Mother as custodian would substantially impair the Child's physical health or emotional development.

The Court opined that it made no judgment as to the exact length of time required to ameliorate a history of bad conduct, nor did it suggest that the removal of a Child from a long-term stable environment would, in itself, be sufficient to establish that a change in custody would substantially impair the Child's physical health or emotional development. Instead, the Court noted that these questions are purely contextual and are subject to the good judgment of the fact-finder at trial.

TRIAL COURT ERRED BY DENYING FATHER'S REQUEST TO TERMINATE HIS PARENTAL RIGHTS UNDER TFC 161.005(C) BASED ON FATHER'S STATUS AS THE CHILDREN'S PRESUMED FATHER; TRIAL COURT ERRED BY CONSIDERING THE CHILDREN'S BEST INTEREST IN DETERMINING WHETHER FATHER WAS ENTITLED TO TERMINATION UNDER TFC 161.005(C).

¶14-4-31. ***In re J.K.B.***, ___ S.W.3d ___, 2014 WL 2895797 ((Tex. App.—Houston [1st Dist.], no pet. h.) (06/26/14).

Facts: Mother and Father married in 1987. During the marriage, Mother gave birth to twin Children. Mother and Father divorced in 2002. In the divorce decree, the trial court found that Mother and Father "[were] the parents" of the Children, appointed Mother and Father as the Children's joint managing conservators, and ordered Father to pay child support, which he has paid through the years. On December 28, 2011, Father filed a verified petition to terminate the parent-child relationship between him and the Children pursuant to TFC

161.005(c) in which he alleged alleged that: (1) he had been adjudicated to be the Children's father in the 2002 divorce decree; (2) genetic testing had not occurred in that proceeding; (3) he had not contested parentage in the divorce proceeding because of his mistaken belief at that time he was the Children's father; and (4) his mistaken belief was based on misrepresentations that had been made to him. Father attached the genetic testing report to his petition, which showed that the testing had been done in September 2003 and had excluded Roy as the twins' biological father.

At a pretrial hearing, the trial court disagreed that the divorce decree adjudicated Father to be the Children's father. Rather than an adjudicated father, the trial court stated that Father was the Children's presumed father, as defined by the Family Code and therefore Texas Family Code 161.005(c) did not entitle a presumed father to petition for termination. Instead, the trial court pointed out that, under the Family Code, a presumed father must seek to challenge paternity within four years of the birth of the child pursuant to Texas Family Code 160.607, which Father had not done. Accordingly, finding that Father's status as presumed Father prevented him from seeking termination, and finding that termination was not in the Children's best interest, the trial court denied Father's request for genetic testing and his request for termination of the parent-child relationship. Father appealed.

Holding: reverse and remand

Opinion: Father argued that the trial court incorrectly determined that he was not an adjudicated father for purposes of subsection 161.005(c) because the divorce decree expressly found Mother and Father "are the parents of" the Children.

Texas Family Code 161.005(c), provides that "[a] man may file a suit for termination of the parent-child relationship between the man and a child if, without obtaining genetic testing, the man ... was *adjudicated* to be the father of the child in a previous proceeding under this title in which genetic testing did not occur." A suit for divorce in which the parties are parents of minor children necessarily includes a suit affecting the parent-child relationship. Texas courts have held that a man has been adjudicated to be the father of a child when a court finds in a divorce judgment that the man is the parent of the child as part of the court's resolution of issues affecting the parent-child relationship in the divorce proceeding.

Here, given that the 2002 divorce decree expressly found Father to be the parent of the Children, appointed him as the Children's joint managing conservator, and ordered him to pay child support, the divorce decree necessarily adjudicated Father as the Children's father in a proceeding under Title 5 of the Family Code. Moreover, Father's status as a presumed father at the time of the divorce proceeding has no bearing on whether he was adjudicated to be the father of the Children during that proceeding. Texas Family Code § 160.637 provides that in a divorce proceeding, "the court is considered to have made an adjudication of the parentage of a child if ... the final order: (1) expressly identifies the child as 'a child of the marriage' or 'issue of the marriage' or uses similar words indicating that the husband is the father of the child; or (2) provides for the payment of child support for the child by the husband unless paternity is specifically disclaimed in the order." The Legislature made no exception for presumed fathers from this provision; nor did the Legislature preclude presumed fathers from filing a petition to terminate the parent-child relationship under Texas Family Code § 161.005(c).

Father argued further that trial court erred when it considered the Children's best interest in determining whether he was entitled to termination of the parent-child relationship under subsection 161.005(c). Texas Family Code § 161.005(a) states that "A parent may file a suit for termination of the petitioner's parent-child relationship. *Except as provided by Subsection (h), the court may order termination if termination is in the best interest of the child.*" Texas Family Code § 161.005(h), in turn, provides: "If the results of genetic testing ordered under Subsection (f) [providing procedural mechanism for termination under subsection (c)] exclude the petitioner as the child's genetic father, the court shall render an order terminating the parent-child relationship." Although a parent may still seek termination of the parent-child relationship based on the best interest of the child under subsection 161.005(a), termination sought under subsection (c) does not include a best-interest determination. If a petitioner makes a prima facie showing under subsection (f), entitling him to genetic testing, and the genetic testing excludes him as the father, then he is entitled to termination under sub-

section (h), irrespective of the child's best interest. Accordingly, the trial court's determination that Father did not show that termination was in the Children's best interest cannot support denial of his termination request under subsection 161.005(c).

THE RECORD CONTAINED LEGALLY AND FACTUALLY SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S TERMINATION OF MOTHER'S PARENTAL RIGHTS.

14-4-32. ***In re S.Y.,*** ___ S.W.3d ___, 2014 WL 2922501 (Tex. App.—Dallas 2014, no pet. h.) (06/27/14).

Facts: Mother and Father were arrested in November 2012, for shoplifting at a Walmart store. Security cameras showed them placing items in the Child's stroller and then walking past the check-out area without paying. While they were being detained at the store, a police officer accompanied Mother to change the Child's diaper and noticed the child had a severe diaper rash. TDFPS eventually place the Child in foster care. At a temporary hearing, a doctor who examined the Child noted that the Child had several other rashes, and that the rashes were a result of feces being left on the Child for an extended period of time resulting in a yeast infection. The doctor testified that these types of rashes were difficult to develop and usually result from medical neglect. After the hearing, the trial court signed temporary orders appointing TDFPS as the Child's temporary managing conservator and ordered Mother and Father to participate in a parenting class, a psychological and psychiatric evaluation, and a drug/alcohol assessment. The trial court also ordered both parents to follow through with all recommendations made by any service providers. TDFPS then created a family service plan, which had as its goal the reunification of the family within one year. A little over a year later, however, TDFPS filed suit to terminate both parents' parental rights on statutory endangerment grounds (Texas Family Code § 161.001(1)(D) and (E)) and failure to comply with provisions of a court order (Tex. Fam. Code § 161.001(1)(O)). Following trial, the trial court terminated Mother's and Father's parental rights. Mother appealed challenging the legal and factual sufficiency of the judgment.

Holding: Affirmed

Opinion: Mother challenged the trial court's finding that she failed to comply with certain court-ordered services that were incorporated into the trial court's order—specifically arguing that the services "were basically completed," and that she "should be commended for progressing from practical homelessness to a home in [their] names. However, undisputed evidence established that neither parent had undergone the required psychiatric evaluation or submitted to a drug test required by TDFPS. Mother had explanations for her failures. She testified she was unable to undergo the psychiatric evaluation because of requirements at the evaluation facility: first for identification and then for income verification. And as to the drug test, Mother testified that she did not want to take it, but also that her attorney told her not to take it. Regardless of these explanations, Tex. Fam. Code § 161.001(1)(O) does not make a provision for excuses for a parent's failure to comply with the trial court's order. Nor does it provide a means of evaluating partial or substantial compliance with a plan.

Mother also challenged the sufficiency of the evidence supporting the trial court's conclusion that termination of her parental rights was in the Child's best interest. Here, the evidence established that Mother had a loving bond with the Child and could provide for the Child's emotional needs. However, the Child was diagnosed with having unusually sensitive skin and at least one food allergy. The record provides reasons for concern as to whether Mother understands these physical needs of her daughter and whether she is capable of meeting them. Although the skin-care issues from which she suffered at the time of the first arrest were not life-threatening, the medical testimony at trial explained the some of the rashes could have caused serious injury to Child had it gone untreated. Mother did not believe then that the Child needed to see a doctor. And professionals who observed Mother interact with the Child over the course of a year expressed concern that Mother would ever recognize when the child needed medical attention. Additionally, Mother did not seem to be able to apply what she was taught in parenting classes, or what she learned in counseling, to her dealings with the Child. She was repeatedly offered sources for programs that would help her to promote the Child's best interest directly (including government assistance, medical services, food pantries) and indirectly by helping Mother to improve her own skills (including literacy programs, job training). And at trial Mother testified she would take advantage of those programs. But the record indicates she never took advantage of them

during the year the Child was in the TDFPS's care, and she actually told those trying to help her she was "not interested" in a list of those providers. Moreover, the record evidences that Mother's first arrest precipitated removal of the Child. The family service plan specifically required Mother to stop participating in criminal acts and accept responsibility for prior criminal activity. Yet during the year the Child was in TDFPS's care, Mother was arrested on a second charge of theft. By choosing to steal again, Mother failed to make reunification a priority.

Although much of Mother's problems stem from her lack of education, financial hardship, and general misfortune, Mother continued to make choices in which she failed to put the Child's safety and welfare first. Accordingly, the record contained clear and convincing evidence supporting the trial court's determination that termination of Mother's parental rights was in the Child's best interest.

TRIAL COURT ERRED IN PROCEEDING WITH TERMINATION TRIAL BEFORE CONSIDERING MOTHER'S AFFIDAVIT OF INDIGENCE

¶14-4-33. ***In re V.L.B.,*** ___ S.W.3d ___, 2014 WL 4373567 (Tex. App.—Houston [1st Dist. 2014, no pet. h.) (op. on rehrng) (09-04-14).

Facts: Mother was arrested for an assault against Maternal Grandmother and was jailed for two weeks. While in jail, her Child was left in the care of two of Mother's friends, who resisted relinquishing the Child to Maternal Grandmother. A referral was made to TDFPS alleging neglectful supervision, and TDFPS took possession of the Child. The Child was temporarily placed with Maternal Grandmother. TDFPS filed a petition for temporary conservatorship and to terminate Mother's parental rights. The trial court signed temporary orders and made "no finding with regard to indigency" at that time due to insufficient information.

One week before trial, Mother filed an affidavit of indigency. Early in the trial, the Court noted that the affidavit needed to be addressed. However, before questioning Mother about her indigent status, TDFPS questioned two other witnesses regarding the termination suit before Mother was called to the stand. At the temporary orders hearing, Mother had testified that she had employment, but by the time of the final trial, she had lost her job. Mother knew that she needed income in order to pay for child support. She attempted to find a job, but because of her assault conviction, she was having difficulty finding work. Mother then decided to go to school and use part of her student loan money to cover child support. The student loan was her only source of income. Mother testified that she had sought counsel through legal aid, but because she was advised that "some fees may apply," she did not follow through with her legal aid application. After this testimony, the child's attorney ad litem questioned Mother regarding the termination proceedings. Only after this line of questions did the trial court then appoint counsel to represent Mother. The trial court recessed until Mother's appointed counsel could have an opportunity to get up to speed on Mother's case.

Approximately two weeks later, trial continued. TDFPS did not present any additional witnesses. Mother's counsel requested more time for Mother to complete TDFPS's recommended service plan. The trial court denied the request for more time and terminated Mother's parental rights. Mother appealed, arguing that the trial court erred in proceeding with a trial on the merits before considering her affidavit of indigency.

Holding: Reversed and Remanded

Opinion: Texas Family Code Section 107.013(a)(1) provides that a court shall appoint an attorney ad litem to represent an indigent parent responding in opposition to a suit for termination of the parent's parental rights. While Section 107.013 does not specify a time by which counsel should be appointed to an indigent parent, Texas Family Code section 107.0131 does specify the specific rights and duties of an appointed attorney ad litem, including interviewing the parties, reviewing the court files, and attending all legal proceedings. An attorney who fails to perform the required duties is subject to disciplinary action. Considering the mandatory nature of appointment and the expansive duties required of an appointed attorney ad litem, a trial court should address a parent's affidavit of indigency as soon as possible and before the next critical stage of the proceed-

ings. If a trial court proceeds with the next critical stage, the delay to address the affidavit of indigency could irreparably impair the parent's ability to defend her case or regain custody of the child.

Here, Mother filed her affidavit of indigency a week before the trial setting. The trial was a critical stage of the termination proceedings. The trial court erred in proceeding with the termination trial before considering Mother's affidavit of indigency. Because the attorney ad litem was not appointed prior to proceedings with a trial on the merits, the COA held that Mother was entitled to a new trial as to the termination of her parental rights.

TFC WAS NOT PREEMPTED BY FEDERAL STATUTE IN TERMINATION PROCEEDING INVOLVING A CHILD WHO WAS A MEMBER OF THE CHEROKEE INDIAN TRIBE; FAILURE TO PROVIDE PROPER NOTICE TO THE TRIBE WAS NOT ERROR BECAUSE THE TRIBE HAD ACTUAL KNOWLEDGE OF AND PARTICIPATED IN THE PROCEEDINGS

¶14-4-34. ***In re K.S.,*** ___ S.W.3d ___, 2014 WL 4100436 (Tex. App.—Tyler 2014, no pet. h.) (08-21-14).

Facts: Mother was a member of the Cherokee Indian tribe, and she lived with her Child in Oklahoma City. The Child had a "bump and bruise" on her forehead from being hit by a fellow toddler at daycare. A few days later, Mother took the Child to the hospital for diarrhea and vomiting. Mother did not recall whether the Child had been diagnosed with head trauma during that visit. The next day, Mother and the Child travelled to Las Vegas, Nevada, where Mother took the Child to the hospital again for "dilated pupils, [an] unsteady gait, [and] altered mental status[.]" Mother was concerned about the Child's head injury, but the medical records stated that there was absolutely nothing wrong with the Child. A week or so later, Mother and the Child travelled to Texas by car with a friend. Mother took the Child to another hospital in Denton, alleging the Child was suffering from a number of symptoms that were not supported by the medical records. After resuming their travels, Mother forced her friend to drop her off "on the side of the road" so she could take the Child to another hospital. Mother's friend did not believe anything was wrong with the Child. Mother's behavior at this hospital was described as "manic" and "odd." The hospital staff reported the situation to TDFPS with an allegation of neglectful supervision. The allegation led to the removal of the Child and a trial to a jury to find whether Mother's parental rights should be terminated. Additional evidence in support of termination was presented to the jury. During the proceedings, the Cherokee tribe intervened, and a representative of the Cherokee tribe appeared and testified. The jury charge included questions relating to the termination requirements under the TFC and under the Indian Child Welfare Act. The jury was asked to find whether the evidence supported the findings under both the TFC and the federal statute "beyond a reasonable doubt." The jury ultimately found in favor of terminating Mother's parental rights. Mother appealed, arguing in part that the trial court erred in (1) not providing proper notification of the proceedings to the Cherokee and (2) making findings under the TFC because it was impossible to comply with both the TFC and federal law.

Holding: Affirmed

Opinion: The Indian Child Welfare Act ("ICWA") provides that the U.S. has an interest in promoting the stability and security of Indian tribes and families. ICWA 1912(a) sets out notice requirements to provide Indian tribes with notice of termination proceedings in order to allow those who receive notice to exercise their rights in a timely manner. Here, there was no notice given that complied with ICWA 1912(a). However, the Child's tribe did have actual knowledge of the proceedings, and it intervened and participated throughout the case. The COA held that the trial court's order terminating Mother's parental rights was not invalidated by the failure to strictly comply with ICWA 1912(a).

The Supremacy Clause of the U.S. Constitution provides that a state action may be preempted by federal law by express language in a statute, implication from the depth and breadth of a congressional scheme, or by implication due to a conflict with congressional enactment. When the U.S. Congress legislates in a field that is traditionally occupied by the states, there is a presumption against preemption. The ICWA does not expressly preempt state law, and family law is a field that is traditionally occupied by the states. Texas Family Code Section 262.2015 allows certain requirements to be waived in a termination proceeding if there are "aggravated circumstances," while ICWA allows for no such exception. Also, TFC applies a "clear and convinc-

ing" standard of proof, where ICWA requires "proof beyond a reasonable doubt." The COA reasoned that the two statutes could be applied concurrently, so long as no exception for "aggravated circumstances" was applied, and the standard of proof was raised to that of "proof beyond a reasonable doubt" for both the ICWA and TFC prerequisites to terminating a parent's parental rights. Therefore, the ICWA did not preempt the TFC with regards to terminating the parental rights of a parent who is the member of an Indian tribe. Further, because grounds for termination under both statutes must be satisfied, the trial court properly made findings under both statutes to support its judgment.

TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS IN THE BEST INTEREST OF HER CHILDREN BECAUSE, AMONG OTHER FACTORS, SHE DID NOT BELIEVE THAT FATHER'S VIOLENCE TOWARDS HER WAS HARMFUL TO THE CHILDREN

¶14-4-35. ***In re A.W.,*** ___ S.W.3d ___, 2014 WL 4291481 (Tex. App.—Dallas 2014, no pet. h.) (08-21-14).

Facts: Mother and Father had two Children, a Son and a Daughter. Father had an extensive criminal record, including four assaults against women, two of which were against Mother. In addition, Father had served 7 years in jail for injuring Mother's other child, who was not Father's child. Mother had a criminal record, which included spending 180 days in jail for possession of methamphetamine when the Children were about 5 and 7 years old. Less than a year after Father's release from his 7-year sentence, the Daughter called 911 because Mother and Father were fighting. Father was arrested, and TDFPS became involved. TDFPS filed an original petition for protection and for the termination of both Mother's and Father's parental rights to the Children. Before Mother's jury trial, Father voluntarily relinquished his rights. After a jury trial, Mother's rights were also terminated. She appealed, arguing that the evidence was insufficient to support the jury's finding that termination was in the best interest of the Children.

Holding: Affirmed

Opinion: A trial court may terminate a parent-child relationship if a parent commits one or more of the enumerated acted in Texas Family Code Section 161.001(1), and termination is in the best interest of the child. Both elements must be established by clear and convincing evidence. When determining whether termination is in the best interest of a child, a court should consider the *Holley* factors, although these factors are not exclusive. Here, the COA held that the following factors supported terminating Mother's parental rights to the Children:

(1) the desires of the Children: The Son stated that he was glad to be spending the summer with his foster family because he knew he would have fun. Further, while both Children missed Mother, both also recognized and appreciated the stability and structure in their foster homes.

(2) the emotional and physical danger to the Children now and in the future: Mother minimized the Children's exposure to Father's continued abuse of Mother. Mother admitted to calling the police at least 20 times for Father's behavior. Mother accused the Son of lying when he said that Father had kicked him, and Mother believed the Daughter blew things out of proportion by calling the police on the day that led to the removal of the Children. Mother did not see any danger to the Children because she was the one being hit, not them; however, the Son was afraid that Father would kill Mother. The evidence showed a likelihood that Mother would not protect the Children from Father's abusive tendencies.

(3) the emotional and physical needs of the Children now and in the future: Mother had difficulty keeping a job, and she and the Children were homeless at least three times since 2008. Mother did not believe the homelessness was harmful to the children. In addition, she testified that "everybody has CPS in their life every now and then." The Daughter knew every homeless shelter in Dallas County, was embarrassed about living in them, and did not feel safe in them. When the Son was moved to foster care, all of his medications, including about 100 pills of different colors were in one container. Mother told the jury that the pills were all the same medication and were just from different pharmacies. When the Daughter was moved to foster care,

she got glasses and began taking medicine to improve her concentration. Both Children's grades improved in foster care.

(4) the programs available to assist the individuals to promote the Children's best interest: Mother did not take advantage of the programs available to her, including individual counseling and the Batterer's Prevention Intervention Program.

(5) Mother's parental abilities: Mother had completed parenting classes, but the case worker did not believe Mother's attitude had changed as a result of the classes. A licensed psychologist testified that Mother's history with abusive men showed a lack of protectiveness for the Children. Mother also suffered from depression, which compromised her ability to act as an engaged parent. In foster care, both Children were eating better, doing better in school, taking their medication regularly, participating in Church, and enjoying the stability of their foster homes.

(6) Future plans for the Children: Mother had no specific plans for the Children. TFDPS had originally placed the Children in the same foster home, but later moved the Son to a "therapeutic foster home" for children with emotional issues. The foster homes worked together so the Children could see each other more than once a month, including some overnight and weekend stays.

(7) the stability of the home or proposed placement: Mother's home situation was not stable. She received financial assistance from Metro Care, but there was no evidence as to how long she could continue receiving that benefit. A CASA volunteer testified that the Son was receiving the structured home environment he needed, and the Daughter interacted well with her foster parent.

(8) Mother's acts or omissions indicating the existing parent-child relationship was not proper: Mother admitted to doing methamphetamine, marijuana, and crack cocaine in the past. She refused to fully comply with drug tests ordered by the trial court. Although TFDPS advised Mother not to give the Children false hopes about reunification, she did so. She did not see her statements as harmful because "I'm their mother. The mother is always right." Additionally, Mother missed about twelve visits with the Children, sometimes without any prior notice.

(9) any excuses for Mother's acts or omissions: Mother did not believe the Children's domestic situation was harmful because Father did not direct the abuse towards the Children and many other people lived in worse situations. She believed it was normal for TDFPS to be a part of a family's life. In addition, Mother once stepped away from her car for "just a second" while the children were in the car. The Daughter knocked the car into gear, and the car ran over Mother. Because of this accident, Mother qualified for a disability. Although she could perform a job that did not require walking, Mother instead chose to live off of the $712 a month she received for disability.

★★★TEXAS SUPREME COURT★★★

TRIAL COURT ERRED IN FAILING TO ADMONISH FATHER OF HIS RIGHT TO COUNSEL IN TERMINATION PROCEEDING; TDFPS FAILED TO MEET ITS BURDEN TO ESTABLISH THAT MOTHER'S EXECUTION OF AN AFFIDAVIT RELINQUISHING HER PARENTAL RIGHTS WAS MADE KNOWINGLY AND INTELLIGENTLY

¶14-4-36. ***In re K.M.L.,*** ___ S.W.3d ___, 2014 WL 4252270 (Tex. 2014) (08-29-14).

Facts: Mother was 18 years old when she had the Child. Mother suffered from a bipolar disorder and borderline intellectual dysfunction. Father, who was 17 at the Child's birth, knew of the Child, but he made little effort to see the Child and no effort to provide support for the Child. The Child lived with Maternal Grandmother, while Mother lived with her uncle and finished high school. Twice over the next few years, Mother and Maternal Grandmother, with the aid of an attorney, attempted to execute documents to empower Maternal Grandmother to manage the Child's affairs. However, neither of these attempts had any legal effect. Shortly after the second attempt, Maternal Grandmother moved into a new apartment with stairs without railings. The apartment manager promised to install railings, but before this installation occurred, the Child fell six feet and suffered non-life threatening injuries to her teeth and jaw. The next day, TDFPS removed the Child, placed her in foster care, and filed a petition to terminate Mother's parental rights. Two months later, TDFPS served

Father by publication, without appointing an attorney ad litem. Father received no notice of the proceedings until Maternal Grandmother contacted him and put him in touch with her attorney. Father filed pro se pleadings, acknowledging his paternity, requesting that his rights not be terminated, and providing his contact information. Nevertheless, Father did not receive any further notices regarding the proceedings. Despite the ongoing proceedings, Father continued to make little effort to see the Child. Subsequently, Mother executed an affidavit of voluntary relinquishment naming TDFPS the managing conservator of the Child. Mother later testified that she believed this document enabled Maternal Grandmother to obtain legal custody of the Child. Six weeks later, as a result of Mother's disabilities, a county court signed a guardianship order naming Maternal Grandmother as the guardian of Mother's person and estate. After this adjudication, Mother made several unsuccessful attempts to strike the affidavit of relinquishment.

On the first day of trial, the State served Father with a subpoena to attend trial, and he arrived by police escort. Father testified that he had received no notice of trial. Father was in the hallway during pre-trial motions, jury selection, and part of TDFPS's opening statement. Maternal Grandmother's attorney alerted the court to this fact, and Father was brought into the courtroom for the remainder of the trial. When he entered, the trial judge told Father that he may have been entitled to appointed counsel but "It's a little late for that now. No attorney could prepare for representing you in the middle of trial." The trial judge further advised Father that he was going to have to represent himself and follow the rules.

At the conclusion of the jury trial, both Parents' parental rights were terminated. The jury found termination grounds for Mother based on endangerment, voluntary relinquishment by affidavit, and failure to follow the court-ordered reunification plan. The jury found termination grounds for Father based on endangerment, failure to follow the court-ordered reunification plan, and constructive abandonment. Mother and Maternal Grandmother appealed, challenging the sufficiency of the evidence to support the jury's findings and the validity of affidavit of relinquishment. Father appealed, also challenging the sufficiency of the evidence, as well as the failure to provide him with notice of any of the hearings or the trial. The COA found that the evidence was sufficient to support the finding that Mother voluntarily relinquished her rights and, thus, did not address the other grounds for Mother's termination. Further, the COA found that Father waived his right to complain of the lack of notice because he appeared at and participated in the trial. All three parties petitioned the Texas Supreme Court for review.

Holding: Reversed

Majority Opinion: (joined by all Justices). Texas Family Code Section 161.001(1)(K) allows a court to terminate a parent's parental rights after the execution of a valid, irrevocable affidavit of relinquishment of parental rights. Texas Family Code Section 161.103 provides requirements that must be satisfied for the affidavit to be valid, including being witnessed by two credible persons and verified before a person authorized to take oaths. Here, the affidavit did not include a "verification," but it clearly stated that it was "[s]igned under oath before [the notary public] in the presence of the above witnesses on this [date]." The Texas Supreme Court held that this statement was sufficient to satisfy the requirement of TFC 161.103 that the affidavit be verified. Further, because the adjudication of Mother's incapacity did not occur until after Mother executed the affidavit, she did not legally lack the capacity to execute the affidavit, and the affidavit did not need to have been executed through Mother's legal guardian to take effect.

Here the evidence established that before the Child's accident, TDFPS had already intervened in Maternal Grandmother's home relating to the care of Mother's younger brothers. Further, the Child was seriously injured while in Maternal Grandmother's care, and Maternal Grandmother appeared to be under the influence of drugs on the day of the Child's accident. Mother and Maternal Grandmother had a strained relationship, and Mother had never resided with Maternal Grandmother for an extended period of time. Maternal Grandmother had a history of domestic violence and drug use. Finally, the Child had been thriving in her foster home, and her foster parents wanted to adopt the Child.

Majority Opinion on Grounds Supporting Mother's Termination: (J. Green, J. Hecht, J. Willett, J. Guzman, J. Brown, J. Lehrman, and J. Devine). Because the termination of a parent's parental rights to a child is

one of constitutional dimension, the proceedings must be reviewed with strict scrutiny. Evidence supporting termination must be "clear and convincing." Further, an appellate review of a termination proceeding requires a higher standard than the "more than a mere scintilla of evidence" standard. Rather, the reviewing court must consider whether a factfinder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof.

In this case, the jury was asked to determine whether it found by clear and convincing evidence that Mother *knowingly and intelligently* executed an unrevoked or irrevocable affidavit of relinquishment. Here, Mother suffered from bipolar disorder and borderline intellectual dysfunction. Mother's psychiatrist testified that there was "no way [Mother] had the mental ability to understand" the affidavit, and that a few weeks after signing the affidavit, Mother was not taking her medication. Two months after signing the affidavit, a county court determined that, as a matter of law, Mother could not manage her own affairs. Mother had a second-grade reading level and an IQ below 70. Mother's TDFPS-appointed counselor testified that they had discussed termination on multiple occasions, but Mother never seemed to get "settled, rooted with the idea that she would never see her daughter again." Twice Mother had attempted to execute legal documents to transfer to Maternal Grandmother legal rights to the Child, so Maternal Grandmother could care for the Child while Mother remained part of the Child's life.

The Texas Supreme Court held that the COA erred in affirming the judgment when the COA determined that a reasonable jury could have decided either way. Mother testified that she thought signing the affidavit would ensure that Maternal Grandmother would get possession of the Child, and Mother would still be involved in the Child's life. The COA held that this testimony showed that Mother understood the affidavit to be relinquishing her rights. Contrarily, the Texas Supreme Court held this was clear evidence Mother did not understand what she was signing. Overall, the Texas Supreme Court held the evidence was not sufficient to produce a firm belief or conviction that Mother knowingly and intelligently relinquished her parental rights. The Texas Supreme Court remanded the case to the COA to determine the factual sufficiency of the evidence to support the jury's findings on the other grounds for termination of Mother's parental rights.

Dissenting Opinion on Grounds for Mother's Termination: (J. Johnson and J. Boyd). Here, the COA and the Supreme Court of Texas held that the affidavit relinquishing Mother's parental rights was admissible evidence. Therefore, a reasonable juror could have relied upon that affidavit to find that termination was proper under TFC 161.001(1)(K). Further, there was additional evidence supporting the jury's finding, including (1) the two previous attempts by Mother to relinquish her parental rights; (2) the testimony of the TDFPS supervisor, who testified that Mother and her attorney discussed the affidavit before Mother executed it; (3) the testimony of Mother's counselor, who testified that she and Mother had multiple conversations about the pros and cons of relinquishment; (4) the language of the first of the two previous affidavits executed by Mother, specifically stating that "termination of her rights would not be dependent on [Maternal Grandmother] being granted conservatorship"; (5) the language of the second of the two previous affidavits, which stated that Mother had been informed of her rights and duties and that the relinquishment was irrevocable; and (5) the testimony of Maternal Grandmother's attorney, who testified that he explained the two previous affidavits to Mother and that he believed Mother understood the intent of the documents. Although there was evidence that Mother may not have understood what she was signing, a reasonable jury could have disregarded that evidenced and found that Mother knowingly and intelligently executed the affidavit of voluntarily relinquishment. Therefore, the trial court's termination of Mother's parental rights under TFC 161.001(1)(K) was proper and should have been affirmed.

Majority Opinion on Judgment for Father's Termination: (J. Green, J. Hecht, J. Willett, J. Guzman, J. Brown, J. Johnson, and J. Boyd). Texas Family Code Section 263.301(a) provides that notice in termination hearings should be given according to Texas Rule of Civil Procedure 21a. Father filed a general appearance and answer in opposition to the termination proceeding and provided contact information. This filing entitled him to ten days' notice of all hearings in the proceedings. However, Father received no notice of the trial. He appeared under subpoena and was driven to court by a district attorney or police officer. Father testified that he had never received anything related to the case and did not receive notice of the trial.

A waiver of notice prior to judgment must be made voluntarily and knowingly. Father appeared and participated in the trial, did not object to the lack of notice, and did not request a continuance. However, Father was told by the judge on the first day of trial that it was too late for him to be appointed an attorney and that

no one would be looking out for him anymore. During trial, Father testified that it was "very difficult to sit up here, and be this nervous, and try not burst into tears over y'all not letting me see my little girl." While a pro se litigant is not exempt from following the TRCP, if a determination "turns on an actor's state of mind" whether the actor is an attorney or not may be a relevant factor. The Texas Supreme Court held that Father did not *voluntarily and knowingly* waive his right to notice, and therefore, Father was entitled to a new trial.

Concurring Opinion on Judgment for Father's Termination: (J. Lehrmann and J. Devine). When a party, who did not receive proper notice, attends trial and fails to object to the lack of notice or request a continuance, he waives his complaint of lack of notice. Father participated at trial, and he did not object to the lack of notice or request a continuance. Father waived his complaint.

However, because termination of parental rights constitutes the "death penalty" of civil cases, and because Texas affords certain protections to parents in a termination proceeding, including the appointment of an attorney to indigent parents, a court must admonish an indigent party of his right to counsel. Without an admonishment, there is no way of ensuring that the parent follows the procedural requirements to exercise his right to counsel. Thus, if an indigent parent is not informed of his right to counsel or how to exercise it, there is effectively no right to counsel in the first place. A court must admonish parents of their right to counsel in state-initiated termination cases and that such right is contingent upon a finding of indigence.

Here, the failure of the trial court to admonish Father of his right to counsel was magnified by the failure to provide Father with proper notice of trial. If Father had been appointed counsel, that counsel would have been aware of the need to object and request a continuance. Although Father never requested counsel, he was also never admonished of his right to counsel. Without the admonishment, it cannot be said that he intelligently waived that right. Because Father was not given a meaningful opportunity to invoke or waive counsel, the trial court erred in terminating Father's parental rights.

MISCELLANEOUS

TRIAL COURT HAD JURISDICTION OVER MOTHER'S MODIFICATION SUIT SEEKING SUPPORT FOR ADULT DISABLED CHILD EVEN IF THE TRIAL COURT DID NOT MAKE A DISABILITY FINDING BEFORE THE CHILD TURNED 18; TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING FATHER'S MOTION TO TRANSFER TO ANOTHER COUNTY BECAUSE FATHER FAILED TO TIMELY FILE HIS MOTION.

¶14-4-37. ***In re Thompson,*** ___ S.W.3d ___, 2014 WL 1642694 ((Tex. App.—Houston [1st Dist.], orig. proceeding) (04/24/14).

Facts: The trial court signed a final divorce decree between Father and Mother, providing that Father would pay child support for the Child, until the Child turned 18 or graduated from high school, whichever was later. The Child turned 18 in April 2001 and graduated from high school. The 1992 divorce decree did not note that the Child had any disability or impairment. In January 2013—approximately 21 years after entry of the divorce decree—Mother sued Father for child support alleging that the Child required substantial care and personal supervision because of a mental disability and that the disability was known to exist on or before the Child's eighteenth birthday. Father was served with the petition on March 18, 2013.

On April 23, 2013, Father answered and moved to transfer the proceeding to Liberty County, Texas arguing that venue was proper there because both Mother and the Child had resided in Liberty County for longer than a six-month period. The trial court denied Father's motion to transfer and ruled that it has jurisdiction to conduct a hearing to determine whether it has jurisdiction over the interest of the adult Child, her disability and right to support. Father filed a petition for writ of mandamus requesting the COA to (1) dismiss Mother's suit for lack of jurisdiction, and (2) transfer the suit to Liberty County.

Holding: Petition for writ of mandamus denied

Opinion: Father argued that the trial court lacked jurisdiction over the case because he satisfied the child support obligations set forth in the divorce decree. Here, the trial court had jurisdiction two ways. First, Texas Family Code 155.201 provided the trial court had continuing, exclusive jurisdiction over the matter because it rendered the final decree of divorce, which also contained provisions related to the child and none of the statutory provisions providing for a loss of such jurisdiction applied. Second, even if the trial court lost jurisdiction because Father discharged his court-ordered support obligation when the Child turned 18, the court still would have jurisdiction to hear an original suit for support of an adult disabled child pursuant to Texas Family Code 154.305(a)(2), which provides that a suit for support of adult disabled child may be filed "as an independent cause of action or joined with any other claim or remedy provided by this code." Accordingly, the trial court had jurisdiction over Mother's suit for support of an adult disabled child.

Father argued further that the trial court lost jurisdiction over the matter because the trial court failed to find, before the Child turned 18, that the Child had a disability. Texas Family Code 154.302 provides that the court may order either or both parents to provide for the support of a child with a disability for an indefinite period if the court finds that "the disability exists, or the cause of the disability is known to exist, on or before the 18th birthday of the child. Texas Family Code 154.305(a)(1) provides further that a "suit under this chapter may be filed ... regardless of the age of the child." Reading the statutes together makes clear that a suit for support of a disabled child can be made at any time and there is no requirement that the court make a disability finding before the child's 18th birthday. Rather, the court must simply find that the child's disability existed, or the cause of the disability was known to exist, prior to the child's 18th birthday. Accordingly, the trial court did not lose jurisdiction over the matter.

Father also argued he was entitled to mandamus relief because the trial court failed to transfer the case to Liberty County pursuant to his motion to transfer. Texas Family Code 155.201(b) provides for the mandatory transfer of venue for a modification case upon the timely motion of a party. Texas Family Code 155.204(b), in turn, provides a motion to transfer by a petitioner or movant is timely if it is made at the time the initial pleadings are filed whereas a motion to transfer by another party is timely if it is made on or before the first Monday after the 20th day after the date of service of citation or notice of the suit or before commencement of the hearing, whichever is sooner.

Here, Father was the respondent to Mother's modification suit only (Father did not file a counter-petition) and is therefore "another party" under Texas Family Code 155.204(b) for purposes of determining the timeliness of his motion to transfer. Father was served with citation in the underlying suit on March 18, 2013. Therefore, to be timely, Father needed to file his motion to transfer by April 8, 2013—the first Monday after the 20th day after service of citation. However, Father did not file his motion to transfer until April 23, 2013. Thus, Father's motion to transfer was untimely. Because Father's motion to transfer was untimely, the trial court did not abuse its discretion by denying the motion.

Editor's comment: *So if a respondent does not file a counter-petition, the respondent must file a motion to transfer venue on or before the date the respondent's answer is due. If the respondent chooses to file a counter-petition, then the motion to transfer venue is timely if filed at the same time as the counter-petition. J.V.*

THE EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S FINDING THAT THREE SEPARATE CHECKS WRITTEN IN 2003 BY WIFE'S PARENTS ONE TO WIFE, ONE TO HUSBAND, AND ONE TO THE PARTIES CHILD WAS INTENDED ONLY AS A GIFT TO WIFE.

¶14-4-38. *In re Marriage of McMahen*, No. 07-13-00172-CV, 2014 WL 2582886 (Tex. App.—Amarillo 2014, no pet. h.) (mem. op.) (06/06/14).

Facts: In 2003, Wife's parents wrote three separate gift checks totaling $50,000: 1) to Wife for $20,000; 2) to Husband for $20,000; and to the parties' child for $10,000. Each check contained the words "a gift" written in the memo section. Husband and Wife used all of the monies to buy a house shortly thereafter. In a 2012 divorce trial, Wife's parents testified that the they wrote the three checks separately in 2003 to avoid federal gift

tax liability, and that they intended the entire $50,000 to be their Wife's as an advancement of her inheritance. The trial court found that Wife's parents intended to gift the entire sum to Wife alone and that there was clear and convincing evidence that the three checks were written in consideration of gift tax consequences and did not evidence the intent to make a gift to Husband or the parties' child. Husband appealed.

Holding: Reversed in part and remanded in part

Opinion: Property acquired by a spouse during marriage by gift is the recipient's separate property. But to constitute a gift, the donor must demonstrate donative intent, delivery of the property, and acceptance of that property. In determining the existence of donative intent, the window through which courts look is that existent at the time of the conveyance.

Here, it was undisputed that Wife's parents wrote three different checks payable to three different people with the words "a gift" at the bottom of each instrument. It was also undisputed that Wife's parents intended to avoid gift tax consequences. However, missing from the record was evidence that Wife's parents either filed amended or corrected tax returns reflecting their purported intent to gift the entire $50,000 to Wife only. Also missing was evidence that the purported advancement to Wife of her inheritance was memorialized in a will or other legal document before the Wife's parents testified at trial. What the record did show, was that Wife's parents made unconditional gifts, took advantage of the gift tax laws in structuring those gifts, and allowed the recipients to reap benefit from them. Not until Wife became embroiled in a divorce did her parents opt to reveal their supposedly true intent. Wife's parents' actions in 2003 speak louder than words in 2012, which words not only happen to contradict their prior action but also happen to favor their daughter in a divorce proceeding. Accordingly, the evidence does not support the trial court's finding that Wife's parents intended a gift only to Wife.

Editor's comment: *In other words, don't get cute with the IRS then try to walk that position back. The court noted that there was no dispute that the parents "intended to avoid gift tax consequences, and missing from this record is evidence that either filed amended or corrected tax returns reflecting their purported intent to gift the entire $50,000 to their daughter." J.V*

Editor's comment: *I love gift cases. I feel like I learn something new each time I read one. This one is another fun one - Chief Justice Quinn of the Amarillo court has quite a way with words. But I think this is a close one. R.T.*

THERE WAS SUFFICIENT EVIDENCE THAT THE TRIAL COURT'S ATTORNEY'S FEES AWARD PURSUANT TO CPRC 38.001 WAS REASONABLE BECAUSE IT IS PRESUMED THAT THE TRIAL COURT TOOK JUDICIAL NOTICE OF THE CASE FILE AND USUAL AND CUSTOMARY FEES, SUCH FEES ARE PRESUMED REASONABLE, AND MOTHER DID NOT REBUT THE PRESUMPTION.

¶14-04-39. ***Kendrick v. Seibert***, ___ S.W.3d ___, 2014 WL 2617315 (Tex. App.— Houston [1st Dist.] 2014, no pet. h.) (06/12/14).

Facts: In 2009, Mother and Father signed an agreed divorce decree providing that the agreement was enforceable as a contract. The agreement gave Mother the right to maintain possession of their Children's passports, but required her to deliver the passports to Father within ten days of Father's notification of his intent to travel outside the U.S. with the children. The passports provision also provided that if Mother or Father violated those provisions, he or she would be liable for costs including attorney's fees.

In 2013, Father provided Mother with proper notice of his intent to travel with the Children to Canada for 3 days. After Mother refused to deliver the passports to Father, he filed a suit to modify the parent-child relationship and agreement incident to divorce. Mother did not answer the suit, but she did deliver the pass-

ports to Father two days before his scheduled travel date with the Children. At the subsequent trial, Father testified that he had paid $2,762 in attorney's fees and costs in his efforts to obtain the passports from Mother. Following the trial, the trial court ordered Mother to pay Father's attorney $2,762. Mother appealed arguing that there was no evidence that Husband's attorney's fees were reasonable.

Holding: Affirmed

Opinion: Central to the COA's inquiry was under what authority Father sought and obtained attorney's fees. Father argued that the agreed decree was enforceable as a contract and that he recovered attorney's fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001. Mother argued that Father's suit did not implicate § 38.001 because the case involved a suit to enforce court orders.

In a divorce proceeding, the parties can enter into an agreement over the matters to be resolved in the divorce. Similarly, the parties can enter into agreements concerning matters affecting the parent-child relationship. For matters concerning the divorce and determination of the marital estate, the agreement is enforceable as a contract. For matters concerning the parent-child relationship, terms of the agreement concerning conservatorship, access to the child, or child support are not enforceable as a contract. However, any other terms concerning the parent-child relationship can be enforced as a contract.

Section 38.001(8) provides that a party may recover reasonable attorney's fees if the claim is for an oral or written contract. Tex. Civ. Prac. & Rem. Code § 38.004(1) further provides that a trial court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in a proceeding before the court. Moreover, Tex. Civ. Prac. & Rem. Code § 38.003 provides a rebuttable presumption that the usual and customary attorney's fees for a claim under Section 38.001 are reasonable. Appellate courts can presume that the trial court took judicial notice of the case file and of the usual and customary fees pursuant to Section 38.004.

Here, the parties' divorce decree was an agreed decree, making it both a contract and a judgment. The decree's passport provision concerned the parent-child relationship, but it did not concern conservatorship, access to the child, or child support. Accordingly, the passport provision was enforceable as a contract under § 38.001. Mother violated the contract's terms concerning delivery of the Children' passports and Father filed suit seeking contractual enforcement of the passport provisions. Under the TCPRC, the trial court had authority to take judicial notice of the case file and of usual and customary attorney's fees, which are presumed to be reasonable. Because Mother failed to rebut the presumption, the trial court's presumed judicial notice of case file and of usual and customary attorney's fees was legally sufficient to support a determination that the attorney's fees award was reasonable.

Editor's comment: *I've always wanted to see a case that looked at an award of attorney's fees for having to enforce the passport sections of a divorce decree. This one has an excellent primer on how and when one can request and receive attorney's fees. R.T.*

A PERSON IS NOT EXEMPT FROM LIABILITY FOR IIED MERELY BECAUSE THE ALLEGED CONDUCT OCCURRED DURING A TROUBLED MARRIAGE

¶14-4-40. *Castro v. Castro*, No. 13-13-00186-CV, 2014 WL 3802613 (Tex. App.—Corpus Christi 2014, no pet. h.) (mem. op.) (07-31-14).

Facts: Husband and Wife were married in 2007. Wife's teenage daughter from a previous marriage lived with the couple. Soon after the marriage, Wife became pregnant, but she miscarried. Husband was unsympathetic and even denied that Wife had ever been pregnant. A few months later, Wife became pregnant with a boy, but Husband again did not believe that she was pregnant. Eventually, he conceded that she was pregnant but denied that he was the father. Throughout the pregnancy, Husband told Wife that the child would either die before it was born or soon after birth. Thus, he would not permit Wife to spend any money on the unborn child. Wife was forced to use the child support money she had received for her daughter to prepare a nursery for her son. When Husband discovered these purchases, he cancelled Wife's credit card.

During the marriage, Husband would not let Wife wear makeup because he said it made her look like a prostitute. He would not allow her to spend money. Several times, he prevented her from seeing her parents and other members of her family. Before their wedding, Husband slapped Wife after discovering a voicemail on her phone from a male friend. Twice during the marriage, Husband left for several weeks and did not tell Wife where he had gone. When Wife went on a women's church retreat, Husband accused her of being a lesbian because she made some female friends. Husband referred to their wedding anniversary as a "Day of Mourning."

Husband also committed physical acts of violence against Wife. Twice, the couple argued in the car, leading to Husband striking Wife in front of Wife's teenage daughter. Husband spit on Wife while she was holding their infant son. During an argument, Husband became so angry that he punched a hole in the wall. Husband pointed a gun at Wife because he did not like the tone of a question she had asked him. Wife claimed that one night she initiated sex with Husband. However, that encounter turned violent, and Husband raped her. Wife did not report the rape to the police or her doctor because she was ashamed. Wife avoided contact with her family, even when her mother was diagnosed with cancer, because Wife was ashamed of bruises she had received from Husband.

Eventually, Husband filed for divorce, and with her Answer, Wife filed counterclaims for assault and IIED. The divorce and tort proceedings were severed, and the parties entered an agreed decree of divorce. The tort claims proceeded to a jury trial. During trial, Husband presented evidence that Wife had contributed to the problems in the marriage and that she exaggerated many of his alleged bad acts. After considering the evidence, the jury found that Husband had not sexually assaulted Wife, but it found in favor of Wife on her IIED claim and awarded her $30,000 for past mental anguish and $45,000 for future mental anguish. Husband appealed, (1) challenging the legal and factual sufficiency of the evidence to support either the jury's finding of IIED or the jury's monetary award, (2) arguing that the "gap-filler" tort of IIED was unavailable to Wife because of her assault claim, and (3) arguing that the alleged conduct, in the context of a troubled marriage, did not rise to the level of IIED.

Holding: Affirmed

Opinion: To recover damages for IIED, a plaintiff must show (1) intentional or reckless conduct (2) that is extreme and outrageous (3) and caused the emotional distress of the plaintiff and (4) that the distress was severe. The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." IIED is used as a "gap-filler" tort when the victim has no other cause of redress. However, if it is shown that a defendant's extreme and outrageous intentional actions caused severe emotional distress, the fact that defendant's actions also caused physical harm does not preclude recovery for IIED. Further, no case law has been identified "exempting a person from liability for the conduct alleged…merely because it occurred during marriage."

Here, Wife testified that Husband threatened Wife with a gun, threatened to kill her, harassed her throughout her pregnancy, told her that her baby was going to die, denied that their child was his son, and repeatedly told Wife that Husband would put the interests of his first family before her and her children. Given the totality of the evidence, a reasonable juror could determine from this evidence that Husband's actions were "extreme and outrageous," "atrocious," and "should not be tolerated in a civilized community." Husband acted intentionally to cause Wife emotional distress, and her distress was severe. Neither her claim of assault, nor the jury finding against an assault, precluded Wife from successfully establishing a separate claim for IIED.

Regarding the award for future damages, Wife testified that she no longer trusted men; she did not believe that she could have a healthy, romantic relationship with a man in the future; she could not sleep at night; and she believed all romantic love was fake. The COA reasoned that Wife's continued stress, sleeplessness, and hopelessness for future romantic love were more than mere worry, anxiety, and vexation. Thus, a reasonable jury could find that Wife would suffer compensable mental anguish in the future.

Editor's comment: *This case will be helpful to anyone who is dealing with an IIED claim from the other side. Rarely do you see such egregious facts. R.T.*

EX-WIFE OBLIGATED TO TURN OVER PROCEEDS FROM DECEASED EX-HUSBAND'S LIFE INSURANCE POLICY, BECAUSE DIVORCE DECREE AWARDED TO HUSBAND ALL LIFE INSURANCE POLICIES INSURING HIS LIFE; HUSBAND'S FAILURE TO REMOVE WIFE AS BENEFICIARY OF HIS LIFE INSURANCE POLICY DID NOT PRECLUDE HUSBAND'S ESTATE FROM SUCCESSFULLY BRINGING A POST-DISTRIBUTION SUIT.

¶14-4-41. ***Hennig v. Didyk,*** ___ S.W.3d ___, 2014 WL 3705175, 05-13-00656-CV (Tex. App.—Dallas 2014, no pet. h.) (07-28-14).

Facts: Husband and Wife divorced and signed an Agreed Final Divorce Decree that awarded each of Husband and Wife his or her own employment benefits and life insurance policies. Husband died a few years after the divorce. Soon before his death, according to testimony of his administrative assistant, Husband discovered that he had failed to change the beneficiary designation on his life insurance policy through his employer. Husband obtained his father's social security number and changed the designation online; however, after Husband's death, the administrative assistant learned that the change was ineffective because a paper form was required by the plan administrator to complete the redesignation. After Husband's death, Husband's father was appointed the independent administrator of the estate and determined that Husband's parents were his heirs. Husband' father made claim to the proceeds of Husband's life insurance policy. The life insurance company filed an interpleader action in federal court to determine how to distribute the life insurance proceeds. The federal court determined that under ERISA, Wife was entitled to the proceeds, but it declined to address whether Wife was entitled to keep the funds after distribution from the plan administrator. Husband's father filed a suit in the family court to enforce the divorce decree and order Wife to turn over the funds to Husband's estate. The trial court found that Husband's parents were entitled to the proceeds of the life insurance policy. Wife appealed, arguing that ERISA preempts state law, and the trial court erred in failing to give res judicata effect to the federal court's decision awarding her the proceeds.

Holding: Affirmed

Opinion: ERISA provides certain requirements to ensure (1) simple administration, (2) avoiding double liability for plan administrators, and (3) ensuring beneficiaries receive their distributions quickly.

Here, a federal district court ruled that under ERISA, Wife was entitled to the distribution of the life insurance proceeds. However, the federal district court also stated that it would not address whether Wife was obligated to turn the funds over to Husband's estate. That court held that the family court was the proper forum for determining the Parties' obligations under the divorce decree. Because the federal court explicitly declined to exercise jurisdiction over that matter, res judicata did not apply. Further, the Texas Supreme Court has held that ERISA does not preempt claims under federal common law to enforce a waiver by an ex-spouse in a divorce decree of her interest in ERISA plan benefits. Allowing a post-distribution suit after a plan administrator has distributed life insurance proceeds does not frustrate the purposes of ERISA.

The final decree of divorce explicitly awarded to Husband "[a]ll sums … or benefits existing by reason of the husband's past, present, or future employment," and "[a]ll policies of life insurance … insuring [Husband]." Similar provisions awarded Wife her own employment benefits and life insurance policies. The COA held that this language unambiguously established the Parties' intent to sever their financial relationship and divest Wife of any interest in Husband's life insurance policy, including any future proceeds.

ATTORNEY LETTER TO WIFE ONE DAY BEFORE HEARING DECLINING TO REPRESENT HER WAS INSUFFICIENT REASON TO CONTINUE FINAL HEARING; WIFE FAILED TO SHOW THAT HER FAILURE TO BE REPRESENTED AT FINAL HEARING WAS NOT DUE TO HER OWN FAULT OR NEGLIGENCE

¶14-4-42. *Nolan v. Nolan*, No. 07-12-00431-CV, 2014 WL 3764509 (Tex. App.—City 2014, no pet. h.) (mem. op.) (07-28-14).

Facts: Husband filed for divorce. Both Husband and Wife were initially represented by counsel; however, Wife's attorney filed a motion to withdraw on the ground of inability to effectively communicate with Wife. Approximately three weeks later, the trial court sent notice to the parties of the final hearing that was set to occur in about three months. Six days before the final hearing, Wife wrote a check to a new attorney with the notation "divorce retainer." However, the copy of the check admitted to the trial court had the word "VOID" written across it. Wife's former counsel forwarded her file to the new attorney at Wife's request. Four days before the hearing, Wife filed a pro se motion for continuance, stating that she had attempted to retain new counsel. One day before the hearing, Wife received a letter from the new attorney stating that the new attorney would be unable to represent Wife. At trial, Wife refused to cross-examine Husband, testify or offer any evidence of her own, or sign the final decree. Wife appealed arguing that the trial court erred in failing to grant her motion for continuance after her attorney "withdrew" the day before trial.

Holding: Affirmed as Modified

Opinion: A motion for continuance based on lack of counsel must show that the failure to be represented was not based on the movant's own fault or negligence. Here, Wife's former counsel withdrew before the final hearing was set on the trial court's docket. Wife had approximately three months before the final hearing to obtain new counsel. The week before the final hearing, Wife contacted an attorney, who declined to represent her. Wife failed to show that an attorney-client relationship ever existed between Wife and the second attorney. The trial court did not abuse its discretion in denying Wife's motion for continuance.

The final decree included a "*Decree Acknowledgment*" indicating that each party agreed that the final division was just and right. Because Wife did not agree to the final division, the COA modified the decree by deleting that paragraph.

★★★TEXAS SUPREME COURT★★★

A PERMANENT INJUNCTION REQUIRING THE REMOVAL OF POSTED SPEECH ADJUDICATED TO BE DEFAMATORY IS NOT A PRIOR RESTRAINT; AN INJUNCTION PROHIBITING FUTURE SPEECH BASED ON THAT ADJUDICATION IS AN UNCONSTITUTIONAL INFRINGEMENT ON FREE SPEECH.

¶14-4-43. ***Kinney v. Barnes,*** ___ S.W.3d ___, 2014 WL 4252272, 13-0043 (Tex. 2014) (08-29-14).

Facts: Plaintiff was employed by a legal recruiter for Defendant, until Plaintiff left that firm to start a competing firm. Several years later, Defendant posted a statement on multiple websites implicating Plaintiff in a kickback scheme and accusing Plaintiff of paying bribes in exchange for law firms hiring his candidates. Plaintiff sued Defendant for defamation. Rather than seeking damages, Plaintiff sought a permanent injunction against defamation requiring Defendant to (1) remove the defamatory statements from the websites, (2) contact third-party re-publishers of the statements to have the statements removed, and (3) conspicuously post a copy of the permanent injunction on Defendant's website. Defendant filed an MSJ on the grounds that the relief sought would constitute an impermissible prior restraint on speech. The trial court granted the MSJ, and the COA affirmed that decision. Plaintiff argued (1) that a "post-trial remedial injunction" was not properly

characterized as a prior restraint and (2) that defamatory speech was not protected speech, so an injunction would be permissible.

Holding: Reversed and Remanded

Opinion: The First Amendment of the U.S. Constitution and Art. I, § 8 of the Texas Constitution provide for the right of free speech. There is a heavy presumption against the constitutionality of prior restraints, or "pre-speech sanctions." An injunction, whether temporary or permanent, that prohibits speech is inherently a prior restraint on speech because it prevents future speech. However, the right to free speech is not absolute. For example, common law has long recognized a cause of action for damages for defamation.

The appropriate remedy for defamation is not an injunction but, rather, damages. An abuse of the privilege of free speech is to be remedied by appropriate penalties, not by a denial of the right to speak. In some cases, a prior restraint may be permissible to avoid an impending danger, if the restraint is the least restrictive means of preventing that harm; however, defamation alone is not sufficient justification for restraining an individual's right to speak freely. Further, an attempt to enjoin against future defamation would necessarily be ineffective, overly broad, or both. If an injunction were narrowly written, the defamer would be enticed to engage in wordplay and modify the statement just enough to express the same message without violating the injunction. Alternatively, an attempt to expand the reach of the injunction to include such modifications would result in an overly broad injunction.

Plaintiff raised a valid concern that damages may not deter a defamer, either because the defamer lacks the funds to pay the damages or has so much money that the fine is immaterial. However, the constitutional protection of free speech is not tied to a person's financial status. A prior restraint cannot be conditioned on a defendant's inability to pay an award of damages. In addition, the potential inadequacy of damages to make a plaintiff whole does not justify opening the door to additional relief. Damages, while "imperfect" is the remedy the law gives to defamation victims.

On the other hand, an injunction ordering the removal of statements adjudicated to be defamatory from a website does not prohibit future speech. Such an injunction would effectively require the erasure of unprotected past speech and would constitute a proper remedy for an abuse of the liberty to speak, not a prior restraint. Thus, because a portion of Plaintiff's requested relief included a permissible injunction to remove statements if adjudicated to defamatory, the trial court erred in granting Defendant's MSJ.

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 held on 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.

***State of Texas v. Naylor* and *Daly*, 11-0114** (pet. granted, oral argument held on 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).

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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 K.L.*, 12-0728** (pet. granted, 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.

13-0861
Cantey Hanger LLP v. Philip Gregory Byrd, et al.
from Tarrant County and the Fort Worth Court of Appeals
Oral argument set December 4, 2014

In this fraud suit by an ex-husband against the law firm that represented his ex-wife in their divorce, the issues are (1) whether attorney immunity covers an allegedly forged bill of sale involving property awarded to the ex-wife in the decree (with tax consequences to the ex-husband) and (2) whether the burden to show the fraud exception to attorney immunity is on the ex-husband as plaintiff.