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IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

It's hard to believe the holiday season has begun - that special time to spend with loved ones, family and friends. I hope that everyone will take time to enjoy the holidays with their families. As family lawyers, I think that we really appreciate the importance of our families. Then, before you know it, it will be time to celebrate Elvis' birthday. On January 8, the King will be 80 years old.

PRO BONO

We continue to advance the Family Law Section's goal of providing an attorney for indigent Texans across the State. The Pro Bono Committee, chaired by Dick Sutherland, will be meeting soon with the State Bar and legal aid providers to plan our family law essentials seminars for 2015. Thank you to the Pro Bono Committee and the many volunteers who donate their time to make our pro bono efforts successful. If you are interested in speaking at one of the family law essentials seminars, please contact Dick Sutherland at rtsutherland@wf.net.

TEXAS FAMILY LAW FOUNDATION

The Legislature will return to Austin soon. If you are interested in working with the Foundation's lobby team, there will be a training session in Austin on December 12. As you know, all of the 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. Thank you to all of those who donated to the Texas Family Law Foundation to make our legislative efforts successful.

UPCOMING CLE

Upcoming CLE seminars include:

- 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
- Advanced Family Law, San Antonio
  August 3-6, 2015 Judy Warne & Kristal Thomson
  (Natalie Webb 101 director)
- Masters in Family Law – September 24-26, 2015, Horseshoe Bay Resort
- New Frontiers in Marital Property Law, Brown Palace Hotel and Spa,
  Denver October 15-16, 2015
  Cindy Tisdale and Chris Nickelson

UPCOMING COLLABORATIVE CLE

The upcoming Collaborative CLE seminars include:

- 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.

Happy Holidays!

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

Return to Table of Contents

TABLE OF CASES

Return to Table of Contents

In the Law Reviews and Legal Publications

LEAD ARTICLES

Christopher A. Tiso, *"Family Support" and the Impact of Child Support Guidelines*, 37-Fall Fam. Advoc. 27 (Fall 2014).

Christopher A. Tiso, *When is Alimony Taxable/Deductible*, 37-Fall Fam. Advoc. 29 (Fall 2014).

Gaetano Ferro, *Unallocated Alimony and Child Support*, 37-Fall Fam. Advoc. 31 (Fall 2014).

James M. Godbout, *Accounting for NOLs and Tax Losses in a Divorce*, 37-Fall Fam. Advoc. 46 (Fall 2014).

Steven N. Peskind, *No Expert, No Problem*, 37-Fall Fam. Advoc. 50 (Fall 2014).

Linda Fieldstone, *Ensuring a Place for Family Court Services in the Family Court of the Future: Do or Die*, 52 Fam. Ct. Rev. 627 (October 2014).

Solangel Maldonado, *Shared Parenting and Never-Married Families*, 52 Fam. Ct. Rev. 632 (October 2014).

Barbara A. Babb, *Family Courts are Here to Stay, so Let's Improve Them*, 52 Fam. Ct. Rev. 642 (October 2014).

Milfred D. Dale, *Don't Forget the Children: Court Protection from Parental Conflict is in the Best Interests of Children*, 52 Fam. Ct. Rev. 648 (October 2014).

Gabrielle Davis, Nancy Ver Steegh, & Loretta Frederick, *An Appeal for Autonomy, Access, and Accountability in Family Court Reform Efforts*, 52 Fam. Ct. Rev. 655 (October 2014).

John M. Greacen, *Self-Represented Litigants, the Courts, and the Legal Profession: Myths and Realities*, 52 Fam. Ct. Rev. 662 (October 2014).

Peter Salem, *The Challenges of Family Court Service Reform*, 52 Fam. Ct. Rev. 670 (October 2014).

Maureen R. Waller & Allison Dwyer Emory, *Parents Apart: Differences Between Unmarried and Divorcing Parents in Separated Families*, 52 Fam. Ct. Rev. 686 (October 2014).

Julianne Prisco, *Insuring that Good Deeds Go Unpunished: Instituting State-Provided Malpractice Protection for Pro Bono Family Lawyers*, 52 Fam. Ct. Rev. 725 (October 2014).

Neelum Arya, *Family-Driven Justice*, 56 Ariz. L. Rev. 623 (Fall 2014).

Peter A. Wright, *The Change Face of American Family Law*, Aspatore 2014 WL 5465751 (November 2014).

Sam F. Halabi, *Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction Under the Hague Convention on the Civil Aspects of International Child Abduction*, 32 Berkeley J. Int'l L. 144 (2014).

Hon. Mimi E. Tsankov, *Domestic Violence and the Plight of the Unauthorized Migrant*, 61-NOV Fed. Law. 50 (October/November 2014).

Jennifer Brobst, *The Impact of Secondary Traumatic Stress Among Family Attorneys Working with Trauma-Exposed Clients: Implications for Practice and Professional Responsibility*, 10 J. Health & Biomedical L. 1 (2014).

Robert Mnookin, *Child Custody Revisited*, 77 Law & Contemp. Probs. 249 (2014).

Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison—Lose Your Child?*, 40 Wm. Mitchell L. Rev. 990 (2014).

Lanhny R. Silva, *The Best Interest is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. Pub. L. 415 (2014).

Return to Table of Contents

ASK THE EDITOR

***Dear Editor*:** I represent the wife/mother in a divorce/SAPCR suit. At trial, I did not prove up appellate attorney's fees. The other side has now filed a Notice of Appeal. Is there any way that I can get appellate fees for my client? *Wondering in Waco*

Dear Wondering in Waco: Yes. Texas Family Code Section 6.709 allows, not later than the 30th day after the date an appeal is perfected, for you to file a motion requesting temporary orders necessary for the preservation of the property and for the protection of the parties during the pendency appeal, including an order for the payment of reasonable attorney's fees and expenses. Similarly, Texas Family Code Section 109.001 allows, not later than the 30th day after the date an appeal is perfected, for you to file a motion requesting temporary orders necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal, including an order requiring payment of reasonable attorney's fees and expenses. The order granting temporary relief pending appeal must be signed within thirty days of the filing of the notice of appeal. *Love v. Bailey-Love*, 217 S.W.3d 33, 36–37 (Tex. App.—Houston [1st Dist.] 2006, no pet.). However, if the 30-day deadline for entering the order falls on a Saturday, Sunday, or legal holiday, the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. *See Id.;* Tex. R. Civ. P. 4. If appellate attorney's fees are requested, a trial court may not grant an unconditional award of appellate attorney's fees. An appellee is entitled to appellate attorney's fees only if the appellant is unsuccessful on appeal because the trial court would be penalizing a party for taking a successful appeal if the appealing party were liable for appellee's attorney's fees even though the appeal was successful. *Smith v. Smith*, 757 S.W.2d 422, 426 (Tex. App.—Dallas 1988, writ denied); *see also Moroch v. Collins*, 174 S.W.3d 849, 870 (Tex. App.—Dallas 2005, pet. denied). *G.L.S.*

IN BRIEF

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

Beware of agreements: California's requirement that divorcing spouses exchange property disclosures prior to the granting of a divorce did not invalidate the parties' agreement that the husband would buy out his wife's share of their house for half the market value of $600,000, when the parties did not file for divorce until two years later - after the real estate crash. *In re Marriage of Evans*, 229 Cal. App.4th 374 (2014). Faced with an agreement on modification of child support that because the father's income fluctuated, child support would, too, a Georgia trial court ordered that each party pay his or her own attorney's fees because both were prevailing parties. But the Georgia Supreme Court reversed, holding that under Georgia law there can be only one prevailing party, and that party was the mother because she succeeded in obtaining an increase in her child support. *Mironov v. Mironov*, ___ S.E.2d ___, 2014 WL 5506558 (Ga. 2014).

Division: Although a Maine trial court may credit a spouse with gifts from the spouse's family by setting aside the amount of the gifts to the spouse prior to dividing the marital estate, a gift made by allegedly discounting the price of a house sold by a spouse's grandmother to a spouse for $75,000 did not support a $75,000 credit because the record did not include any evidence of the house's fair market value and therefore the value of the gift. *Burrow v. Burrow*, 100 A3d 1104 (Me. 2014). In another Maine case, a trial court erred when it found a negative value for Irv's Drywall when the undisputed evidence showed a liquidation value of $47,039, but the error was harmless because the award of Irv's Drywall to Irv did not cause Irv's ex-wife to suffer substantial injustice in that Irv's continued self-employment enabled Irv "to pay the significant amount of spousal support that the court ordered." *Starrett v. Starrett*, ___ A.3d ___, 2014 WL 4637234 (Me. 2014).

Return to Table of Contents

Domestic violence: The Virginia Supreme Court upheld a protective order based on stalking, as against the defendant's claim that his conduct could not have caused his former girlfriend "to experience reasonable fear of death, criminal sexual assault, or bodily injury," when during the course of one week, he escalated his attempts to contact her electronically, unexpectedly appeared at her parents' home, sent flowers to her at work plus called her there and then appeared uninvited at her home. *Stephens v. Rose*, 762 S.E.2d 758 (Va. 2014). A California trial court erred when it denied a request to renew a three-year-old domestic violence restraining order, on the ground that there had been minimal contact between the parties during that period, because by statute, such an order may be renewed "either for five years or permanently, without a showing of any further abuse since the issuance of the original order." *Eneaji v. Ubboe*, 229 Cal.App.4th 1457 (Cal. 2014).

Evidence: The Georgia Supreme Court rejected a husband's claim that proof of the terms of a lost antenuptial agreement should be subject to the clear and convincing evidence standard, holding that the terms could be proved by a preponderance of the evidence. *Coxwell v. Coxwell*, ___ S.E.2d ___, 2014 WL 5506403 (Ga. 2014). The South Dakota Supreme Court reversed a domestic violence protection order, concluding that it was based entirely on hearsay, when a nine-year-old's mother testified that the child had told her of the father's sexual abuse, the trial court did not require testimony from the child and there was no corroborating evidence of sexual abuse. *S.L.W. v. Huss*, 852 N.W.2d 367 (N.D. 2014). Because testimony by telephone is more like in-person testimony than testimony by deposition, a Tennessee trial court's decision regarding the credibility of a witness who testified by telephone, and the weight of that testimony, was subject to the same deference on appeal as that extended to trial court findings based on in-person testimony. *Kelly v. Kelly*, ___ S.W.3d ___, 2014 WL 4437671 (Tenn. 2014).

Over-delegation: Massachusetts' Supreme Judicial Court held that although a family court has the power to appoint a parental coordinator over a parent's objection, the court does not have the power to delegate binding, decision-making authority to a parental coordinator on matters of custody and visitation. *Bower v. Bournay-Bower*, 15 N.E.3d 745 (Mass. 2014). In California, a juvenile court has the power to order a parent to participate in a domestic violence support group for an indeterminate period of time, even if the sessions "might last four weeks or 100 weeks," but it does not have the power to delegate the decision that the parent has attended enough sessions to the support group counselors. *In re Daniel B.*, ___ Cal. Rptr. ___ 2014 WL 6306674 (Cal. App. 2014).

Retirement: Unless the divorce decree so states, allocation of a community property interest in an employee spouse's Nevada's Public Employees Retirement System pension plan to the nonemployee spouse does not also entitle the nonemployee spouse to survivor benefits. *Henson v. Henson*, 334 P.3d 933 (Nev. 2014). Laches did not bar a West Virginia woman from seeking a Qualified Domestic Relations Order to obtain her share of her ex-husband's Thrift Savings Plan six years post-divorce, after the ex-husband had liquidated the account, because her delay did not harm or prejudice the ex-husband in any way. *Kinsinger v. Pethel*, ___ S.E.2d ___, 2014 WL 6477002 (W. Va. 2014).

SAPCR alienation? A divided Mississippi Supreme Court held that children of a marriage have no standing to pursue a cause of action for alienation of affection against their mother's boyfriend, the dissent arguing that the children's "right to familial harmony and stability ought to be recognized and protected by the judicial branch of Mississippi's government." The court agreed that no cause of action existed for tortious interference with a marriage contract (because marriage is not a contract) and dismissed the children's cause of action for intentional infliction of emotional distress (based, in part, on the boyfriend's "downright revolting" text messages) because the boyfriend did not direct his conduct toward the children. *Brent v. Mathis*, ___ So.3d ___, 2014 WL 5766919 (Miss. 2014).

Unintended consequences: After a Vietnamese national married a naturalized United States citizen who had immigrated from Vietnam, she petitioned for conditional permanent residence in the United States based on her marriage, but as it turned out, the petitioner's mother was her husband's half-sister, such that the petitioner was her husband's half-niece. In answer to a certified question from the United States Court of Appeals for the Second Circuit, the New York Court of Appeals held the marriage void as incestuous, and the petition presumably denied. *Nguyen v. Holder*, ___N.E.3d ___, 2014 WL 5431014 (N.Y. App. 2014).

Return to Table of Contents

COLUMNS

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

My New Year's wish, this time around, is for greater civility and professionalism in the practice of law, but wait, don't stop reading yet. I'm sure you've seen many "calls to professionalism" over the years and, as well meaning as they may be, they can come across as pious and soft headed. And while it would be wonderful if lawyers would all act with dignity and accord while still diligently representing their clients, human nature being what it is, such a sea change is unlikely.

The fault, though, lies not entirely with lawyers. Litigants themselves and judges also must take some heat on this issue. First, the litigants. How many times have you heard someone contemplating a divorce ask, "Who is the meanest (or toughest, or most ruthless) attorney in town!" Of course, what they should be asking, and what attorneys should be striving to become, is the most *effective* attorney for the case. Rarely, if ever, is the meanest or toughest attorney also the most effective attorney. Oddly, too, there is but a loose correlation between the most effective attorney and the most expensive attorney. The two concepts aren't totally unrelated, but they sure aren't joined at the hip, either.

As a mediator, I am often asked for an attorney recommendation, and I try to steer people toward effective attorneys, not necessarily the one reputed to be the biggest ass. There is some poetic justice, though, in unpleasant litigants hiring unpleasant attorneys. In my experience, that type of attorney is very successful at running up fees unnecessarily, thus costing that type of client extra money. The symmetry, however, is not perfect. That kind of attorney tends to run up the fees for the other side, too, and cause everyone extra stress and anxiety while depleting the community estate. And woe unto the unpleasant client who runs out of money to pay his or her unpleasant attorney.

So, often unprofessional behavior starts with the client, although a good attorney needs to know when to tell a client "No," even at the risk of losing the client.

Next, judges. While judges must allow a lawyer great leeway in how the lawyer represents his or her client, there is some behavior that simply should not be ignored. Yes, there are some judges, God bless them, who aren't reluctant to admonish and even sanction attorney misconduct, and that is the surest way to curb the behavior. Too often, though, a judge will ignore or soft peddle bad behavior and simply issue a general admonishment to both attorneys to behave. Any judge who is displeased by attorney misconduct has all the power he or she needs to correct it. Like any power, of course, it could be misused by a judge who is him or herself out of line, but, again in my experience, it is the reluctance to act that is more prevalent. It doesn't take long for lawyers to figure out which judges will put up with nonsense and which ones won't and act accordingly.

And, yes, lawyers. There is nothing I can say to the showboaters and the self-glorifying to change their ways, so I'll address myself to the good lawyers who strive for professionalism amid the worst behavior. Sometimes we all lose our way and are tempted to sink to the other guy's level. At those moments, just remember to be the most *effective* lawyer in the room. Word will get around, as it always does.

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[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.

Return to Table of Contents

TESTIFYING THERAPISTS: A PROBLEM?

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

How should you cross-examine a psychotherapist or counselor who confidently offers opinions for her patient on parenting arrangements in a child custody dispute or on the proximate cause of her patient's emotional impairments in a personal injury lawsuit? Unfortunately, too many therapists don't see a problem with such testimony. And, unfortunately, such testimony, often compelling, can hurt your case.

At first blush, a therapist's testimony seems appropriate, even helpful—Who better knows the patient's emotional state and capacities, especially if the therapy has been ongoing? Of course, therapists may offer helpful, reliable testimony about issues within the scope of the counseling relationship: the patient's condition, treatment progress, and, to an extent, prognosis. But therapists who stray beyond this scope in their testimony compromise the quality of their opinions because they don't have enough independent information of their patient to consider reasonable alternative explanations of their opinions. The advisory committee's notes for Rule 702 of the Federal Rules of Evidence notes that "whether the expert has adequately accounted for obvious alternative explanations" is a test of the reliability of an expert's testimony.

To flesh-out the problem, focus your deposition or cross examination questions of a testifying therapist on three key topics:

• *Bias*. The confidentiality-based therapist-patient relationship allows the therapist, with support and empathy, to help the patient discuss personal, emotional, and relationship concerns. Because the therapist's sensitivity is to the patient, the therapist will feel less drawn to testify forthrightly if asked to describe aspects of the patient's functioning that might weaken the patient's position in the case— a recipe for bias.

• *Limited information*. The source of the therapist's information about the patient is largely defined by what the patient tells the therapist in counseling sessions. Therapists, unlike nontherapist or court-appointed forensic evaluators, rarely interview other parties to the litigation or other persons who have information relevant to ultimate issues in the case. Also, therapists usually do not review the patient's previous mental health records. As a result, a therapist's information about the patient is likely too limited to support opinions on issues the court must decide.

• *Professional ethics*. Professional psychology's ethics code and practice guidelines (and Texas's Psychology Licensing Board) discourage, if not prohibit, a therapist from offering ultimate issue opinions on behalf of her patient—examples include opinions offered in child custody litigation on parenting arrangements or other "best interest of the child" determinations and in criminal responsibility trials. Such testimony reflects a multiple relationship (therapist, whose loyalty is to her patient, vs. expert, whose duty, under Texas Rule of Evid. 702, is to assist the court) that may compromise the trustworthiness of the therapist's testimony.

Use the therapist's responses to questions based on these three key topics to test whether he or she has a testifying therapist problem. You'll sharpen your deposition or cross-examination questions and provide the court with a clear roadmap to support your position about the quality or reliability of the therapist's testimony.

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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.*

Return to Table of Contents

SHOULD I TAKE THE ONE TIME LUMP SUM OF PAYMENTS?

By Christy Adamcik Gammill, CDFA[1]

Before you click the lifetime payment or annuity option on the corporate or other pension box, it is wise to evaluate all your options and know how to do so. Should I take the monthly pension or rollover the funds into an IRA? You may want to ask yourself a few questions before choosing one of the pension or annuity payout options, which almost always means losing liquidity and control over the funds.

Am I okay with losing liquidity or control?

- Do I have funds to divert into another investment should an opportunity arise in the future?
  - Investment products are constantly evolving and you may have an interest in another type of investment down the road.
- Is there a possibility of a lump sum purchase such as a down payment on a second home?
  - Once the pension box is selected you may have no access to any payments outside of these funds being paid out periodically, no cash is available for future purchases.
- Is there a survivorship option in the event of death? Are funds available in a lump sum vs. continued payments to the beneficiary? Although there may be an option for shared or continued pension payments, there is rarely a lump sum available at death.

Pension Management

- Although the pension is guaranteed by the corporation or institution promising to pay the benefit, the guaranty is as good as the underlying ability to pay the benefit.
- Monies managed inside of a pension are geared toward the masses, not a customized portfolio based on your individual needs and risk tolerance.
- Some good news, the Pension Benefit Guaranty Corporation or "PBGC" is a corporate funded government entity that insures pensions in the event of default (up $59,318 for a 65 year old in 2014).

Continued Tax-Deferral

- If the Pension Beneficiary is fortunate enough to have more funds in the plan that will cause more income than needed to be disbursed if a pension or periodic payout is elected, ordinary income tax will have to be paid on all of the funds whether they are needed or not.
- If the Pension funds are rolled over into an IRA, only the Required Minimum Distributions must be taken out beginning April 1st the year following the owner turning age 70 ½ versus a larger amount.
- Tax-deferral will continue on the remaining funds in the IRA rollover account(s) until future distributions are made.

Before choosing a potentially irreversible retirement plan election, please consult your Financial Advisor, CPA or other trusted professional to analyze all of your options and maximize your retirement funds.

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[1] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC, member FINRA, SIPC. 12377 Merit Drive, Suite 1500, Dallas, TX 75251, offers investment advisory products and services through AXA Advisors, LLC, an investment advisor registered with the SEC and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC. CBG Wealth Management is not a registered investment advisor and is not owned or operated by AXA Advisors or AXA Network. Contact information: 972-455-9021 or Christy@CBGWealth.com.

Return to Table of Contents

ARTICLES

THE UNDERGROUND REHOMING OF CHILDREN: A SOCIAL AND LEGAL ANALYSIS OF FAILED ADOPTIONS IN AN INTERNET ERA

By Zunny Losoya[1]

INTRODUCTION

The online search terms "rehoming" and "adoption" primarily lead to sources, websites, and articles aimed at guiding pet-owners through the process of finding a new home for their cat or dog. Interestingly, the main reasons behind pet-rehoming loosely parallel the reasons behind failed international adoptions; they include: dealing with "frustrating behavioral problems"; encountering challenging and unexpected health problems; or deciding that the animal or child simply is not a good fit for the current family.[2] The pet-rehoming process is largely driven by the Internet as pet owners are encouraged to take pictures and compile a summary for their pet, which they can post to animal adoption message boards and social media websites, and will ideally lead to the animal's successful re-adoption.[3] However, in the age of the Internet and social media, "rehoming" has also taken on a much darker meaning within the adoption context: the process where parents use the Internet to rid themselves of an unwanted adopted child without the involvement or oversight of child protective services or family law courts. This illicit practice is also known as "private rehoming" or "adoption disruption" (hereinafter "online rehoming" or "rehoming"), and much of this underground process is similar to that of pet-rehoming, where unhappy parents decide that their difficult-to-parent child would be happier and better off with a new family, and so an informal and unregulated trade-off takes place, with little to no concern regarding the child's needs and wellbeing.[4]

The rehoming process is typically accomplished by parents advertising their child on online message boards and websites like Yahoo, Craigslist, and Facebook.[5] Once a parent finds another party who wants the child, he or she will often only execute a power of attorney document granting the new "parents" legal guardianship, much like signing over a property title to a new owner or dropping off an unwanted pet with any seemingly willing caretaker.[6] The victims of rehoming are mostly children from failed international adoptions.[7] International adoptees are especially vulnerable because not only are they in a new country, away from relatives and familiar faces, but once they are adopted, there is no state or federal law or regulatory authority that monitors the success or outcome of international adoptions.[8] Further, there are no uniformly applied international regulations that aid in screening the parents or assessing proper disclosure regarding the child's known physical or mental wellbeing.[9] This lack of oversight ultimately results in children being relocated from their home countries and adopted by underprepared, overwhelmed, and inadequate parents.[10] Thus, once a parent engages in private rehoming, children are essentially cast into an unregulated, black market for unwanted adoptees, which allows them to be freely rehomed multiple

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[1] Ms. Losoya graduated from SMU Deadmon School of Law in May 2014. She can be reached at zlosoya@smu.edu.

[2] *See Re-Homing Your Dog*, ASPCA, http://www.aspca.org/pet-care/virtual-pet-behaviorist/dog-behavior/re-homing-your-dog.

[3] *See id.*

[4] *See* Megan Twohey, *The Child Exchange: Inside America's Underground Market for Adopted Children*, REUTERS (Sept. 9, 2013), http://www.reuters.com/investigates/adoption/#article/part1 [hereinafter Reuters Investigation].This detailed, 18-month long investigation is the primary source that researched, tracked, and exposed is composed child rehoming in the U.S. See id. under section titled "About the Series." It is composed of 5 parts, and for purposes of clarity, citations to this investigation will also reference the relevant parts where the information is located.

[5] *Id.* at Part 1.

[6] *Id.* (also defining a "power of attorney document" as "a notarized statement declaring the child to be in the care of another adult").

[7] *Id.*

[8] *See id.*

[9] *See id.*; Mirah Riben, *Adopted then Discarded: Online Child Trafficking*, DISSIDENT VOICE: A RADICAL NEWSLETTER IN THE STRUGGLE FOR PEACE AND SOCIAL JUSTICE (Oct. 19, 2003), http://dissidentvoice.org/2013/10/adopted-then-discarded/.

[10] *See* Georgia Gebhardt, *Hello Mommy and Daddy, How in the World Did They Let You Become My Parents*, 46 FAM. L.Q. 419, 422-23 (2012).

Return to Table of Contents

times and also exposes them to dangerous, unstable environments and physical, sexual, and emotional abuse.[11]

This article offers an in-depth look at the underground practice of rehoming in the United States. It will expose online rehoming from the perspectives of both the parents and the children involved in these broken adoptions, and it will also discuss the current state of the law, the response of state and federal legislatures, and the implications that this problem has regarding our flawed system for addressing, tracking, and correcting failed international adoptions. Part II will present a comprehensive overview of the rehoming process, starting from a family's decision to rehome their child, the role of the Internet in setting up the exchange, and the child's realities in coping and surviving in a broken and exploitative system. Part III will address current laws that pertain to rehoming, such as the Hague Convention and the Interstate Compact on the Placement of Children. Lastly, Part IV analyzes the shortcomings of these laws and presents an overview of the legal and political aftermath of rehoming. Part IV also analyzes recently proposed and enacted legislation and argues that harsher criminal penalties and access to post-adoption support groups are needed to combat rehoming and improve our flawed system for dealing with failed international adoptions.

I. THE REHOMING PROCESS

The initial rehoming process (where an adoptive family is rehoming the child for the first time) is often fueled by the common thread of failed international adoptions.[12] Further, the Internet has served as a catalyst for rehoming and the creation of a black market for children. However, the progress of any market is dictated by supply and demand.[13] With regards to rehoming, the "supply" is a marketplace of available children, which is fostered by the "demand" of those either wanting to give up or obtain a child. Thus, before discussing the harsh realities of using the Internet to advertise and offload unwanted children to interested strangers, it is important to examine the reasons and motives of the adoptive parents, guardians, and middlemen who create and promote this underground system.

A. Parental Reasons and Motives behind Rehoming: An Insider's Perspective

Rehoming, whether legally or illegally carried out, is often initially instigated by the scenario of a difficult or "hard-to-place" child that is deemed to conflict with or disrupt the adoptive family.[14] In fact, the same or similar reasons given by parents seeking legal dissolution for broken international adoptions are also cited by parents in the rehoming process. They commonly include: adopting a foreign-born child with unexpected behavioral, health, and developmental issues; the child not getting along with siblings (often the parents' biological children) or fitting in with the family; the child's misbehavior or trouble with the law; financial difficulties (often exacerbated by the adopted child's medical or special-needs care); and emotional stress.[15] Although the focus of this article is rehoming of international adoptees, it is important to note that online rehoming also occurs with domestic adoptions.[16]

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[11] *See* Reuters Investigation, *supra* note 3 at Part 2.
[12] *See id.*; *see also* Emily Matchar, *Broken Adoptions: When Parents "Re-Home" Adopted Children*, TIME (Sept. 20, 2013), http://ideas.time.com/2013/09/20/broken-adoptions-when-parents-re-home-adopted-children/.
[13] *See* Reuters Investigation, *supra* note 3 at Parts 1, 2.
[14] *See* Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 455 (2012); Matchar, *supra* note 11.
[15] *See* Elizabeth Long, *Where Are They Coming from, Where Are They Going: Demanding Accountability in International Adoption*, 18 Cardozo J.L. & Gender 827, 827 (2012); *Adoptive Parent's Worst Nightmare: Interview with an Anonymous Mother who Rehomed Her Adopted Child*, Adoption Voices Magazine (OCT. 17, 2013), http://adoptionvoicesmagazine.com/adoptive-parents/adoptive-parent-rehomed-adoptee/#.U16vVlfA_Jd.
[16] *See* Reuters Investigation, *supra* note 3 at Part 2 (describing instances where U.S. children are legally adopted from birth or foster care, but are later rehomed in the same unregulated and Internet-based process); Robin Respaut, *Parents Struggle to Get Assistance After Adopting from Overseas*, REUTERS (Mar. 26, 2014), http://www.reuters.com/investigates/adoption-follows/ (noting that residential psychological and medical treatment for international adoptees can cost up to $250,000 a year and is often not covered by insurance).

Return to Table of Contents

International adoption is often one-sidedly portrayed as the story of good Samaritans who are able to provide a happy home for a child in need.[17] A common mentality of parents seeking to adopt is that of a "romantic playbook"—a scenario described as "we want a child, there are poor orphans overseas, so let's help each other. Everybody wins."[18] Although it may be a positive and rewarding experience, the reality is that international adoption is a complex, lengthy, expensive, unpredictable, and emotionally-involved process.[19] An important inquiry is how this "romantic playbook" of international adoption can end with parents taking extreme measures for rehoming or dissolution.[20]

Misinformation or a lack of disclosure concerning the health of international adoptees, coupled with a "lack of information about where to go for services and the cost of services" are the main reasons cited by families as "barriers to a successful adoption."[21] Often, medical records of international adoptees are minimal to non-existent, or have been found to be "misleading, confusing, or false."[22] A study comparing the medical reports of Eastern European adoptees to their actual physical conditions reveals that "some of the children were found to have Hepatitis B, severe hearing loss and strabismus; conditions not mentioned in their records."[23] Additionally, adoptive parents of Russian children "encounter the risk of fetal alcohol syndrome . . . . as the rate of fetal alcohol syndrome in Russia is practically eight times greater than the worldwide incidence."[24] In addition to nondisclosure or inaccurate medical histories, the symptoms of some health issues (such as fetal alcohol syndrome) and learning disabilities may not materialize until the child is pre-school aged or older.[25] Another common scenario cited by distressed parents is that they were in fact informed that the child has special needs or a correctible and manageable medical condition, which allowed them to plan and prepare for treatment accordingly. But when additional, unforeseen or undisclosed conditions arise, parents often find themselves emotionally and financially unprepared to handle these issues.[26]

Parents and adoption specialists have also recognized issues with the matching process in international adoptions.[27] The matching process may vary depending on the foreign country or the agency involved.[28] Sometimes children are matched simply according to their order on a waitlist, but they can also be matched depending on a variety of other factors, such as race or physical resemblance.[29] Thus, in addition to inaccurate family and medical histories, parents expect to (and are expected to) create a harmonious upbringing with a child that was chosen from a photograph or video footage, thousands of miles away and according to differing matching criteria.[30] In many foreign adoptions "parents fall in love with a vid-

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[17] *See* Belinda Luscombe, *The Dark Side of Cleaning Up International Adoptions: Kids Are Left in Orphanages Longer*, TIME (Nov. 4, 2913), http://healthland.time.com/2013/11/04/the-dark-side-of-cleaning-up-international-adoptions-kids-are-left-in-orphanges-longer/; Katherine Joyce, *Orphan Fever: the Evangelical Movement's Adoption Obsession*, MOTHER JONES, (May/June 2013), *available at* http://www.motherjones.com/politics/2013/04/christian-evangelical-adoption-liberia (describing a Christian movement encouraging "the idea that adopting a needy child is a form of missionary work").

[18] *See* Luscombe, *supra* note 16.

[19] *See Domestic v. International Adoptions*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/adopt/domestic_international (noting that the process of international adoptions can cost from $25,000-$50,000, can have wait-times of up to several years, and can involve undisclosed medical and family history issues).

[20] *See* Luscombe *supra* note 16; Dawn Friedman, *The Myth of the Forever Family: When Adoption Falls Apart*, Brain Child, http://www.brainchildmag.com/2013/11/the-myth-of-the-forever-family-when-adoption-falls-apart/

[21] *Adoption Disruption and Dissolution*, CHILD WELFARE INFORMATION GATEWAY (June 2012), *available at* https://www.childwelfare.gov/pubs/s_disrup.pdf; *see also* Judith S. Rycus, Madelyn Freundlich, Ronald C. Hughes, Betsy Keefer, Emily & Joyce Oakes, *Confronting Barriers to Adoption Success*, 44 FAM. CT. REV. 210, 220-21, 223-24 (2006) [hereinafter Rycus et al.] (discussing negative impact of adoptive parents' misinformation and lack of knowledge throughout the adoption process); Friedman, *supra* note 19.

[22] Gabriela Marquez, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, 21 J. JUV. L. 25, 34 (2000) (internal citations omitted) (citing an article cautioning the American pediatric and nursing community of undisclosed or misleading health records in international adoptions).

[23] *See id.* at 34.

[24] *Id.* at 35.

[25] *Id.*

[26] Donovan M. Steltzner, *Intercountry Adoption: Toward A Regime That Recognizes the "Best Interests" of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 114 (2003).

[27] *See* Friedman, *supra* note 19.

[28] *See* Gebhardt, *supra* note 9 at 425-428 (describing the different requirements and investigative home studies performed by different countries or agencies and noting that "the level of investigation that must occur within these studies is left to the judgment of the respective country").

[29] *See* Friedman, *supra* note 19.

[30] *See id.*

Return to Table of Contents

eotape . . . . They don't know they're falling in love with a child who has been horribly sexually abused."[31] For example, in 1997, the Whatcotts, an American family with three children (two adopted from China) adopted a Russian girl named Inga; however, they later discovered that the agency presented her to be four year younger than her actual age of twelve.[32] The agency also did not disclose that she had learning disabilities, depression, post-traumatic stress disorder, and a smoking habit.[33] The Whatcotts, turned to online rehoming after trying therapy, support groups, and even unsuccessfully attempting to have a Russian judge dissolve the adoption.[34] After less than a year with the Whatcotts, Inga was passed around to three different families within a six-month period.[35] Thereafter, she was admitted to a Michigan psychiatric facility, which documented her many issues: "substance abuse, domestic violence, separation from parents, sexual abuse, physical abuse, emotional abuse, verbal abuse, attachment issues and mental health issues."[36]

The Whatcotts' adoption experience is not unique.[37] The Reuters Investigation, along with countless reports of failed international adoptions describe parents feeling overwhelmed, deceived, and without proper recourse when raising adoptees who have complex medical conditions, violent and uncontrollable behavioral problems, and/or sexual abuse and mental health issues.[38] Parents have fearfully expressed safety concerns in situations where international adoptees have exhibited violent behavior or have even threatened to kill siblings or other family members.[39] In response to the Reuters Investigation, Tina Traster, a mother who has spent years writing about and researching Reactive Attachment Disorder (RAD)[40] describes her own feelings of defeat, fear, and frustration when attempting to raise and cope with her Russian daughter's unforeseen RAD issues.[41] Traster also sheds light on the arduous struggles that similarly-situated parents have shared:

> Many parents share deeply personal details about how they've been unable to bond with their adopted children. How they had no idea of the severity of their child's disabilities . . . . How no one told them the child had fetal alcohol syndrome or other medical problems. They relate stories about children who kill animals, harm siblings, set fires. Many seek help from therapists, adoption agencies, or state agencies, but nothing works . . . . [T]hey are financially depleted, their marriages are rocky or broken. These children have turned their lives upside down. One man recently wrote: "I just want my life back."[42]

On the other hand, such troublesome issues have also given rise to the equally troublesome outcome of rehoming. In one case, Reuters reports that after obtaining months of therapy for their Guatemalan child with RAD, his adoptive parents resorted to "what distressed parents across America continue to do: They began advertising their unwanted adopted child online."[43]

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[31] Friedman, *supra* note 19 (internal quotations omitted).
[32] *See* Reuters Investigation, *supra* note 3 at Part 5.
[33] *See id.*
[34] *See id.*
[35] *Id.*
[36] *See id.* (internal quotations omitted).
[37] Olga Grosh, *A Call of Duty: Preventing Adoption Disruption by Expanding Adoption Providers' Responsibility to Investigate and Disclose Adoptive Children's Medical History*, 11 WHITTIER J. CHILD & FAM. ADVOC. 149, 150-51 (2011).
[38] *See id.* at Part 3 (exposing accounts of "desperate parents"); Steltzner, *supra* note 25 at 132-33; Respaut, *supra* note 15.
[39] *See* Marquez, *supra* note 21at 36; Friedman, *supra* note 19 (recounting a mother's experience after adopting a young boy from a Caribbean orphanage: he "would threaten to force [her] to crash the car. He said he would bash her head in with a rock. The other children were terrified."); Susan Donaldson James, *Torry Hansen: When an Adopted Child Hates You*, ABC News (Apr. 15, 2010), http://abcnews.go.com/Health/MindMoodNews/parents-violent-adoptive-children-support-torry-hansen-russian/story?id=10372316&singlePage=true.
[40] "Reactive attachment disorder, a behavioral condition under which the child is completely unable to bond with the parents, may not be initially apparent and may reveal itself after the adoption process has been finalized." Marquez, *supra* note 21 at 35.
[41] Tina Traster, *When Adoption Goes Awry*, THE DAILY BEAST, (Sept. 18, 2013), http://www.thedailybeast.com/witw/articles/2013/09/18/when-adoption-goes-awry.html.
[42] *Id.*
[43] *See* Reuters Investigation, *supra* note 3 at Part 4.

Return to Table of Contents

B. The Role of the Internet and Social Media

1. Online Rehoming Communities

For adoptive parents feeling overwhelmed, angry, frustrated, and at a dead-end, the Internet can both serve as a positive outlet to help them empathize with one another on the challenges and failures of parenting an adopted child; it also serves as a means of exploitation, crime, abuse, and human trafficking.[44] Both of these aspects shall be explored in detail.

Many online adoption and rehoming groups began to form because frustrated parents needed an outlet to vent and empathize with others facing similar experiences.[45] In fact, a Facebook rehoming community called "Way Stations of Love" was created by Tim Stowell, a Tennessee father of four adopted children.[46] The Way Stations of Love community has about 275 members and states that its purpose is "to support distressed parents to avert re-homings, and to help find new families for children if necessary."[47] The group's stated aim is to avoid or diminish rehomings, as its founder acknowledges that children suffer every time they are rehomed.[48] However, it has also fostered abusive and dangerous relationships.[49] Although the Internet brings people together, it also serves as a shield to hide true identities behind online screen names. It facilitates deception and fraud, and therefore serves as easily-accessible forum to dump unwanted children onto complete strangers, regardless of their mental or criminal backgrounds.[50] In fact, Way Stations' Facebook classification is not public, and the accessible content is for members only, who require Stowell's approval to join the group.[51] Furthermore, Stowell acts as an administrator and middleman in the rehoming process and even "keeps a private list of people willing to take in children from failed adoptions."[52]

Stowell, like many other online community administrators and go-betweens, does not have any sort of professional or state-licensed experience in adoption, child welfare, or the process of screening and investigating prospective caretakers.[53] In another rehoming example, a North Carolina woman, Megan Exon, moderated an online rehoming message board called "adoption_disruption."[54] Similar to Stowell, Exon viewed her efforts in a positive light and as a way to guide others to find a proper home for a troubled or unwanted child.[55] This shared mentality of altruism and hope is not unlike the simplistic and romantic views of international adoptions as a way to rescue baby orphans and obtain a happily-ever-after ending.[56] Yet beyond the loose rationale of good intentions, online rehoming moderators and administrators cannot escape the fact that they are not child welfare professionals or social workers, nor do they have expertise in their state's adoption or child advertising laws.[57] Stowell further admits that he is unsure whether the people on his online community are breaking the law, and irresponsibly adds that "he leaves the vetting of prospective parents to families offering a child."[58] Outside of providing a place where people can exchange messages and emails about offloading children and coordinating pick-up and drop-off

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[44] *See id.* at Parts 1, 3.
[45] *See generally* ADOPTIVE FAMILIES CIRCLE, http://www.adoptivefamiliescircle.com/groups/group/Dealing_With_a_Loss_in_Adoption1/ (online support group that focuses on failed, contested, and disrupted adoptions); JULIA AND ME (Feb. 9, 2014), http://juliaandme.com/ (Author Tina Traster's website that reaches out to parents of failed or troubled adoptions and also shares her experiences about parenting and coping, and bonding with a child with Reactive Attachment Disorder); *Adoptive Parent's Worst Nightmare: Interview with an Anonymous Mother Who Rehomed Her Adopted Child*, ADOPTIVE VOICES MAGAZINE (Oct. 17, 2013), http://adoptionvoicesmagazine.com/adoptive-parents/adoptive-parent-rehomed-adoptee/#.UyXV34WyPkZ (featuring a parent's experience with disruption and rehoming).
[46] *See* Reuters Investigation, *supra* note 3 at Part 3.
[47] *Id.*
[48] *See id.*
[49] *See id.*
[50] *See id.*; Megan Twohey, *Adopted Girl: I Was 'Re-homed' After Reporting Dad's Alleged Sexual Abuse*, NBC News (March 21, 2014, 5:04 am), http://www.nbcnews.com/storyline/re-homing/adopted-girl-i-was-re-homed-after-reporting-dads-alleged-n57671 (describing a family who was lauded in their community for caring for adopted children, yet the father is currently facing charges for their ongoing sexual abuse).
[51] *See* Reuters Investigation, *supra* note 3 at Part 3.
[52] *Id.*
[53] *Id.* at Part 2.
[54] *Id.* at Part 3.
[55] *Id.*
[56] *See* Luscombe, *supra* note 16; Joyce, *supra* note 16.
[57] *See* Reuters Investigation, *supra* note 3 at Part 3.
[58] *Id.*

Return to Table of Contents

details, these self-proclaimed moderators, facilitators, and middlemen practice a laissez-fair and hands-off approach to rehoming.[59] One moderator states that he has told members to involve an attorney, but that it is ultimately the responsibility of the families "to do due diligence."[60] Many have no idea where the children end up after the exchanges, and they carelessly assume that the child is off to a better home.[61] In fact, during the initial rehoming process, the Reuters study exposed that most parents felt relief, rather than remorse or worry, when they were able to hand-off their adopted child.[62] After rehoming their thirteen year old Russian daughter, one mother recounts that that beyond hoping the girl would be okay, she reassured her husband to "'get in the car and go'" and "'don't look back.'"[63]

2. Advertising Methods and the Exchange Process

With online rehoming, parents and caregivers casually post advertisements, pictures, and short descriptions of their child, as though they were placing an ad for an unwanted piece of furniture.[64] Other ads carry short descriptions of the child's age, country of origin, and behavioral issues.[65] The tone and language of the advertisements vary from worried and desperate to cruel and abusive, and even bizarre and incredulous.[66] Reuters exposed eight different Internet groups and sifted through 5,029 online ads and messages posted to a rehoming community on Yahoo and discovered: "On average, a child was advertised for re-homing there once a week. Most of the children ranged in age from 6 to 14 and had been adopted from abroad – from countries such as Russia and China, Ethiopia and Ukraine. The youngest was 10 months old."[67] Excerpts from these online advertisements are startling. "I am totally ashamed to say it, but we truly do hate this boy!" wrote a woman in Nebraska, offering to give away her eleven year-old son who had been adopted from Guatemala.[68] A couple who adopted a four-year old Taiwanese boy stated that they found him from an online rehoming ad where his current parents complained that his "feet were too big and his ears looked funny."[69] Most disturbing are ads that have a clear purpose of pedophilia and sexual abuse. One ad states: "Born in October of 2000 – this handsome boy, 'Rick' was placed from India a year ago and is obedient and eager to please."[70] Upon learning of these online messages, Yahoo immediately shut down its six-year old message board "Adoption-from-Disruption," yet the Facebook group "Way Stations of Love," was kept open.[71] Facebook defends its decision by stating that "'the Internet is a reflection of society'" and a tool used to communicate and address all sorts of problems.[72] Despite some social media networks acting to shut down these communities, the Internet still allows for countless other outlets to facilitate underground rehoming practices.[73]

Additionally, the physical exchange process is done just as informally as the online advertising process. Current parents and prospective caregivers arrange a meeting point, and often travel across state lines to obtain the child.[74] The hand-offs have occurred at the homes of the involved parties, or in public areas such as shopping centers and parking lots.[75] Children are willingly and purposefully given up to strangers, often along with their birth certificate or whatever documentation or belongings the parent

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[59] *See id.*
[60] *Id.*
[61] *See id.*
[62] *Id.* at Part 4.
[63] *Id.*
[64] *Id.* at Part 1.
[65] *See id.*
[66] *See id.*; Joyce, *supra* note 16 (stating that "parents began writing that their adopted children were manipulative and wild, compulsive liars or thieves, and sometimes violent.").
[67] Reuters Investigation, *supra* note 3 at Part 2.
[68] *Id.*
[69] *Id.* at Part 3.
[70] *Id.* at Part 2.
[71] *Id.*
[72] *Id.*
[73] *See id.*
[74] *See id.*
[75] *Id.* at Parts 2-3.

wishes to include or disclose.[76] Most commonly, parents or current guardians include a note or power of attorney document briefly naming the new parties as legal guardians and granting them permission to care for the child.[77] From this point on, the child's fate is unpredictable, as reports indicate that oftentimes, the same child is advertised and rehomed more than once.[78] Rehomed children must face at least one, but often a combination, of the following traumatic scenarios: being uprooted and passed around multiple states; living with multiple parties; being returned to their original set of parents who rehomed them in the first place; or ending up in foster care or institutionalized by the state.[79]

C. A Child's Nightmare: Exploitation, Crime, and Abuse

Although some parents may have legitimate rationales behind their desire to end an adoption, the biggest danger of private rehoming is that the process occurs without any state or federal oversight.[80] This allows children to be handed over to individuals who have not been properly vetted and may be mentally and physically unfit to foster a child.[81] Further, some re-homers purposefully opt to circumvent proper authorities because there has been abuse, neglect, or other criminal behavior involved.[82] Even more troubling is that this underground system supports and attracts criminal behavior such as abuse, neglect, fraud, kidnapping, pedophilia, and human-trafficking.[83] Therefore, there are two main groups of adults that are involved in private rehoming: overwhelmed parents who seek an outlet and speedy solution for their failed international adoptions, and criminals and con artists who seek to exploit this underground market. The Internet allows for these two groups to intersect, and online rehoming has created a grey area where it is difficult to differentiate the legal from the illegal and the unethical from the well-intentioned. This section exposes the criminal and abusive side of rehoming and discusses the rehoming experience from as told by children who have been victims of the process.

1. Skirting the Legal System: A Gateway for Abuse and Criminal Behavior

Some parents claim they looked to the Internet as a last-ditch effort after exhausting traditional options like counseling or medical treatment options for behavioral disorders.[84] However, one major reason why unregulated rehoming is lucrative is that the legal process of dissolution may itself lead to criminal penalties.[85] Not only is the dissolution process lengthy and expensive, but it also varies according to state laws and whether adoption agencies and/or state welfare programs are involved.[86] In some states, the relinquishment of parental rights requiring the child's admittance into foster care is considered child abandonment.[87] Furthermore, in order for a court to approve this process so that the child may be placed into foster care or appointed a guardian, parents must sometimes prove neglect, disregard, or parental unfitness.[88] This process may result in criminal charges, "which has lifelong ramifications (such as being unable to teach or care for children in a professional capacity)."[89]

For example, Glenna Mueller, a Wisconsin mother rehomed her adopted son (a domestic adoptee obtained through the foster care system) to Nicole Eason and her roommate, Randy Winslow, a pedophile and sex offender,[90] discussed infra. When justifying her use of the Internet to rehome the boy, Mueller admitted that a state welfare agent told her that giving the boy back to the foster care system would trigger an investigation.[91] She feared this could result in the loss of her many other adopted children, who

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[76] *See id.* at Part 2.
[77] *See id.* at Parts 1-2.
[78] *See id.* at Parts 1-2. Reuters found that "A 10-year-old boy from the Philippines and a 13-year-old boy from Brazil each were advertised three times. [A girl from Haiti] was offered for re-homing when she was 14, 15 and 16 years old." *Id.* at Part 1.
[79] *Id.* at Parts 3-5.
[80] *See id.* at Parts 2-3.
[81] *See id.* at Part 1.
[82] *See id.* at Part 2; Joyce, *supra* note 16; Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking*, CNN (Sep. 18, 2013), http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking/.
[83] *See* Reuters Investigation, *supra* note 3 at Part 2.
[84] *See id.* at Parts 2, 5.
[85] See Jon Bergeron, Jr. & Robin Pennington**,** *Supporting Children and Families When Adoption Dissolution Occurs*, ADOPTION ADVOCATE, Aug. 2013, Issue No. 67, *available at* https://www.adoptioncouncil.org/publications/adoption-advocate-no-62.html.
[86] *Id.*
[87] *See id.*
[88] *See* Margaret M. Mahoney, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, 42 IND. L. REV. 639, 640 (2009); Elizabeth Barker Brandt, *De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?*, 38 FAM. L.Q. 291, 298 (2004).
[89] Bergeron & Pennington, *supra* note 84.
[90] *See* Reuters Investigation, *supra* note 3 at Part 2.
[91] *See id.*

Return to Table of Contents

serve as her main form of income.[92] Mueller's primary rationale for rehoming is simple: "the state wouldn't have to know, and therefore wouldn't investigate her for neglect or abuse."[93]

On the other hand, some parties specifically opt for rehoming because they may already have criminal records, are currently engaging in child abuse or neglect, or seek to engage in such crimes.[94] In one shocking example, Calvin and Nicole Eason, are a couple that has spent years acquiring, abusing, and exploiting children through online rehoming.[95] Nicole Eason's background with children is riddled with misfortune and red-flags as to her parental unfitness.[96] "In addition, she and her husband . . . . were each accused of sexually abusing children they had babysat. Nicole took custody of one child when she was living with a pedophile who is now in prison for trading child pornography."[97] Engaging in what can only be described as serial-rehoming, Nicole Eason alone obtained custody of over six children, and scoured online rehoming communities under usernames such as "Big Momma" and "momma_bear2000."[98] At one point, she even created and moderated her own Yahoo rehoming community.[99] Eason, who has admitted to a having a psychological compulsion for acquiring children through rehoming, has shown no concern for their safety or welfare. Her involvement in rehoming involves no concern for the safety or welfare of children.[100] Eason serves as one of the many examples exhibiting the dangers of an unregulated system, as children are made available to self-interested strangers, criminals, and the mentally unfit.

Child predators can easily hide behind online usernames and profiles, which facilitate their use for fraud and deception in targeting the masses and capitalizing upon frustrated parents who desperately seek to rehome their child.[101] As compared to a pre-social media era, the Internet further increases a predator's chances of accessing and exploiting adoptees. This is because the use of social media and online forums now allows them to cast a much wider net than ever before and reach parents and children all across the United States. For example, the Reuters study includes several instances where parents would either drive or fly their unwanted child to a new home in another state, or the interested party would travel across state lines to acquire the child.[102] With regards to deception and fraud, Nicole Eason lied to several parents regarding her parental qualifications, expertise in handling difficult-to-parent children, and her desire to be a loving caretaker.[103] She would even present parents with falsified home-study documents attesting to her parental fitness.[104] When parties are desperate to rid themselves of an unwanted child, and others are equally desperate to abuse and exploit these children, parents are careless and negligent about the screening process (if they even screen at all).[105] Likewise, many parents are easily convinced that the stranger offering to care for the child is actually the kind-hearted good Samaritan that he or she purports to be.[106]

Online rehoming also provides an arena that is ripe for pedophilia and sexual abuse.[107] There are several reasons why international adoptees, in particular, are especially easy targets of abuse and exploitation. First of all, many adoptees do not come to the United States as infants, but may arrive as young

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[92] *Id.*
[93] *Id.*
[94] *See id.* (describing in detail the criminal backgrounds and child abuse allegations of the Eason couple; the majority of the Reuters report centers around Nicole Eason, and the many children she obtained through rehoming).
[95] *See id.* at Part 3.
[96] *See id.* at Part 2 (noting that Eason's own biological children were removed from her custody by child welfare authorities, and an eighteen-month old baby had negligently died while under her supervision).
[97] Megan Twohey, *Lawmakers Demand Stop to Parents Giving Away Adopted Kids on the Internet*, NBC NEWS, (Oct. 29, 2013) http://www.nbcnews.com/news/other/lawmakers-demand-stop-parents-giving-away-adopted-kids-internet-f8C11492450 [hereinafter Lawmakers Demand Stop Article].
[98] *See* Reuters Investigation, *supra* note 3 at Part 3.
[99] *See id.*
[100] *See id.* at Parts 3, 5.
[101] *See id.* at Part 2.
[102] *Id.* at Part 3.
[103] *Id.* at Part 4.
[104] *See id.* at Part 1.
[105] *See id.* at Part 2 (noting a moderator of an online rehoming community who believed she was helping an unwanted adoptee find a good home when she was misled into arranging the placement of a child with an abusive couple).
[106] *See id.*
[107] *See id.* at Part 2.

Return to Table of Contents

school-age children, and have formed bonds with their native countries, cultures, and caretakers.[108] As if adjusting to a new family in a new country is not stressful enough, some children are dumped into the rehoming network, sometimes unable to speak the language and already suffering from mental or physical disabilities.[109] To add to the problem, parents have openly disclosed or advertised the child as having a history of sexual abuse or complaining about the fact that a child has displayed sexual or inappropriate behaviors towards others.[110] There have also been numerous accounts of parents advertising and re-homing children with special needs or behavioral problems, as these issues often form the underlying basis as to why they are abandoned in the first place.[111] In its investigation of online posts, which is an extensive but by no means all-encompassing representation of the problem, Reuters found that "more than half [of the children] were described as having some sort of special need. About 18 percent were said to have a history that included sexual or physical abuse."[112] In addition to many adoptees experiencing abuse prior to being brought to the United States, "[t]he unstable and turbulent nature of adoption, orphanages, and foster homes creates an atypical developmental environment that in a myriad of ways affects the behavior, identity, and intellectual capacity of adoptive children."[113]

The fact that parents and other re-homers resort to online forums to disclose a child's mental or behavioral weaknesses to the world at large is practically urging sexual predators to obtain free children to abuse. A health professional specializing in child abuse acknowledges that advertising such details, especially that the child has a history of sexual abuse, is equivalent to "waving a red flag" at predators.[114] A "Chicago-based forensic psychologist who evaluates sex offenders" further acknowledges that such descriptions are "a tremendous lure."[115] Such a lure was exactly what attracted Randy Winslow, a roommate of Nicole Eason and now convicted sex-offender who used the underground rehoming network to obtain custody of a ten-year old boy.[116] This boy was Glenna Mueller's adopted son; she had handed him over to Eason and Winslow in a hotel parking lot.[117] Winslow also spent time in online chat rooms dedicated to pedophilia and was eventually caught by an undercover federal agent in 2007.[118]

At the time Winslow was caught, authorities focused on the pornography charges and were unaware of his involvement in rehoming.[119] However, a transcript that was not included in Winslow's criminal case reveals that Winslow referred to the child as a "fun boy" whom he and his ex-girlfriend planned to adopt."[120] After spending months with Winslow and Eason, Mueller eventually took the boy back.[121] Yet Mueller only did so after her caseworker learned of the rehoming and urged her to take the boy back because "the transfer violated a legal requirement that authorities be notified when custody is transferred across state lines."[122] Incredulously, Mueller incurred no criminal penalties for carelessly granting custody of her adopted son to a pedophile.[123] Afterwards, the boy was reintroduced into the state foster care system.[124]

2. *Experiences and Outcomes of Rehomed Children*

The emergence of online rehoming is a relatively recent practice that can date back to the early 2000s.[125] Within these short years, rehomed children have endured horrific experiences and have been

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[108] See *Steve Kalb, Int'l Adoptee Identity and Community: Emerging Lessons Learned from Adoptee Experts*, 21 J. OF SOC. DISTRESS AND THE HOMELESS 122, 123 (Oct. 2012).
[109] *See* Reuters Investigation, *supra* note 3 at Part 5.
[110] *See id.* at Part 2 (citing an online Yahoo post where a parent writes of her unwanted adoptee: "Almost immediately after being adopted, (she) showed some sexualized behaviors toward her adoptive mother and younger sister." *Id.*
[111] *See id.*; *see also* Traster, *supra*, note 39; Bergeron & Pennington, *supra* note 84 (listing contributing factors of dissolutions and failed adoptions, specifically "problematic behaviors [in adoptees], and that the primary intent behind these behaviors is a personal attack on one or more individuals in the family").
[112] Reuters Investigation, *supra* note 3 at Part 2.
[113] Grosh, *supra* note *36 at* 152, 156.
[114] Reuters Investigation, *supra* note 3 at Part 2. (internal quotations omitted).
[115] *Id.*
[116] *See id.*
[117] *Id.*
[118] *Id.* Winslow currently serving a 20 year sentence in an Ohio federal prison). *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* (referencing the Interstate Compact on the Placement of Children).
[123] *Id.*
[124] *See id.*
[125] *See id.* at Part 1.

Return to Table of Contents

scarred by painful memories.[126] When interviewing older international adoptees who have been rehomed, the beginning of their stories often begin with describing their feelings of joy and gratitude upon learning that they would be adopted and brought to America.[127] After being rehomed, these children must cope with the stigma of not only being unwanted by their parents in their home countries, but also being abandoned in the United States, despite their hope that adoption would lead to a better life and a loving family.[128] This section will discuss the experiences and emotional aftermath of rehoming as told by the children who have been cast aside, abused, and overlooked due to America's underground adoption system. In particular, it will examine the experiences of two international adoptees, who have spent years in the rehoming network: Nora Gateley and Nita Dittenber.[129] Though the children are now adults, they still carry with them the psychological wounds of growing up as an unwanted child.[130]

a. **Personal Accounts and Experiences**

The fairytale of international adoption may come to an abrupt halt when parents notice that their international adoptee is misbehaving, exhibiting challenging behavioral or health issues, or when the child has lashed out at a family member or sibling.[131] Nora Gateley's rehoming experience was triggered by an accusation by one of her new sisters that Nora had "hit[] her during a fight."[132] Nora was adopted from a Chinese orphanage by the McLaughlin family in 2000; she is now twenty-six years old and has finally spoken to news outlets about her painful memories as a rehomed child.[133] Nora's last memories of her adoptive parents are of their abrupt detachment.[134] After spending only two years with the McLaughlins, she remembers being served her favorite meal at dinner one night, and then her mother "announced the meal would be Nora's last with the family."[135] Her adoptive father then drove Nora from their Florida home and delivered her to the Tom and Debra Schmitz in Trenton, Tennessee, and neither Nora nor her adoptive parents had ever met them before.[136] No lawyers or child welfare officials were involved.[137] During an interview with NBC News, Nora cried as she recalled the moment her father left her with the Schmitz family.[138] He told Nora the stay was only temporary and that he would return for her in a few years.[139] Despite believing her adoptive father at the time, Nora never saw the McLaughlins again.[140]

At fourteen years old, Nora was left to face the emotional ordeal of being abandoned by her newly adopted parents and uprooted from her Florida home.[141] She also had to deal with living in a different state, with unfamiliar faces, and adjusting to new set of parents, the Schmitzes, which Nora describes as being much more unfeeling and abusive than her original adoptive parents.[142] The Schmitz home was full of children, as they had already housed twelve other children, and would eventually amass up to seven-

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[126] *See id.* at Part 5.
[127] *See id.*, Parts 1, 5 (reporting that Quita Puchalla, an adoptee from Liberia who is now 21 years old, states that she "'was happy . . . . coming to a nicer place, a safer place. It didn't turn out that way . . . . It turned into a nightmare.'" Inga Whatcott, adopted from Russia in 1997, recalls "'My picture was, I'm gonna have a family, I'm gonna go to school, I'm gonna have friends.'"); *see also* Monica Alba, Kate Snow, & Mark Schone, *Adopted Girl Says Mother Forced Her to Dig Her Own Grave*, NBC News (Sept. 09, 2013), http://www.nbcnews.com/news/other/adopted-girl-says-mother-forced-her-dig-her-own-grave-f8C11111029 (reporting that Nora Gateley, adopted from China in 1999 states "'I was the luckiest girl in the world . . . I never felt so special.'").
[128] *See* Reuters Investigtion, supra note 3 at Part 5.
[129] *See id.* (discussing Nora Gateley); Twohey, *supra* note 49 (discussing Nita Dittenber).
[130] *See* Reuters Investigation, *supra* note 3 at Part 5.
[131] *See id.* at Parts 1, 5.
[132] *Id.* at Part 5.
[133] *See id.* (also noting that the Mclaughlins, Nora's original adoptive parents, refuse to discuss Nora's rehoming, but other parents who rehomed their children to the Schmitz couple admitted to finding them via an online rehoming community); Alba, Snow, & Schone, *supra* note 126.
[134] *See* Reuters Investigation, *supra* note 3 at Part 5.
[135] *Id.*
[136] *See id.*
[137] *See id.*
[138] *See* Alba, Snow, Schone, *supra* note 126.
[139] *See id.*
[140] *Id.*; Reuters Investigation, *supra* note 3 at Part 5.
[141] *See* Alba, Snow, & Schone, *supra* note 126.
[142] *See id.*; Alba, Snow, & Schone, *supra* note 126.

Return to Table of Contents

teen, many with special needs.[143] "The Tennessee Department of Children's Services was quoted at the time saying that seven of the 18 children removed from the home did not legally belong to the Schmitzes. The kids had come from families across the United States."[144] Debra Schmitz would also punish the children by beating them, confining them, verbally abusing them, forcing them to clean the house, and depriving them of necessities such as eyeglasses, walkers, or other health aids.[145] For instance, Nora suffers from polio and wears a leg brace.[146] "Nora recalls that Schmitz mocked her after taking away her leg brace. 'Go on, try to run away,' Schmitz would say. 'No one cares about you.'"[147]Even more traumatic is when Schmitz would make the children "dig their own graves," by forcing them to go outside and dig holes in the yard as punishment for anything she considered to be misconduct.[148]

In addition to coping with the stress and turmoil that causes parents to give up on their international adoptees, these children must also live with the fear of what type of abuse their new families might bring.[149] Within their five-year study, Reuters found that Nita Dittenber, an adoptee from Haiti, "was passed among four families over two years."[150] In 2009, Nita was originally adopted from Haiti at age thirteen by an American couple, the Dittenbers, who at the time had four biological children and four internationally adopted children, including Nita's biological sister.[151] The Dittenbers, who lived in Idaho, later advertised Nita on a Yahoo rehoming community called "Adopting-from-Disruption."[152] They claimed that they could no longer handle Nita's behavioral problems and had unsuccessfully attempted to get help from government welfare agencies.[153] Michelle Dittenber advertised Nina on multiple occasions, describing Nita as a liar, and "a bully," that is "manipulative" and has "an attitude of entitlement."[154] However, since the main purpose of online rehoming is to find a child a new home, Michelle also made sure to include a few redeeming qualities in her advertisements as well: Nita "'does love little kids very much' and has 'a soft spot for elderly people as well.'"[155]

The Dittenbers rehomed Nita three times via the Yahoo community[156] Each time, they simply created a power of attorney documents that would name Nita's new guardians; no child welfare officials were involved.[157] Despite the constant change of living arrangements, Nita, who was fourteen years old at the time the rehoming began, was left uninformed as to how she was ending up with new families and who was involved behind the scenes, which brings up issues of child consent and guardianship preferences.[158] As of 2007, fifty U.S. jurisdictions had statutes "directing the court to consider in some capacity a child's preferences during adoption proceedings."[159] Additionally, forty-nine jurisdictions require that children of a certain age consent to the adoption process.[160] "The jurisdictions that require a child's consent for adoption use the threshold age of ten, twelve, or fourteen. Twenty-five jurisdictions require consent if an adoptee is either fourteen or older; eighteen jurisdictions use age twelve or older; six jurisdictions use age ten or older."[161] Nita Dittenber was fourteen years of age or older when she was unknowingly and unwillingly advertised and rehomed on multiple occasions.[162] During the years she was being rehomed, Nita

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[143] *See* Reuters Investigation, supra note 3 at Part 5; Alba, Snow, & Schone, *supra* note 126.
[144] Reuters Investigation, *supra* note 3 at Part 5.
[145] *See id.*; *see also* Wendy Koch, *Underground Network Moves Children from Home to Home*, USA TODAY, (Jan. 18, 2006) http://usatoday30.usatoday.com/news/nation/2006-01-18-swapping-children_x.htm.
[146] *See* Reuters Investigation, *supra* note 3 at Part 5.
[147] *Id.*
[148] *See id.*; Alba, Snow, & Schone, supra note 126; Koch, *supra* note 143.
[149] *See* Twohey, *supra* note 49 Reuters Investigation, Part 5 (describing the fear felt by rehoming "survivors").
[150] See Twohey, *supra* note 49 (citing the Reuters Investigation, *supra* note 3).
[151] *See id.*
[152] *Id.*
[153] *See id.*
[154] *Id.* (internal citations omitted).
[155] *See id.*
[156] *Id.*
[157] *See id.*
[158] *See id.*
[159] Am. Bar Ass'n Child Custody and Adoption Pro Bono Project, *Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings*, 41 FAM. L.Q. 365, 376 (2007).
[160] *Id.*; *see also* Sarah J. Baldwin, *Choosing A Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK U. L. REV. 503, 511-12 (2013).
[161] *See* Am. Bar Ass'n Child Custody and Adoption Pro Bono Project, *supra* note 157 at 376.
[162] See Twohey, *supra* note 49.

Return to Table of Contents

was completely unaware that her adopted mom was advertising her on the Internet.[163] She recalls: "I didn't really know what was going on . . . . I had no clue about where I was going to live and for how long."[164]

Nita's first two rehomings both resulted in her eventually being returned to the Dittenber family.[165] In tracking her experiences, it can seem as though the parties involved were dealing with a borrowed or rented piece of property, rather than a human being. Specifically, Nita was sent to family number one in Ohio, then returned to Idaho.[166] Nita was then sent to family number two, also in Idaho, and then returned.[167] Finally, Nita was sent to family number three (which is the fourth family Nita lived with since being adopted from Haiti) and introduced to yet another set of parents, Jean Paul and Emily Kruse, who lived in Ohio.[168] Shortly after Nita's arrival, some of the younger Kruse children confessed to her that they were being sexually abused by Jean Paul Kruse.[169] When the Kruses found out that Nita knew of the sexual abuse and had told some of their relatives about the incidents, Emily Kruse immediately put Nita on a plane and sent her back to the Dittenbers in Idaho.[170] The Bill of Particulars filed with the Ohio trial court states that Emily Kruse did not notify the receiving family that she was sending the child back, and she "did not tell the child where she was going and did not permit her to pack clothing or other belongings."[171] The prosecution argues that the Kruses sent Nita away so that she would be unavailable to bear witness or attest to their sexual abuse crimes.[172] When police investigated the Kruses, "ten children were removed from their home." and the Kruses now face felony and sexual abuse charges.[173]

Nita, who is now eighteen years old, sheds light on the constant fear and lack of self-worth she experienced as a child growing up in America's online rehoming network.[174] Each time she was rehomed, she wondered if it would be the last time, or whether her current family, or the next, would physically or sexually harm her.[175] Nita, who lived with the Kruses for seventeen months, described the guilt and fear she carried with her when deciding whether she should tell anyone about the sexual abuse of the younger girls in the home.[176] Although Nita states that she was not sexually abused in the Kruse home, she explains that she kept quiet for eight months due to a fear that she would be rehomed again or worse—left without a home or family.[177] In an interview, Nita shares that she did not want to "ruin" yet another one of her living situations and that she "didn't want to get passed around anymore."[178] When Nita did gather the courage to approach Emily Kruse about the abuse, Emily belittled her, "accused her of lying," and threatened to send her away if she spoke about it with anyone else.[179] When she was returned to the Dittenbers, she was also met with accusations of lying.[180]

Nita's stressful rehoming experiences, coupled with the pain of feeling unwanted and unloved, took a serious toll on Nita's mental health.[181] She was not only forced to cope with depression, guilt, fear, and

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[163] *See* *id.*
[164] *Id.*
[165] *Id.*
[166] *See* *id.*
[167] *See* *id.*
[168] *See* *id.*
[169] *See* *id.*
[170] *Id.*
[171] Bill of Particulars at 1, State of Ohio v. Emily Kruse, No. 2013-CR-0123 (Ohio Union Cnty. Ct. Cm. Pl. Dec. 20, 2013).
[172] *See* *id.*
[173] Twohey, *supra* note 49 (noting that "Kruse, has pleaded not guilty to 17 felony criminal counts, including raping two of his daughters and sexually abusing another daughter . . . . Emily Kruse has pleaded not guilty to felony charges of obstructing justice and intimidating a witness.") The Kruses are still awaiting trial. "Jean Paul Kruse is scheduled for trial in May [2014]; Emily Kruse is scheduled for trial in July [2014]." *Id.*
[174] *See* Twohey, *supra* note 49.
[175] *See* *id.*
[176] *See* *id.*
[177] *Id.*
[178] *Id.*
[179] *See* *id.*
[180] *Id.*
[181] *See* *id.*

anxiety, but she also developed an eating disorder and even considered suicide.[182] Nita, like so many rehomed children are left with indelible memories of abuse, exposure to harm, and the stigma of being unloved and unwanted.[183] In an interview about her terrible memories, Nita makes an astute yet painfully obvious reflection to her adoptive parents: "I do understand that you needed help . . . but there could have been murderers or killers . . . You don't know those people. I could have been dead."[184] Such a readily-known thought seems to be carelessly—and selfishly—ignored by parents who participate in online rehoming.

b. Emotional Struggles and Psychological Aftermath

Children of failed international adoptions must unfortunately encounter a roller-coaster of emotions, and many have lived through peaks of happy and hopeful moments, dashed with times of incredible sadness and fear of the unknown. Not only have adoptees had to endure the hardships of poverty, loss, malnutrition, and unstable living conditions in their countries of origin, but older adoptees have to psychologically cope with the selection process and feelings of abandonment.[185] If they are fortunate enough to be adopted and brought to the United States, many describe emotions of absolute joy and gratitude, like living a fairytale or winning the lottery.[186] Thereafter, in what seems like a cruel joke or an unpredictable twist of fate, rehomed adoptees must encounter yet another nightmare when they are rehomed and handed over to strangers, sometimes on multiple occasions.[187]

Although rehoming and adoption disruption are emotionally jarring events for any child, the different backgrounds, living conditions, and challenges of international adoptees make their experiences doubly traumatizing.[188] For example, Inga Whattcott, a Russian adoptee, who had been rehomed three times, had already encountered her own set of hardships even before being brought to the United States.[189] "Inga spent most of her childhood in an orphanage, longing for parents who would protect her. Her biological mother, a prostitute, had abandoned her when she was a baby. She never knew her father."[190] At age twelve, Inga learned that she would be adopted, and described her hope of a happy and rosy future with family, friends, and new opportunities.[191] In stark contrast, Inga, now twenty-seven years old, also described her feelings after she experienced rehoming: "My parents didn't want me. Russia didn't want me. I didn't want to live."[192] Inga's adopted parents claimed they rehomed her due to her serious, undisclosed behavioral problems.[193] However, Inga, like Nita Dittenber, also felt guilt and fear over the failed adoption.[194] During an interview, Inga cried as she stated "I let my parents down" and expressed that due to her past experiences, the idea of freedom is a scary and foreign concept to her.[195]

The outcomes of failed international adoptions and children who have been victims of online rehoming have not been thoroughly tracked or examined in the United States.[196] However, it is clear from the sparse yet powerful accounts of international adoptees that they felt helpless, insignificant, unwanted, and dehumanized.[197] Online rehoming allows parents to move children around the country, often against their will, without their consent, or sometimes even without warning or explanation as to where they are

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[182] *Id.* The Dittenbers, who now express regret at rehoming Nita, eventually sent her to a Nashville mental health facility, where Nita received treatment for her eating disorder, her mental health, and self-esteem issues. *Id.*

[183] *See id.*; *see also* Rycus et al., *supra* note 20 at 224 (noting that an adopted child's "feelings of grief, depression, and anxiety in response to both real and perceived losses and threats may continue well beyond the actual events that precipitated them").

[184] Twohey, *supra* note 49.

[185] *See* D. Marianne Brower Blair, *Admonitions or Accountability?: U.S. Implementation of the Hague Adoption Convention Requirements for the Collection and Disclosure of Medical and Social History of Transnationally Adopted Children*, 40 CAP. U. L. REV. 325, 345 (2012); Kathryn Patricelli, *Long-Term Issues for the Adopted Child*, MENTALHEALTH.NET (Jan. 22, 2007), http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=11455.

[186] *See* Reuters Investigation, supra note 3 at Parts 1, 5.

[187] *See id.* at Part 5; Twohey, *supra* note 49.

[188] *See* Rycus et al., *supra* note 20 at 224-25; *Patricelli*, *supra* note 184.

[189] *See* Reuters Investigation, *supra* note 3 at Part 5.

[190] *Id.*

[191] *See id.*

[192] *Id.*

[193] *See id.*

[194] *See id.* at Part 5; Twohey, *supra* note 49.

[195] See Reuters Investigation, *supra* note 3 at Part 5.

[196] *See id.* (stating that "roughly quarter-million foreign children brought to this country through adoption since the late 1990s. Their fate in America has never been systematically examined."); *see also* Post & Zimmerman, *supra* note 13 at 440 (noting that "there are no federal standards for data collection to track broken adoptions").

[197] See Reuters Investigation, *supra* note 3 at Part 5; Twohey, *supra* note 49; Alba, Snow, & Schone, *supra* note 126.

Return to Table of Contents

going, who they are staying with, or whether the arrangement will be temporary or permanent.[198] Also, the origin of rehoming was a system created for unwanted pets,[199] therefore rendering consent a non-issue since it unnecessary and impossible to inform or actively involve the animal in the process. Not only does a lack of oversight or regulations pose a threat to child safety, but abruptly abandoning and uprooting children, regardless of their needs or feelings, adds another layer of psychological complexity to an already frightened and overwhelmed child. Before children are readopted or placed into another environment, consent, communication, and child involvement are important components needed for coping and healthy adjustment.[200]

> [C]hildren typically need intensive preparation for adoption in much the same manner as their adoptive families. Their expectations and misperceptions must be explored, and they must be provided with accurate and complete information about how adoption will impact them, their relationships with siblings and other members of their biological families, and the nature of the adjustments they will face.[201]

Thus, online rehoming not only exposes children to danger and abuse, but it also robs them of a voice, which may inflict serious psychological damage since "they are deprived of their primary coping resource—reliance on stable, predictable, trusted adults in their lives."[202]

III. CURRENT STATE OF THE LAW

A. The Hague Adoption Convention

With regards to international adoptions, there are current legal safeguards that monitor the process of adopting a child from overseas and purport to ensure that adoptive parents are properly screened and equipped to parent a child.[203] The central body of law that governs the international adoption process is the Hague Adoption Convention (the Hague), an international agreement that is currently followed by 90 member countries.[204] Its regulations apply only in adoptions between countries that have joined the Hague, and its main purpose is to "prevent the abduction, sale of, or traffic in children, and it works to ensure that inter-country adoptions are in the best interests of children."[205] Abiding by the Hague is a complex and extensive process requiring U.S.-approved child studies, home studies, required forms, applications, placement proposals, reviews, authorizations, and court proceedings.[206] Another U.S. requirement is that parents adopting from a fellow Hague-approved country complete a ten-hour training program; however, this requirement does not apply when adopting children from non-member countries.[207] Interestingly, when adopting children domestically within the foster care system, states typically require that parents complete about thirty hours of training, which is triple the amount of hours required by the Hague.[208]

Yet after surpassing the Hague's numerous checks and hurdles, there are strangely little to no requirements that oversee an international adoptee's status after the adoption has been finalized.[209] There are no state or federally imposed checks, reviews, or updates required to see whether the child has successfully adjusted to his or her new family.[210] "Once an adoption is finalized, there are no state or federal

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[198] *See* Reuters Investigation, *supra* 3 at Parts 1, 5; Twohey, *supra* note 49.
[199] See Reuters Investigation, *supra* note 3 at Part 1.
[200] *See* Rycus et al. *supra* note 20 at 225.
[201] Rycus et al., *supra* note 20 at 225.
[202] *See id.*
[203] *See Understanding the Hague Convention*, U.S. DEPT. OF STATE, http://adoption.state.gov/hague_convention/overview.php; Reuters Investigation, *supra* note 3 at Part 2 (summarizing the process of U.S. adoptions of foreign children).
[204] *See id.*
[205] *Id.*
[206] *See id.*; Blair, *supra* note 184 at 358-360 (outlining the extensive amount of background information needing to be collected by adoption service providers).
[207] *See* Long, *supra* note 14 at 838; Reuters Investigation, *supra* note 3 at Part 2.
[208] *See Understanding the Hague Convention*, *supra* note 202.
[209] *See* Gebhardt, *supra* note 9 at 422 (noting that "there is no international body of law that requires countries to monitor a child's well-being, post-adoption).
[210] Riben, *supra* note 8; Mahoney, *supra* note 87 at 640-41 (discussing the parent-child relationship created by legal adoption).

Return to Table of Contents

agency follows ups. Adopted children are considered in every way the legal children and responsibility of their adopters with birth certificates amended to list adopters as the parents of birth confirming their status as the same as had they been born into their families."[211] Likewise, the resources available to parents who feel that they cannot handle, adequately parent, or properly bond with their internationally adopted child are sparse and mainly consist of voluntary support groups or seeking expensive counseling or treatment options.[212] Some may not see the need for required checks after the completion of an international adoption, especially if parents have already abided by the Hague. After all, when a court finalizes an adoption, the state laws often treat the child as though he or she were a parent's biological child, and such stringent checks are not required of those parenting biological children.[213] However, because there is no uniform or international reporting requirement concerning the outcomes of international adoptions, there is no way to track or document an accurate indicator of failed international adoptions within the United States.[214] Additionally, online rehoming further muddles any concrete insight into the number of adoption failures because it provides an easy means for illegitimate dissolutions, without oversight or documentation required by state laws. It cannot be denied that the Hague is an expansive body of law that does much to implement a uniform system for international adoption aimed at placing children with capable parents. Nevertheless, its focus is on the logistics and bureaucracy of the international adoption process, and it offers practically no protection against rehoming after the child arrives stateside.

B. The Interstate Compact on the Placement of Children

Although the Hague ensures safe placement of international adoptees brought to the United States, there is a federal law that "provides for the movement and safe placement of children between states when the children are in the custody of a state, being placed for private/independent adoption, or under certain circumstances, being placed by a parent or guardian in a residential treatment facility (RTF)."[215] This federal law is called the Interstate Compact on the Placement of Children (ICPC), and is an agreement codified by all fifty states, the District of Columbia, and the U.S. Virgin Islands.[216] It is "both a contract binding the party states and a statute enacted by the legislature of each party state."[217] The ICPC is triggered when children will be entering a different state for the purposes of being placed with an adoptive family, family relatives, or into foster care or other state-run institutions.[218] Additionally, the ICPC has four main goals: "(1) maximization of opportunity for placement; (2) maximization of information for the receiving; (3) maximization of information for the state from which the child is sent; and (4) resolution of jurisdictional conflicts."[219] Another important effect of the ICPC is that it promotes adoption by broadening the options and availability of suitable homes for children in need beyond their home state.[220]

More specifically, a federal law was needed in interstate placements because family law courts only have jurisdiction within their own states, whereas the ICPC "extends the jurisdictional reach of a party state into the borders of another party state for the purpose of investigating a proposed placement and supervising a placement once it has been made."[221] With regards to child welfare, the ICPC ensures that the receiving party or state entity is properly vetted and mandates that the sending state or party retain legal jurisdiction and financial responsibility over the child until the placement process has been finalized.[222] In such instances, the ICPC mandates that both the sending state and the receiving state be notified of such

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[211] *Id.*
[212] *See* Respaut, *supra* note 36; David Crary, *Advocates: Int'l Adoptions Need Stronger Safeguards, Support for Families*, WASHINGTON POST (Oct. 6, 2013), http://www.washingtonpost.com/politics/advocates-international-adoptions-need-stronger-safeguards-support-for-families/2013/10/06/7b4e480c-2ec4-11e3-9ccc-2252bdb14df5_story.htm.
[213] *See* Riben, *supra* note 8.
[214] See Post & Zimmerman, supra note 13 at 440; *Intercountry Adoption: Process Summary*, U.S. Dep't of State. http://adoption.state.gov/hague_convention/adoptions_from_us/process.php at 5 (acknowledging that "[a]ccurate data on dissolutions are more difficult to obtain because, at the time of legal adoption, a child's records may be closed, first and last names and Social Security numbers may be changed, and other identifying information may be modified.").
[215] *See Intercountry Adoption: Process Summary*, *supra* note 213.
[216] *See* Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 294 (1989); *ICPC FAQ*, ASSOCIATION OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, http://www.aphsa.org/content/AAICPC/en/resources/ICPCFAQ.html [hereinafter ICPC Fact Sheet].
[217] Hartfield, *supra* note 215 at 294.
[218] *See* ICPC Fact Sheet, *supra* note 215.
[219] Hartfield, *supra* note 215 at 296.
[220] *Id.* at 293.
[221] Hartfield, *supra* note 215 at 296.
[222] *Id.* at 229.

Return to Table of Contents

transfers and that the involved parties complete a "placement request" that ultimately guides the receiving state's decision to approve or deny the placement.[223]

Although the process for fulfilling an ICPC placement request is beyond the scope of this article, it involves significant requirements and oversight for both the sending and the receiving party.[224] The process requires that a caseworker or adoption agency in the child's home state compile an information packet that includes: the child's birth and social security information, medical and educational history, and documents pertaining to any court proceedings in which the child has been involved.[225] It will also include extensive details for the receiving party or entity so that the receiving state can make an informed placement decision.[226] Such details include: financial status, home study reports, any needed licensing requirements, and statements or reasons behind the proposed placement.[227] The ICPC at the very least ensures that children within interstate adoptive placements are documented and tracked between the two states.[228] Like foster care placement, ICPC placements also heavily rely on home study reports in order to help courts determine the suitability of a placement with a foster or adoptive family.[229] A home study report includes: "background checks of all family members, face-to-face interviews with family members, completion of a written questionnaire and a physical inspection of the home to ensure it meets applicable safety requirements."[230] In contrast, rehoming bypasses the ICPC, occurs without state or federal oversight, and allows parties to use the Internet to essentially conduct their own rudimentary and uncontrolled system of child placement.[231] Without the bounds of fulfilling state or federally-mandated placement requirements, parents can rehome children without social workers, background checks, home studies, or any documentation of the receiving party's address, mental capacity, financial stability, or living arrangements.[232]

C. Online Rehoming: Is it Legal?

The prevalence of rehoming has been able to surge and thrive because of a lack of oversight and laws that address the issue. As of 2013, "no state, federal or international laws even acknowledge[d] the existence of re-homing."[233] Thus, the practice often fell into a legal grey area where parents were not criminally charged for the act of rehoming itself, but would be charged under other state or federal violations—if they were even punished at all.[234] The Reuters Investigation found that "[a] child might be removed from the new home if an illegal re-homing is discovered. But seldom is either set of parents punished."[235] For instance, in many of the individual case studies where police and child protective services were involved, criminal charges were pursued only when there were other serious offenses at issue, such as physical or sexual abuse or child trafficking.[236] Furthermore, executing a power of attorney document is a technically legal and valid way for parents to assign temporary guardianship to another adult or relative.[237] In most

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[223] *See* ICPC Fact Sheet, *supra* note 215.
[224] *See id.* (discussing a more detailed, step-by-step process of an ICPC placement request).
[225] *Id.*
[226] *See id.*
[227] *See id.*
[228] *See id.*; *see also In re Adoption of Infants H.*, 904 N.E.2d 203, 208 (Ind. 2009) (noting that the Indiana ICPC statute requires that the "sending agency" give notice to "the proper authorities" which requires the disclosure of: "(1) The child's name, place, and date of birth. (2) The identity and address or addresses of the child's parents or legal guardian. (3) The name and address of the person, agency, or institution to or with which the sending agency proposes to send, bring, or place the child. (4) A full statement of the reasons for the proposed action and evidence of the authority under which the placement is proposed to be made." (citing Ind. Code Ann. § 31-28-4-1).
[229] *See* ICPC Fact Sheet, *supra* note 215; Vivek S. Sankaran, *Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys*, 27 CHILD. L. PRAC. 33, 38 (2008).
[230] ICPC Fact Sheet, *supra* note 215.
[231] *See* Reuters Investigation, *supra* note 3 at Part 1.
[232] *See id.* at Part 3.
[233] *Id.* at Part 1.
[234] *See id.*
[235] *Id.*
[236] *See* Reuters Investigation at Parts 1, 3, 4; Twohey, *supra* note 49; Alba, Snow, & Schone, *supra* note 126.
[237] *Id.* at Part 1; Brandt, *supra* note 87 at 299-300; Michelle Lillie, *Rehoming Adopted Children*, THE TRAFFICKING SEARCH (Oct. 18, 2013), http://humantraffickingsearch.net/wp/rehoming-adopted-children/.

states, "the primary mechanisms for obtaining legal authority to parent children are guardianship and adoption."[238] Yet states have acknowledged the need for some flexibility in custody arrangements, especially to allow a relative or other trusted person to temporarily act as a guardian at times where parents face illness, hardship, or situations where they are absent from the child's life.[239] This need has given rise to power of attorney statutes, which differ greatly from state to state.[240] These informal custody arrangements are quick and simple since lawyers are not needed (and often not used) to execute such documents, and they are legally recognized as valid without court approval.[241]

Many power of attorney statutes have a time limit on the custody arrangement, such as six months or one year; however, since judicial oversight is typically not needed to execute these arrangements, it is difficult for states to track violations or force parents or guardians to abide by the statutory limitations.[242] Thus, parents and other re-homers have capitalized on the flexible and informal, yet legally valid, ability to transfer guardianship through power of attorney documents.[243] Moreover, many power of attorney transfers allow a guardian "to enroll a child in school or consent to medical, dental, and mental health care."[244] This makes it even more difficult track down and investigate rehoming situations since the child's current guardian often has some semblance of custodial authority (however informal or illegitimate).[245] Also, the fact that the re-homer is able to enroll the child in school and obtain healthcare also serves as a ruse to hide illegalities since this can allow the re-homer and affected adoptee to carry on an outward appearance of normalcy. Notably, power of attorney agreements are only enforceable if executed by the child's parents (or legally adoptive parents).[246] Thus, any multiple rehoming transfers that take place beyond the initial "parent-to-stranger" arrangement is likely illegal unless the child is returned to his or her legal parents or permanent guardians and they execute a new power of attorney transfer for the new rehoming placement. The occurrence of this type of multiple rehoming arrangement where the child is returned to the parent and then rehomed again has also been documented.[247] In sum, the short answer to the question of whether or not online rehoming is legal is: it depends. It is certainly possible for parents to legally arrange temporary rehoming transfers, but there are also many other moving parts involved in a legality determination, such as the relevant state laws involved, whether the ICPC was violated, whether child advertising laws were violated, or whether child abuse or fraud was involved—which are all determinative factors that can make or break the technical legality of a rehoming situation.

IV. RESPONSE TO REHOMING: ANALYSIS OF CURRENT LAWS, LEGISLATIVE PROPOSALS, AND A CALL FOR CHANGE IN THE U.S. ADOPTION SYSTEM

A. The Inadequacy of the ICPC in Combating and Addressing Online Rehoming

With regards to rehoming, the ICPC is a more pertinent body of legislation than the Hague because it may serve as a means of oversight that applies after an international adoption has been finalized.[248] The Reuters study presents the ICPC as only a "potential safeguard"; it is, in fact, exactly that.[249] Unfortunately, the ICPC would likely only be implicated within a narrow set of circumstances. Additionally, there are several caveats that prevent the ICPC from protecting against the online rehoming. First, the ICPC would likely only apply when a child is rehomed across state lines.[250] For example, it would be relevant in situa-

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[238] Brandt, *supra* note 87 at 297.
[239] *Id.* at 293, 299-300.
[240] *Id.* at 299-300.
[241] *Id.* at 300 (stating "No court order is required to give effect to these arrangements. Many parents could prepare such a power of attorney without the aid of an attorney."); *see also* Reuters Investigation, *supra* note 3 at Part 1.
[242] *See* MINN. STAT. ANN. § 524.5-211(a) (West 2004) (having a 1-year time limit); IDAHO CODE ANN. § 15-5-104 (West 2003) (having a 6-month time limit); Reuters Investigation, *supra* note 3 at Part 1.
[243] Reuters, *supra* note 3 at Part 1; Lillie, *supra* note 236.
[244] Brandt, *supra* note 87 at 299.
[245] *See* Reuters Investigation, *supra* note 3 at Part 1 (stating that "[b]y obtaining a power of attorney, the new guardians are able to enroll a child in school or secure government benefits – actions that can effectively mask changes of custody that take place illegally outside the purview of child welfare authorities").
[246] *See* Brandt, *supra* note 87 at 300.
[247] *See* Twohey, *supra* note 49 (discussing Nita Dittenber's multiple rehoming arrangement).
[248] *See* ICPC Fact Sheet, *supra* note 215; See Reuters Investigation, *supra* note 3 at Part 1.
[249] *See* Reuters Investigation, *supra* note 3 at Parts 1, 2.
[250] *See id.* at Part 1.

tions where parents of an adoptee sought legal dissolution or displacement,[251] and placement with the prospective entity or foster family was located in another state.[252] Thus, parents could easily avoid an ICPC violation by keeping the rehoming within the child's home state.[253] Second, even if the rehoming occurred across different states, the possibility of judicial oversight first requires that the parent or re-homing party actually begin the placement request and provide both states with the required notice and documentation—an unlikely prospect given that the practice of online rehoming is inherently reckless and underhanded.[254]

Additionally, the possibility of any criminal penalties would apply only if those engaging in online rehoming actually get caught violating the law and either the home state, the receiving state, or both, decides to enforce penalties.[255] Since the majority of rehomed children are those from failed international adoptions, the transfers occur almost exclusively from one private individual to another.[256] This makes the ICPC less of a concern for re-homers since parents are not seeking to involve the courts, adoption agencies, or foster families.[257] "When the underground network is used, a transfer will likely go unnoticed by authorities, minimizing the chance of getting caught."[258] Another concern is that criminal penalties for ICPC violations can vary from state to state, though they often constitute either some type of misdemeanor for private individuals or the suspension or revocation of a state licenses for agencies or institutions.[259] Many state law enforcement authorities were unaware of or unfamiliar with ICPC legislation, and often violations are often not pursued since states have to invest time, money, and judicial resources into bringing ICPC penalties to fruition.[260] Thus, the ICPC is a weak deterrent at best, as there have been multiple instances of potential ICPC violations where parents have rehomed their children across state lines, yet did not face any ICPC penalties, despite getting caught by state authorities.[261]

B. A Step in the Right Direction: Domestic Reaction and Legislative Efforts towards Oversight, Accountability, and Post-Adoption Support Programs

As of 2013, there were no U.S. laws that addressed online rehoming.[262] This section will give an overview of reactionary political and legislative measures in an attempt to shed light on the currently-evolving legal status of America's underground rehoming network.

In January of 2011, the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) and the American Public Human Services Association (APHSA) issued a national alert that warned many parents are using the Internet to rehome unwanted adoptees to strangers, often

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[251] *See* Post & Zimmerman, *supra* note 13 at 443 (stating that "displacement" means "the temporary (short or long term) return of a child to state custody after a legally finalized adoption") (internal citations omitted).
[252] *See* ICPC Fact Sheet, *supra* note 215.
[253] *See id.*
[254] *See* ICPC Fact Sheet, *supra* note 215; *see also* Reuters Investigation, *supra* note 3 at Parts 1, 2; Riben, *supra* note 8; Hartfield, *supra* note 215 at 203 (stating that a "major barrier to the effectiveness of the ICPC is lack of compliance with its terms" as the ICPC is often violated both intentionally and non-intentionally).
[255] *See* Rycus, *supra* note 20 (noting that "resource limitations, among other factors, have prevented many states from complying with the provisions of the ICPC in a timely manner").
[256] *See* Reuters Investigation, *supra* note 3 at Parts 1, 4.
[257] *See id.*; Hartfield, *supra* note 215 at 304-05.
[258] Reuters Investigation, *supra* note 3 at Part 4.
[259] *See ICPC Articles*, ASSOCIATION OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, http://www.aphsa.org/content/AAICPC/en/ICPCArticle.html (citing Article IV of the Texas ICPC); Reuters Investigation, *supra* note 3 at Part 1. For example, in Texas an ICPC violation is a class B misdemeanor, whereas in Oregon, an ICPC violation is a class C misdemeanor. *Cf.* TEX. FAM. CODE ANN. § 162.025 (West) *with* OR. REV. STAT. ANN. § 417.990 (West).
[260] *See* Reuters Investigation, *supra* note 3 at Part 2 (noting that [i]f authorities learn of an illegal transfer, they can remove the child from the new home. They also can take legal action against the adults involved, but this rarely happens"); Hartfield, *supra* note 215 at 203 (noting that states often choose not to pursue ICPC violations).
[261] *See* Riben, *supra* note 8 (noting that "[n]one of the parents named in the Reuters investigation who 're-homed' their adopted children, nor those who received them, were ever charged with [ICPC] crimes"); *See* Reuters Investigation, *supra* note 3 at Part 1 (noting that although the Puchallas violated the ICPC by rehoming their adoptive daughter, Quita, across state lines, state authorities responded by simply returning Quita to the Puchallas without pursuing criminal charges).
[262] Reuters Investigation, *supra* note 3 at Part 1.

across state lines and in violation of the ICPC.[263] Furthermore, after the Reuters investigation, government entities, private organizations, and state and federal legislators have acted to bring attention to the matter and effectuate laws that would actually address and deter online rehoming.[264] The Reuters investigation was released on September 9, 2013, and that same month, several U.S. adoption and child welfare organizations issued a group press release bringing attention to failed international adoptions and online rehoming.[265] It also addresses the problem of overwhelmed, uninformed, and unprepared adoptive parents and strongly urges lawmakers to acquire federal funding to implement stronger post-adoption support services and make them available to parents of all kinds of adoptions.[266] The press release also calls for congressional hearings on rehoming and asks that federal funding be directed towards researching the efficacy of post-adoption services as well as the shortcomings of current state and federal laws.[267] In alluding to the ICPC, it states: "[W]e strongly urge legislators and policymakers to protect children from unregulated custody transfers, whether or not they cross state lines."[268]

Additionally, on October 29, 2013, several members of Congress issued letters to both Obama administration officials and the Hon. Dave Reichert, chairman of the U.S. House Ways and Means Subcommittee on Human Resources.[269] In the letter to the House subcommittee, eighteen members of the House called "for a hearing, a government study of [rehoming] practices and a request for federal agencies to identify gaps in services available to families who have adopted children that have been exposed to trauma."[270] In another letter to the heads of the U.S. Department of State, U.S. Department of Justice, the U.S. Department of Homeland Security, and the U.S. Department of Health and Human Services, Senator Ron Wyden (D-Oregon), expressed concern over rehoming and asked the that the Obama administration propose a "minimum federal standard" to combat the nationwide problem.[271] Furthermore, Illinois attorney general's office has written letters to Yahoo and Facebook, asking them to better monitor their websites and shut down child rehoming communities.[272] State legislators have responded to enact legislation, with Wisconsin being the first state to amend its child advertising and custody laws to address rehoming.[273] Currently, the legal forefront against rehoming is quickly adapting. In addition to Wisconsin, legislators from around the country have spoken out against the practice, and Florida, Rhode Island, Colorado, and Ohio are amongst some of the states that have introduced anti-rehoming bills that heighten criminal penalties or bills focused on expanding pre- and post-adoption support services.[274]

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[263] *See id.* at Part 1 (citing Press Release, Association of Administrators of the Interstate Compact on the Placement of Children & the American Public Human Services Association, The Disruption, Dissolution, and Illegal Transfer of Unwanted Children (Jan. 2011), *excerpt available at* http://www.reuters.com/investigates/adoption/#article/part1).

[264] *See* Lawmakers Demand Stop Article, *supra* note 96.

[265] *See* Press Release, Voice For Adoption, North American Council on Adoptable Children, Child Welfare League of America, & Donaldson Adoption Institute, National Adoption and Child Welfare Organizations, Responding to 'Re-homing' Reports, Call on Congress and Public Officials to Protect Children, Support Adoptive Families (Sept. 11, 2013), *available at* http://voice-for-adoption.org/sites/default/files/Release_Call%20on%20Congress_Adoption_Rehoming_LINKS.pdf [hereinafter Adoption and Welfare Press Release]; *see also Legislative and Policy Updates*, **Voice for Adoption**, http://www.voice-for-adoption.org/advocacy-and-policy/leg_and_policy (last visited Apr. 26, 2014).

[266] *See* Adoption and Welfare Press Release, *supra* note 264.

[267] *See id.*

[268] *Id.*

[269] *See* Lawmakers Demand Stop Article, *supra* note 96; *Legislative and Policy Updates*, *supra* note 245.

[270] *See* Legislative and Policy Updates, *supra* note 245 (citing Letter from House Representatives to Hon. Dave Reichert, Chairman, House Ways and Means Subcomm. on Human Resources (Oct. 29, 2014), *available at* http://www.voice-for-adoption.org/sites/default/files/files/2013_10_29%20Re-Homing%20letter%20to%20WAM.pdf.

[271] Letter from Ron Wyden, U.S. Sen., to Eric Holder, U.S. Atty. Gen., John Kerry, U.S. Sec. of State, Kathleen Sebelius, Sec. of Health and Human Services, & Ron Beers, Acting Sec. of U.S. Dep't. of Health and Human Services (Oct. 29, 2013), *available at* http://www.voice-for-adoption.org/sites/default/files/files/Wyden_Re-Homing.pdf .

[272] *See* Lawmakers Demand Stop Article, *supra* note 96; *Editorial: Shut Down Internet Adoptions*, CHICAGO TRIBUNE (Oct. 31, 2013), http://articles.chicagotribune.com/2013-10-31/opinion/adopt-ct-edit-1031-20131031_1_child-welfare-adoptions-two-children (also noting that Yahoo has shut down such communities, whereas Facebook has not).

[273] *See* Lawmakers Demand Stop Article, supra note 96; David Stout, *Wisconsin Inks Bill to Prevent Parents from 'Giving Away' Adopted Children*, TIME (Apr. 17, 2014), http://time.com/66171/wisconsin-adopted-children-rehoming/.

[274] *See Florida Should Crack Down on Illegal Re-Adoptions*, SUN SENTINEL (Jan. 5, 2014), http://articles.sun-sentinel.com/2014-01-05/news/fl-editorial-rehoming-adopted-children-dv-20140105_1_child-abuse-adoption-florida-couple; *Langevin Introduces Bill to Protect Adopted Children*, CONGRESSMAN JIM LANGEVIN (Oct. 30, 2013), http://langevin.house.gov/press-release/langevin-introduces-bill-protect-adopted-children (introducing "the Protecting Adopted Children Act, the House companion bill to S. 1527," which proposes increasing state funding to provide extensive pre- and post-adoption services); *Rep. Conti's Bill to Prevent Child Trafficking Passes Committee Unanimously*, COLORADO HOUSE GOP (Apr. 22, 2014), ttp://coloradohousegop.com/2014/04/rep-contis-bill-to-prevent-child-trafficking-passes-committee-unanimously/ (referencing

Wisconsin's new law focuses on amending child advertising laws and deterring private rehoming arrangements by requiring court oversight and judge approval for power-of-attorney guardianship transfers to anyone that is not a relative.[275] In sum, the new "makes it illegal for anyone not licensed by the state to advertise a child over age one for adoption or any other custody transfer, both in print and online. Parents who want to transfer custody of a child to someone other than a relative must seek permission from a judge."[276] With regards to criminal penalties, Wisconsin statute § 48.979, which refers to parental delegation of powers in custody transfers will be amended to include the following:

> (g) Any person who delegates his or her powers regarding the care and custody of a child to a person who is not a relative of the child for longer than one year without first obtaining the approval of the court as provided in this subsection is subject to a fine not to exceed $10,000 or imprisonment not to exceed 9 months, or both.[277]

The Wisconsin Code currently has a very broad definition of "relative."[278] Therefore, the amendment would still potentially allow for parents to rehome their child to a broad range of individuals (including non-blood relatives who married into a parent's family) without having to get court approval or be subject to the statutory fine or imprisonment penalties.[279] Temporary custody transfers to family relatives often provide for a more familiar and suitable alternative than foster care placement, and the new statutory provision will hopefully impede one of the biggest rehoming concerns: giving children away to complete strangers. This concern is also addressed in the law's child advertisement amendment.

Violating Wisconsin's current child advertising statute already has a penalty of up to a $10,000 fine, up to nine months of imprisonment, or both.[280] However, the new act broadens the statutory definition of "advertise" beyond the original definition, which only covered printed, radio, or television communications originating within the state.[281] The amended statutory definition now includes Internet and electronic communications such as "any computerized communication system, including by electronic mail, Internet site, Internet account, or any similar medium of communication provided via the Internet."[282] In sum, Internet advertising and guardianship transfers to non-relatives without prior judicial approval now carry the same criminal repercussions in Wisconsin.[283] The Reuters Investigation discovered that prior to anti-rehoming legislation, the worst form of punishment that parents often faced was simply to have the rehomed child returned to them—which hardly serves as a deterrent to impede the practice of giving children away to strangers.[284] Thus, there is a definite need for harsher criminal penalties, and other states should follow Wisconsin's lead to at the very least impose some form of jail time or pecuniary penalties for unauthorized rehoming.

House Bill 1372, which proposes to "make unauthorized solicitation of children for adoption purposes a class 6 felony"); *States Moving to Ban Private Re-Homing of Adopted Children*, EXAMINER.COM (Apr. 18, 2014), http://www.examiner.com/article/states-moving-to-ban-private-re-homing-of-adopted-children.

[275] *See* Megan Twohey, REUTERS, *Wisconsin Passes Law to Curb Private Custody Transfers of Children* (Apr.16, 2014) http://www.reuters.com/article/2014/04/16/us-wisconsin-adoption-idUSBREA3F1VS20140416 [hereinafter Wisconsin Passes Law Article].

[276] *Id.*

[277] *See* 2013-2014 Wisc. Legis. Serv. Act 314 (2013 A.B. 581) (West) (amending WIS. STAT. § 48.979 (2012).

[278] *See* WIS. STAT. § 48.02 (2012) (defining "relative" as "a parent, stepparent, brother, sister, stepbrother, stepsister, half brother, half sister, brother-in-law, sister-in-law, first cousin, 2nd cousin, nephew, niece, uncle, aunt, step uncle, step aunt, or any person of a preceding generation as denoted by the prefix of grand, great, or great-great, whether by blood, marriage, or legal adoption, or the spouse of any person named in this subsection, even if the marriage is terminated by death or divorce" and extended family members "whether by blood, marriage, or adoption").

[279] *See* 2013-2014 Wisc. Legis. Serv. Act 314 (2013 A.B. 581) (West) (amending WIS. STAT. § 48.979 (2012).

[280] *See* WIS. STAT. § 48.825(3m) (2012).

[281] *See* WIS. STAT. § 48.825(1)(a) (2012).

[282] *See* 2013-2014 Wisc. Legis. Serv. Act 314 (2013 A.B. 581) (West) (amending WIS. STAT. § 48.825(1)(a) (2012)). Amendment also broadens WIS. STAT. §28.825(2)(a), which prohibits advertising "for the purpose of finding a child to adopt." §28.825(2)(a) now prohibits advertising "for the purpose of finding a child to adopt *or otherwise take into permanent physical custody*" (emphasis added). *Id.*

[283] *See* 2013-2014 Wisc. Legis. Serv. Act 314 (2013 A.B. 581) (West); Wisconsin Passes Law Article, *supra* note 274.

[284] *See* Reuters Investigation, supra note 3 at Part 1.

Return to Table of Contents

Nevertheless, laws that only impose fines or heighten criminal penalties are not enough to curtail and correct America's rehoming problem. Although criminal sanctions are needed as both a deterrent and a way to hold parents and re-homers accountable for child abuse and endangerment, such laws are only attacking one side of the rehoming issue.[285] "This is a complex issue, and simply outlawing the online advertisement of children available for adoption will unfortunately not fix the problem. In many states, rehoming a child without notifying the state is already illegal, yet those prohibitions have not prevented the unsafe and illegal transfer of children."[286] The issues of failed international adoptions and online rehoming are closely intertwined since such problematic adoptions are typically the root-cause behind a parent's decision to rehome an adoptee in the first place.[287] Consequently, Wisconsin's anti-rehoming law, as it currently stands, falls short of being a comprehensive solution.

On the other hand, some states are proposing legislation that aims to direct funds at adoption support services so that parents do not feel abandoned and overwhelmed when faced with an adoptee's behavioral or health-related complications.[288] Post-adoption services could compensate for the shortcomings of the Hague, which sets standards and guidelines to protect international adoptees during the selection and placement process.[289] For example, an anti-rehoming bill under consideration in Rhode Island would provide funding for:

> [T]reatments specialized for adopted children, including psychiatric residential services, outpatient mental health services, social skills training, intensive in-home supervision services, recreational therapy, suicide prevention and substance abuse treatment. Adoptive parents would have access to peer-to-peer mentoring and support groups in order to learn from experienced adoptive parents, and could access a 24-hour emergency hotline.[290]

Research suggests that a majority of international adoptees already have health or behavioral issues at the time of their initial adoption or they are prone to developing or exhibiting latent issues after being adopted.[291] Therefore, the need for pre- and post-adoption services is a fundamental component in ensuring that both parents and adoptees have available resources to help them learn, cope, and achieve a harmonious and manageable family life.[292] Moreover, access to these services should be available to parents of *all* types of adoptions, whether public or private, domestic or international. Currently, "[m]any U.S. states provide help to families who adopt troubled children from the state's own foster system, such as counseling or temporary placement outside the home ('respite'). But this support usually isn't available with internationally adopted kids."[293] Making such counseling and support services available only to parents of domestic adoptions would have a very insignificant effect on addressing rehoming since an overwhelming majority of rehomed children are international adoptees.[294] Also, providing this constructive outlet for parents and adoptees could help address the problem of overwhelmed parents who say they chose online rehoming out of frustration and despair.[295] Ideally, effective anti-rehoming legislation should be two-pronged. Like Wisconsin's statute, it should criminalize online rehoming and promote more judicial oversight in child custody transfers. Also, like Rhode Island's proposal, it should make counseling, treatment and post-adoption support available—especially to international adoptees and their parents.

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[285] *See Langevin Introduces Bill to Protect Adopted Children*, *supra* note 273.
[286] *Id.* (quoting Congressman Jim Langevin (D-RI) (internal quotations omitted).
[287] *See* Riben, *supra* note 8; Reuters Investigation, *supra* note 3 at Part 1; Traster, *supra* note 40.
[288] *See* Nina Williams-Mbengue, *State Legislation to Provide Adoption and Post-Adoption Supports, Subsidies and Tax Credits 2005 – 2013*, National Conference of State Legislatures (Feb. 5, 2014), http://www.ncsl.org/research/human-services/ncsl-adoption-support-and-subsidy-legislation-2005-2013.aspx.
[289] *See* Gebhardt, *supra* note 9 at 430 (describing the scope and purpose of the Hague).
[290] *See Langevin Introduces Bill to Protect Adopted Children*, *supra* note 273 (referencing the Protecting Adopted Children Act, a House companion bill to S. 1527).
[291] *See* Riben, *supra* note 8 (stating that about "60 percent of internationally adopted children have health problems, according to Dr. Nancy Curtis, who heads Children's Hospital of Oakland's International Adoption Clinic"); Grosh, *supra* note 111 at 154-157; Rycus et al, *supra* note 20 at 216.
[292] *See* Grosh, *supra* note 36 at 161.
[293] Reuters Investigation, *supra* note 3 at Part 2; *see also* Respaut, *supra* note 15 (noting that the U.S.-born children and adoptees in foster care are enrolled in Medicaid and qualify for other state subsidies, which could help cover treatment costs, but these services are typically not extended to international adoptees and their families).
[294] *See id.*, *supra* note 3 at Part 1 (noting that 70% of the children advertised on one Yahoo rehoming community were international adoptees); Riben, supra note 8 (noting that although comprehensive data on failed adoptions are lacking, "[t]he highest percentage of failed adoptions – at least 70% – is of children who were adopted internationally, and a large percentage of those are children adopted from Eastern Europe").
[295] *See* Reuters Investigation, *supra* note 3 at Part 3.

Return to Table of Contents

V. CONCLUSION

The emergence of failed international adoptions, online rehoming communities, and a lack of legislative and judicial oversight has allowed frustrated parents, unlicensed middlemen, and criminals and abusers to freely interact and create an underground system for the adoption of unwanted children. Although anti-rehoming legislation is helpful, it is ultimately futile if states do not also act to address the crux of American's rehoming problem: failed adoptions. Therefore, funds should be directed towards researching and tracking these adoptions in order to craft adequate post-adoption services and support groups and make them available to affected families. At a state hearing to address rehoming, one legislator brought up an unsettling observation. She noted that pets have more protections than children, adding that "when she adopted a cat . . . she signed a contract that prohibited her from re-homing the pet."[296] Without implementation of anti-rehoming legislation and access to adoption support services, then internationally adopted children will unfortunately continue to live in a society where their rights to a stable and loving home have less value and fewer protections than those of household pets.

A MOTHER'S WOMB: A PLACE OF PRIVATE AUTONOMY, STATE INTERVENTION OR SOMEWHERE IN BETWEEN?

By Madeline C. Pinckert[297]

Introduction

On November 26, 2013, in Fort Worth, Texas, Marlise Muñoz was found collapsed on her kitchen floor by her husband after she had stopped breathing. Her husband, Erick Muñoz, resuscitated her and she was rushed by ambulance to John Peter Smith Hospital (JPSH). While Marlise was alive when she arrived at the hospital, she did not have a written medical directive nor was she able to communicate with hospital staff when they began life-sustaining treatment on her. According to court records, "[d]espite such treatment, Ms. Muñoz met the clinical criteria for brain death on November 28, 2013."[298]

While her husband "vehemently opposes any further medical treatment to be undertaken on the deceased body of his wife, Marlise Muñoz,"[299] the family and hospital became entrenched in an "emotionally charged national debate over end-of life care, abortion, and a Texas law that prohibits medical officials from withdrawing life support from a pregnant patient."[300] Marlise was 14-weeks pregnant when her unconscious body was brought to the hospital. There is a codified procedure allowing hospitals and physicians to follow advanced medical directives or power of attorney in cases of incompetent patients and patients unable to communicate.[301] Under the Texas *Advanced Directive Act*, "however, a person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient"[302] regardless of whether a directive or medical proxy exists. To satisfy this pregnancy exclusion, the staff at JPSH

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[296] Lawmakers Demand Stop Article, *supra* note 96 (quoting Illinois state Rep. Sara Feigenholtz).

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[298] Def.'s Brief in Resp. to Pl.'s Mot. to Compel at 3:1, *Munoz v. John Peter Smith Hospital*, No. 096-270080-14, 2014 WL 285056 (N.D. Tex. Jan. 23, 2014).

[299] Pl.'s Mot. to Compel Defs. to Remove Marlise Munoz from "Life Sustaining" Measures and Application for Unopposed Expedited Relief at 1:2, *Munoz v. John Peter Smith Hospital*, No. 096-017-270080-14, 2014 WL 285060 (N.D. Tex. Jan. 14, 2014).

[300] Manny Fernandez, *Judge Orders Hospital to Remove Pregnant Woman From Life Support*, New York Times, Jan. 24. 2014, at A1.

[301] Texas Health & Safety Code §166.038 reads in part: "(a) This section applies when an adult qualified patient has executed or issued a directive and is incompetent or otherwise mentally or physically incapable of communication. (b) If the adult qualified patient has designated a person to make a treatment decision as authorized by Section 166.032(c), the attending physician and the designated person may make a treatment decision in accordance with the declarant's directions."

[302] Tex. Health & Safety Code §166.049 (West 2013).

Return to Table of Contents

refused to follow the request of Muñoz's family to remove her from life support as "such withdrawal would cause the death of the unborn child,"[303] despite their own admission Muñoz was brain-dead and thus could no longer be a patient.[304]

Following a two-month legal battle, a Tarrant County judge held the hospital erred in its decision to keep then 22-weeks pregnant Muñoz on life support. The court held that she was legally dead and thus, the advance directive pregnancy exception was not applicable to her.[305] Interestingly, the decision to remove Muñoz from life support came shortly after medical records revealed that the fetus was not viable. An expert witness testified that the "fetus [was] distinctly abnormal," suffered from hydrocephalus (an accumulation of fluid in the brain cavities), a possible heart problem, and had lower extremities deformed to the extent gender could not be determined.[306]

As a matter of first impression in Texas, this scenario raises serious questions regarding the rights of families in heartbreaking cases like this: where does the autonomy of the family end and the right of the state to intervene on behalf of the unborn child begin? In a conservative state like Texas that applies the most restrictive pregnancy exclusions to the end of life-sustaining treatment,[307] would this case have been resolved differently if the fetus had not been found to be viable? And if the state has the right to keep a pregnant woman on life-sustaining treatment, does the family then have civil remedies available if they are financially burdened with the birth of an unwanted, "distinctly abnormal" or severely handicapped child as the result of the mother's incapacitation?

While a 2010 Study[308] (hereafter referred to "2010 BMC Medicine Study") states there have been only 30 cases of medically managed pregnant-brain dead women between 1982 and 2010, it appears this "unique" situation is becoming increasing more common as advances in medical technology change our conception of "life" and viability. While the 2010 BMC Medicine Study found "twelve viable infants were born and survived the neonatal period," there have been at least two other cases besides Muñoz's since 2012. For example, Christine Bolden of Muskegon, Michigan "gave birth" to 25- week old twins by C-section while on life support in May 2012.[309] Even more recently, the son of Robyn Benson in Victoria, British Columbia was delivered at 27 weeks after "growing normally."[310] Yet, unlike the cautionary tale of Marlise Muñoz, Robyn Benson's story differed for three important reasons. First, "in Muñoz's case, her husband wanted her taken off the ventilator, and [second] the hospital acknowledged the fetus she carried was not viable."[311] Lastly, though the Bensons had already collected more than $150,000 online to go towards "bills, baby supplies, day care, housing, food, transportation and an education" with the "Baby

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[303] Def.'s Brief in Resp. to Pl.'s Mot. to Compel at 3:1, *Munoz v. John Peter Smith Hospital*, No. 096-270080-14, 2014 WL 285056 (N.D. Tex. Jan. 23, 2014).

[304] Texas Health & Safety Code § 671.001 (Standard Used in Determining Death) reads in part "(a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions. (b) If artificial means of support preclude a determination that a person's spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, *there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease*") (emphasis added).

[305] Fernandez, supra note 3, at 2.

[306] Dana Ford, *Attorneys: Fetus of Pregnant, Brain-Dead Wife is 'Distinctly Abnormal,'* CNN, Jan. 24, 2014, http://www.cnn.com/2014/01/22/us/pregnant-life-support-texas/.

[307] Megan Greene & Leslie R. Wolfe, *Pregnancy Exclusions in State Living Will an Medical Proxy Statutes*, Center for Women Policy Studies: Reproductive Laws for the Twenty First Century Papers *1, 1 (2012) (stating Texas is one of 12 states that "automatically invalidates a women's advance directive if she is pregnant").

[308] Majid Esmaelizadeh et al., *One Life Ends, Another Begins: Management of a Brain-Dead Pregnant Mother-A Systematic Review,"* BMC Medicine, Nov. 2010, http://biomedcentral.com/1741-7015/8/74.

[309] *Brain Dead Mom Gives Birth to Twins While on Life Support*, CBS, May 4, 2012, http://www.cbsnews.com/news/brain-dead-mom-gives-birth-to-twins-while-on-life-support/.

[310] Ed Payne, *Doctors Keep Brain-Dead Pregnant Woman on Life Support Until Baby's Birth*, CNN, Feb. 4, 2014, http://www.cnn.com/2014/02/04/world/americas/canada-brain-dead-woman/.

[311] *Id.*

Return to Table of Contents

Iver Fund,"[312] the Muñozes faced financial uncertainty had their "distinctly abnormal" child actually been born.

To fully understand the legal backdrop of Muñoz's unique case, one must first have a clear comprehension of who constitutes a "patient" or "brain-dead" as defined by Texas statutes. While death is ingrained with cultural, social, and religious meaning, from a medical and legal lens, death is a definable event. The idea of *comá dépassé* ("a state beyond coma") was created in 1959.[313] But "brain death" was not introduced to the world until 1968, when a committee at Harvard Medical School created the classic definition of "irreversible coma as a new criterion for death."[314] The *Uniform Determination of Death Act* (hereafter "UDDA") approved in 1981 and adopted by 45 states further clarified the medical diagnosis.[315] According to the UDDA's definition, death is defined as "either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem."[316] Further, a determination of death "must be made in accordance with accepted medical practices."[317] Modeled after the UDDA, Texas law states, "the person is dead when, . . . according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease."[318] In a similar vein, "life-sustaining treatment" refers to treatment that, "sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support."[319] Thus, while Texas does not explicitly define "patient," by reading the statutes together, "life sustaining" and "brain–dead" are mutually exclusive terms. In other words, a person who has been declared "brain-dead" cannot, by definition, be on "life support" as that individual is medically and legally dead.[320] Moreover, brain death does not fall under an "irreversible condition" like a coma or permanent vegetative state that "without life sustaining treatment…is fatal" as death has already occurred.[321]

Similarly, to understand statutory rights and restrictions of pregnancy, the terms "fetus," "child," and "viability" must also be defined in the legal context. Yet, these terms cannot simply be defined in medical terms. Rather, an author's deliberate choice to use "baby" versus "fetus" go to the very heart of the abortion debate. Typically, in the pro-choice context, the medically accurate but emotionally sanitized "fetus" is the preferred lexicon.[322] But to further a pro-life agenda, words like "baby" and "unborn child" are meant to be emotionally charged even if medically inaccurate.[323] For example, under the Texas Penal

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[312] Paula Newton, *Brain-Dead Canadian Woman Dies After Son's Birth*, CNN, Feb. 12, 2014, http://www.cnn.com/2014/02/11/health/canada-brain-dead-pregnant-woman/.

[313] Lawrence O. Gostin, *Legal and Ethical Responsibilities Following Brain Death: The McMath and Munoz Cases*, JAMA Online http://jama.jamanetwork.com/article.aspx?articleid=1818922 E1, E1 (January 24, 2014) (citing Mollaret P, Goulon M. *Le comá dépassé (mémoire préliminaire).* Rev. Neural 101:3-5 (Paris 1959)).

[314] Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death. A definition of irreversible coma. JAMA. 1968; 205(6): 337-40.

[315] UDAA § 1, 12 U.L.A. 384 (Supp.1993); David C. Magnus et al., *Accepting Brain Death*, 370 New Eng. J. of Med. 889, 890-91 (March 6, 2014); Eddy R. Smith, *A Time to be Born and a Time to Die: Pregnancy and End-of-Life Care*, 50-APR Tenn. B.J. 28, 31(April, 2014).

[316] *Id.*

[317] *Id.* at 386.

[318] Tex. Health & Safety Code Ann. § 671.001(b) (West 1995).

[319] Tex. Health & Safety Code Ann. § 166.002 (West 2009).

[320] Daniel Sperling, *Maternal Brain Death*, 30 Am. J.L. & Med. 453, 478 (2004).

[321] *Id.*

[322] Keith Grady, *The Value of Life: Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. 2169 (1986)*, 10 Hamline L. Rev. 623, n 282 stating, "[t]he abortion conflict is characterized by bitter divisiveness, even in the terminology used to identify what is being aborted. The 'pro-life' group would use the 'unborn child' terminology, while 'pro-choice' groups would use the term 'viable fetus.'" (citing Kristen Luker, *Abortion & The Politics of Motherhood*, 62-65 (U Cal. Press 1984)).

[323] Samuel Calhoun, *"Partial-Birth Abortion" Is Not Abortion: Carhart II's Fundamental Misapplication of Roe*, 79 Miss. L.J. 775 (2010) ("Although using "fetus" and "baby"/"child" synonymously is also consistent with the Latin word, "fetus," which "simply means 'offspring' or 'unborn young,"' David K. DeWolf, Book Review/Essay, 26 GONZ. L. REV. 257, 259 n.10 (1991)

Code, an "individual" means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.[324] Thus in Texas, a "child" is created at the moment of conception and any discussion of "viability" is conspicuously absent from both the abortion and "pregnant patient" statutes.[325] In fact, the State's deeply conservative stance is further illustrated by the requirement to provide every pregnant woman with "color pictures representing the child's development" and "information on the possibility of the unborn child's survival" before an abortion can be performed.[326] In this article, the author may refer to "fetus," "unborn child," and "baby" interchangeably as states are not consistent in how they define child, fetus, and viability. When discussing states that suggest life is created at the moment of conception, the author will use the term "child" or "baby." In contrast, where a viability standard is used to define life, the term "fetus" will be utilized.

Given the huge emotional, financial, and physical constraints a handicapped child can place on a family above and beyond the experience of a normal pregnancy, this article will explore the potential legal ramifications of advanced directive pregnancy exclusions from both the perspective of constitutional law and public policy. In the Part I, this article will discuss the evolution of rights under the Fourteenth Amendment for mothers and unborn children, beginning with the landmark *Roe v. Wade* case. Following the establishment of abortion as a fundamental right, the Supreme Court narrowed a mother's rights and expanded those of the unborn child by redefining "viability" in *Planned Parenthood v. Casey*. Additionally, *Cruzan by Cruzan v. Director, Miss. Dept. of Health* fundamentally altered a patient's rights under medical directives, protecting the right to refuse life-sustaining treatment. Lastly, the decision in *Gonzales v. Carhart* represented a significant departure from the Supreme Court's previous abortion jurisprudence by banning intact dilation and evacuation (hereafter "D & E") abortions without an exception for the health and life of the pregnancy mother. This article will argue that the constitutional protections provided by *Roe v. Wade* and its progeny stand in conflict with advanced directives being invalidated by pregnancy.

In Part II, the article will explore the various treatments of advanced medical directive statutes and pregnancy exclusions by state. Notably, a woman's fundamental right to make decisions regarding family relationships, procreation, and maintaining autonomy over her body are directly implicated by the possible effect pregnancy may have on her desire to issue an advanced directive.[327] Arguably these choices are central to personal dignity and the right to privacy.[328] Moreover, a woman's "life and liberty" interests are intimately tied to her reproductive freedom. As such, a woman's constitutional rights are impermissibly denied when the state can override all chosen medical decisions simply because she is pregnant.[329] In this part, the article will explore the different types of advanced directives and how they are impacted by pregnancy depending upon jurisdiction. Currently, there are at least five different methods to apply advanced directives when a mother is expecting.[330] The spectrum ranges from an ultra-conservative stance that pregnancy automatically invalidates medical directives, to the liberal belief requiring a mother's explicit advanced directive to be followed regardless of pregnancy. Further, the great variance in methodology highlights the potential problems that arise under inconsistent treatment and ambiguous statutes.

In Part III, this article will explore the problems that arise from brain dead pregnancies under ambiguous advanced directive statutes. As the Marlise Muñoz case illustrates, there are significant civil and practical ramifications from ambiguous language in statutes that can determine life or death matters. There are four primary problems raised by ambiguous advanced directive statutes: (1) the State's interest in the unborn child's life may unduly burden the rights of the mother and family; (2) advanced directive statute ambiguities place undue burdens on hospitals and doctors to legally determine if a woman's preg-

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(quoting AMERICAN HERITAGE DICTIONARY 260 (1983)), some find it objectionable as revealing "hostility to the right Roe and Casey secured." *Gonzales v. Carhart*, 550 U.S. 124, 132, 186-87 (2007) (Ginsburg, J., dissenting)).

[324] Tex. Penal Code § 1.07(26) (West 2011).

[325] Tex. Health & Safety Code Ann. § 171.016 (West 2013) (regulating abortion); Tex. Health & Safety Code §166.049 (requiring "life-sustaining treatment" be given to pregnant patients).

[326] Tex. Health & Safety Code Ann. § 171.016(c) insists, "[t]he materials provided under this section must be objective and nonjudgmental and be designed to convey only accurate scientific information about the unborn child at the various gestational ages" (yet ignores that "child" at the prenatal stage is not scientifically accurate).

[327] Daniel Sperling, *Do Pregnant Women Have (Living) Will*?, 8 J. Health Care L. & Pol'y, 331, 342 (2005).

[328] *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 284 (1990).

[329] Sperling, supra note 30, at 342.

[330] Megan Greene & Leslie R. Wolfe, *Pregnancy Exclusions in State Living Will an Medical Proxy Statutes*, Center for Women Policy Studies: Reproductive Laws for the Twenty First Century Papers *1, 1 (2012).

Return to Table of Contents

nancy changes the decision making of whether she is a patient, who is alive and the fetus's viability, (3) mothers and families may have a lack of notice as to their respective rights under advanced directive statutes; and (4) ambiguities surrounding fetus viability may place importance of protecting the life of the fetus above the liberty rights of a brain-dead mother. To address these problems, the author proposes a new methodology in these unique situations.

In Part IV, this article will propose a new method for balancing the state's interest in the lives of unborn children and the family's right to autonomy and privacy. Namely, legislative clarification of medical definitions, consistency in hospital procedures and policies, and collaboration with individual families found in these difficult situations will create the proper balance of power to address the medical needs and emotional wants of pregnant patients and their unborn children. This article will discuss the financial ramifications of long term life-support for brain-dead patients, and propose two situations: either tort claims must be allowed in these cases; or families must be able to seek an injunction if the State insists on continuing life-sustaining treatment despite the mother's wishes to the contrary. Additionally, this part will discuss the legal, moral and ethical implications of state mandates on women's health. By addressing the possible right to life versus quality of life of an unborn child, this article will show that prioritizing a fetus's right to life at all costs is detrimental to both the family and society as a whole. Further, these types of laws create a philosophical slippery slope, evaluating the constitutional rights of pregnant women as a unique class of persons. More perversely, these laws not only discriminate against pregnant women, providing them different rights than non-pregnant women; but worse, unless the same restrictions are placed on males' advanced directives, pregnant women are additionally discriminated against due to their gender. Lastly, as a resolution to the current problems, this article will illustrate how these unfortunate scenarios would be improved under the new proposal of practice, policy, and procedure. Legislators, hospital staff and families must collaborate to protect both the state's interests in the lives of unborn children and the rights of the family because:

> As individuals – and just like fathers and men – mothers and women deserve to have their wishes regarding their liberty, including decisions about health, respected and followed. Their right to determine the course of their end-of-life care should be inviolate, unaffected by whether or not they may be pregnant . . . Using a dead woman's body as an incubator against her wishes (as interpreted by her family) should be of grave concern to everyone who cares for and about both women and our nation's moral health.[331]

I. THE EVOLUTION OF RIGHTS UNDER THE FOURTEENTH AMENDMENT FOR MOTHERS AND UNBORN CHILDREN.

A. *Roe v. Wade* –Established Abortion as a Fundamental Right.

The right to reproduce or the private decision not to, finds its constitutional roots under the right to privacy provided for, in part, by the Bill of Rights.[332] This right was further extended in the landmark 1973 Supreme Court Case, *Roe v. Wade*, in which the Court held a pregnant woman, has a fundamental privacy right, derived as a liberty interest under the Fourteenth Amendment, to obtain an abortion.[333] Although the right to privacy was found to be a fundamental under *Roe* and its progeny, the Court held this right must be balanced against the State's interests in the health of the pregnant woman and the "potential life" of her unborn child.[334] But these interests become compelling at different stages of pregnancy.[335] The State's interest in the health of the mother does not become "compelling," or strong enough to warrant regulation of the abortion procedure until the end of the first trimester, and until that time the decision to abort should be left entirely to the patient and her doctor.[336] The State has a right to intervene on the mother's behalf after the first trimester because at this point the risk associated with having an abor-

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[331] J.L. Ecker, *Death in Pregnancy – An American Tragedy*, 370 New Eng. J. of Med. 889, 890-91 (March 6, 2014).
[332] *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).
[333] 410 U.S. 113, 152-56 (1973).
[334] *Id.* at 155 n. 11.
[335] *Id.* at 162-64.
[336] *Id.* at 164.

tion are approximately the same as the risks associated with carrying the pregnancy to term.[337] On the other hand, the State's interest in the "potential life" of the fetus does not become compelling until the child is viable at approximately twenty-eight weeks gestation (i.e. capable of surviving outside the womb with or without medical assistance).[338] However, the State may not prohibit an abortion, even after a point of viability, if the procedure is necessary to preserve the pregnant mother's life or health.[339]

B. *Planned Parenthood of Southern Pennsylvania v. Casey* –Established "Undue Burden" Test.

The rule established in *Roe* was altered slightly by the plurality holding of *Planned Parenthood of Southern Pennsylvania v. Casey*, in which the Court did away with *Roe's* trimester framework.[340] The holding in *Casey* tactically downgraded the nature of the right recognized in *Roe* and instead adopted a new standard for evaluating regulations.[341] The Court held because the State has a "concurrent interest" in the potentially of life, it may implement measures "designed to ensure that the woman's choice is informed, so long as these measure do not place an undue burden on her right.[342] Further, under *Casey*, an abortion regulation is constitutional unless it imposes an "undue burden" on a woman's choice.[343] An "undue burden" exists if the questioned regulation "has the purpose or effect of placing a substantial obstacle in the path of the woman seeking an abortion of a nonviable fetus."[344] The Court provided some guidance as to what constitutes a "substantial obstacle" by invalidating a provision of the *Pennsylvania Abortion Control Act* of 1982, which required spousal notification prior to being able to obtain an abortion.[345] Nonetheless, the Court in *Casey* reaffirmed the determination of "viability" as set out in *Roe* that, [r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[346] However, due to advances in technology, the Court held a fetus *might* be considered viable before 23-weeks gestation instead of the previous 28-week bar set by *Roe*.[347] While the holding in *Casey* gave the State greater authority to regulate terminations throughout pregnancy, the State has no authority to restrict abortion before the point of viability.[348] Post-viability, the rule remained that the State may completely proscribe abortion, except where necessary to promote the life or health of the mother.[349]

The holdings of *Roe* and *Casey* were limited only to laws prohibiting and regulating abortion. Notably in *Roe*, the Court held that the unborn child was not a "person" within the meaning of the Fourteenth Amendment, and thus was afforded no constitutional rights in the context of abortions.[350] However, neither *Roe* nor *Casey* purported to address what authority the State had to define the legal status of unborn children outside termination procedures or whether the State could confer legal rights upon unborn children assuming they did not interfere with the "abortion liberty" established by *Roe*.[351] Moreover, apart from the regulation of abortion, the Court held nothing in *Roe* precluded the State from extending protection under the law to unborn children.[352] Despite *Roe's* refusal to recognize the fetus as a person, i.e. a human life, *Roe* and *Casey* stand for the proposition the State does have a compelling interest in the potential life of the fetus at least at the determination of viability.[353] Thus the issue is whether a pregnant patient's right to privacy and autonomy can ever be outweighed by the State's interest in potential life.

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[337] *Id.* at 163.
[338] *Id.* at 160 (The Court held that a "fetus becomes viable," when it is "potentially able to live outside the mother's womb, albeit with artificial aid).
[339] *Id.*
[340] 505 U.S. 833, 869-79 (1992).
[341] *Id.*
[342] Alexis Gregorian, *Post-Mortem Pregnancy: a Proposed Methodology for the Resolution of Conflicts Over Whether a Brian Dead Pregnant Woman Should be Maintained on Life-Sustaining Treatment*, 19 Annals Health L. 401, 416 (2010) (citing *Casey*, 505 U.S. at 878).
[343] *Casey*, 505 U.S. at 873-79.
[344] *Id.* at 877.
[345] *Id.* at 893-95.
[346] *Id.* at 879.
[347] *Id.*
[348] *Id.*
[349] *Id.*
[350] *Roe*, 410 U.S. at 156-59.
[351] *See Webster v. Reprod. Health Serv.*, 492 U.S. 490, 506 (1989) (finding "State law has offered protections to unborn children in tort and probate law" without contradiction *Roe*).
[352] *Id.*
[353] *Id.* at 164-65; *Casey*, 505 U.S. at 846.

Return to Table of Contents

C. *Gonzales v. Carhart* –Banned D & E Abortions Regardless of Health or Life of Mother.

Conversely, scholars have expressed alarm in response to the Supreme Court's *Gonzales v. Carhart* decision as it represents a major and "troubling" regression from the Court's previous abortion jurisprudence.[354] In *Carhart*, the Court upheld the federal *Partial Birth Abortion Ban Act* of 2003 (hereafter "PBABA"), which eliminated a procedure previously used during abortions.[355] More specifically, the Act banned intact D &E abortion without an exception for the life and health of the pregnant mother, was held not to constitute an "undue burden" on a woman's pre-viability right to terminate.[356] Significantly, "the dissent notes, the majority's argument uses new, dubious interpretations of state interests to justify abortion regulation."[357] Scholars have voiced adamant disapproval of the *Carhart* decision due to the multiple influences it may have on cases concerning a pregnant woman's right to refuse treatment:

> The decision expands the states interests that the Court recognized as justifying intrusion into women's medical treatment during pregnancy. The majority's reasoning also implicitly weakens one's right to informed consent in the context of medical decisions during pregnancy. Finally, the decision undermines the principle that a woman's health cannot be compromised to further the state interest in protecting fetal life.[358]

The decision in *Carhart* essentially undermined the principle under *Roe* and its progeny that women's health "must always be paramount in abortion regulation" and has "troubling implication for expanding state's ability to regulate" terminations.[359] The concern under *Carhart* is that in conjunction with statutes already placing restrictions on a mother's ability to effectuate an advanced directive, this holding will expand the justification for states to compel medical treatment for pregnant patients, incompetent or otherwise.[360]

D. *In re Quinlan* –Established Patients Have a Fundamental "Right to Die."

In *In re Quinlan*, the landmark "right to die" case, the Supreme Court of New Jersey expressly held the right to privacy is "broad enough to encompass a patient's decision to decline medical treatment in certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain condition."[361] *In re Quinlin* involved a family declining unwanted "life sustaining" medical treatment so that their daughter, Karen, could be allowed to die instead of being forced to remain in a permanent vegetative state.[362] The court held a right to privacy encompassed the right to refuse unwanted medical treatment, and balanced this right against the state's interest in preserv-

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[354] Margo Kaplan, *"A Special Class of Persons": Pregnant Women's Right to Refuse Medical Treatment after* Gonzales v. Carhart, 13 U. Pa. J. Con. L. 145, 146 (2010); Michael Ulrich, *With Child, Without Rights?: Restoring A Pregnant Woman's Right to Refuse Medical Treatment Thorough the HIV Lens*, 24 Yale J.L. & Feminism 303, 333-34 (2012) (stating, "[t]his dangerous precedent, which essentially creates a new state interest in protecting a pregnant woman from herself [based on the Court's "use of emotion and potential for regret"], can have larger implications outside of abortion jurisprudence by justifying the state's insistence on what it regards as the reasonable medical decision"); Sonia Sutter, *The Politics of Information; Informed Consent in Abortion and End-of-Life Decision Making*, 39 Am. J.L. &Med 7, 22, 34 (2013) ("[Professor Rebecca Dresser] and other commentators find it deeply problematic for a state to treat decisions that uniquely affect women so differently from other kinds of medical decisions that affect both sexes") (citing Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 Geo. Wash. L. Rev. 1599, 1602 (2008)); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 Duke J. Gender L. & Pol'y 223, 225 (2009); Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 Duke L.J.1641 (2008)).

[355] 550 U.S. 124 , 132, 168 (2007).

[356] *Id.* at 137. The Court in *Carhart* described intact D & E abortion as the following: "Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential in the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called 'serial' dilation. Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use 25 osmotic dilators. In an intact D & E procedure, the doctor extract the fetus in a way conducive to pulling out its entire body instead of ripping it apart" (citations omitted).

[357] Kaplan, supra note 57, at 146 (citing *Carhart*, 550 U.S. at 132, 168 (dissent)).

[358] *Id.* at 176.

[359] *Id.* at 146.

[360] *Id.* at 176.

[361] Kristeena L. Johnson, *Forcing Life on the Dead: Why the Pregnancy Exemption Clause of the Kentucky Living Will Directive Act is Unconstitutional*, 100 Ky. L.J. 209, 213 (2012) (citing *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976)).

[362] Id. at 647.

ing life.[363] Given that the degree of bodily invasion was so great and the prognosis so poor, the Court ruled that Karen should be removed from the ventilator as "the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."[364]

E. *Cruzan by Cruzan v. Director, Missouri Department of Health* –Established "Clear and Convincing" Test.

Following state Court decisions like *Quinlin*, the Supreme Court decided in *Cruzan by Cruzan v. Director, Missouri Department of Health*, by a 5-4 vote that it was permissible for a state trial court to require "clear and convincing evidence" of a patient's wishes before life-sustaining treatment could be withdrawn from an incompetent person.[365] Nancy Cruzan suffered from brain damage due to oxygen deprivation following a traumatic car accident.[366] While Cruzan's parents were unable to meet the "clear and convincing" burden of proof, they testified their daughter had verbally expressed before her accident that she would not want to be on life support in a permanent vegetative state.[367] The Court reasoned a constitutionally protected liberty interest under the Due Process Clause existed allowing unwanted nutrition and hydration to be removed even if Cruzan's "life depended on it."[368] Because the Court held the right to refuse medical treatment is not a fundamental or absolute right, one of four compelling and countervailing state interests may be strong enough to override a patient's right to refuse treatment: (1) the prevention of suicide; (2) the preservation of life; (3) the protection of third parties; and (4) the preservation of the ethical integrity of the medical profession.[369] While the protection of third parties arguably would support compelling medical treatment for pregnant patients, this exception has only been applied in very limited cases, as the State cannot compel a person to undergo medical treatment for the benefit of another person, even if this act would save the life of the third party.[370] This proposition is proven by the finding in *McFall v. Shimp* that a court cannot require a man to donate bone marrow even if it would save his cousin's life.[371] Surprisingly, despite the lengthy evolution of judicially protected patient rights, the court in *McFall* expressed the public policy principle of these cases best more than thirty-five years ago, "[f]or our laws to compel [a] defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits…"[372]

II. TREATMENT OF ADVANCED DIRECTIVE STATUTES AND PREGNANCY EXCLUSIONS BY STATE.

After the landmark Supreme Court decision in *Cruzan*, allowing incompetent patients to refuse medical treatment, the importance of advanced directives became a focal point of patients' right issues. Currently, every state in the United States has a statute regarding an individual's right to create an advanced directive.[373] In general, advanced directives are legal documents that allow a person to declare his or her wishes regarding the scope and duration of life-sustaining medical treatment before the treatment is needed or the person has become incapacitated.[374] An individual is able to express within the document how much or little of a medical intervention he or she wants under certain conditions.[375] Moreover, "they pro-

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[363] *Id.* at 664.
[364] John Mahoney, *Death with Dignity: Is There an Exception for Pregnant Women?*, 57 UMKC L. Rev. 221, 223 (1989) (citing *Quinlin*, 355 A.2d at 664).
[365] *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 284 (1990).
[366] *Id.* at 279.
[367] *Id.*
[368] *Id.*
[369] Kaplan, supra note 57, at 146 (citing *Cruzan*, 497 U.S. at 271).
[370] Kaplan, supra note 57, at 164 (citing FURROW ET AL., supra note 76, § 19-2 ("The law does not recognize any circumstance when a person must undergo a medical procedure for the benefit of another person.")); *See also* Cheryl E. Amana, *Drugs, AIDS and Reproductive Choice: Material –State Conflict Continues into the Millennium*, 28 N.C CENT. L.J 32, 57 (2005) ("A woman should not be treated differently based on her pregnancy, but that does not mean that she will not be")).
[371] 10 Pa. D. & C3d 90, 91 (1978).
[372] *Id.*
[373] Donna A. Casey & David M. Walker, *The Clinical Realities of Advance Directives*, 17 Widener L. Rev. 429, 430 (2011) (citing Daniel Hickey, *The Disutility of Advance Directives: We Know the Problems, But Are There Solutions?*, 36 J. Health L. 455, 455 (2003)).
[374] *Id.* at 30 (citing Gregorian, supra note 37, at 412).
[375] *Id.*

Return to Table of Contents

vide a mechanism that advances the ethical principles of individual autonomy, self-determination, and bodily integrity."[376]

There are two primary types of documents that constitute advanced directives: living wills, also referred to as treatment directives, and durable powers of attorney, known as proxy directives.[377] Living wills are documents that instruct health care providers about that individual's preferences for end-of-life treatment.[378] It is important to note that the more specific these instructions are, the more protection you are afforded as a general directive "may not be enough to protect you from treatment you may not wish to receive because of medical conditions not specifically accounted for in your living will."[379] Scholars theorize that advance directives, particularly living wills have "three important purposes:"

> First, by issuing an advanced directive, an individual is exercising her control over health care decisions concerning her body and state of health. Validating an advanced directive is giving respect to the parent's prior wishes and to her right of self determination, which does not extinguish should the signor of the advanced directive become incompetent. However, advanced directives also have an important procedural role: they prevent the need to go to court whenever a problem occurs as to what the patient would have decided in the relevant case had she had the opportunity to do so. Just as important, they provide physicians with immunity from civil and criminal liability by offering solutions that reside with the patient, even when incompetent.[380]

In contrast, durable powers of attorney allow for a named individual to make decisions on behalf of the patient once that patient is no longer able to make the decisions him/herself.[381] But, to be valid, the appropriate form must be completed to designate a proxy, who may be any adult, not just a family member, and precludes the patient's doctor from acting in this role.[382] Following *Cruzan*, in 1991 Congress passed the *Patient Self-Determination Act*, which requires nursing homes, hospices, and home health care agencies receiving federal Medicare and Medicaid funds to inform all adult patients of their constitutional right to prepare an advanced directive.[383] Yet, as of 1999, only "[a]pproximately 20% of Americans and 50% of severely ill patients had advance directives.[384] Scholars estimate that by 2006, 36% of Americans implemented a living will, "despite the fact that [74%] of people believe it is very important to have such a document."[385] Although these documents have been promoted by public health agencies and endorsed by Congress, there appears to be no positive correlation between the government's attempts to increase awareness of advance directives and their implementation by individuals.[386]

While all states have advanced directive statutes, only 31 states contemplate the validity of the advanced directive when the patient is pregnant.[387] Each of these statutes has specific guidelines as to whether and when an advanced directive will be applicable. These pregnancy clauses or "pregnancy exclusions" attempt to create a balance between the constitutional rights of an incompetent pregnant patient and the State's interest in protecting the life of the fetus.[388] Yet, there is no national conformity as how to

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[376] Daniel Sperling, *Do Pregnant Women Have (Living) Will*?, 8 J. Health Care L. & Pol'y, 331, 331 (2005).
[377] *Id.*
[378] *Id.* at 331 (citing Ed Newman, *Ethical Issues in Terminal Health care, Part Four: Patients Have Rights, but Doctors Have Rights, Too* (1992)).
[379] Nicole M. Saitta & Samuel D. Hodge, *Wrongful Prolongation of Life-A Cause of Action That Has Not Gained Traction Even Though a Physician Has Disregarded a "Do Not Resuscitate" Order*, 30 Temp. J. Sci. Tech. & Envtl. L. 222, 223 (2011).
[380] Sperling, supra note 79, at 331 (citations omitted).
[381] Casey & Walker, supra note 76, at 430.
[382] Saitta & Hodge, supra note 82, at 223.
[383] Greene & Wolfe, supra note 33, at *2.
[384] *Id.* (citing Kellen F. Rodriguez, *Suing Health Care Providers for Saving Lives*, 20 J. Legal Med. 1, 2 (1999)
[385] Casey & Walker, supra note 69, at 430 (citing Ben Kusmic, Note, *Swing Low Sweet Chariot: Abandoning the Disinterested Witness Requirement for Advance Directives*, 32 J.L & Med. 93, 97 (2006).
[386] *Id.*
[387] Greene & Wolfe, supra note 33, at *1; Kristeena L. Johnson, supra note 60, at 210; Daniel Sperling, supra note 72, at 333-36; Amy Lynn Jerdee, *Breaking Through the Silence: Minnesota's Pregnancy Presumption and the Right to Refuse Medical Treatment*, 84 Minn. L. Rev. 971, 977-81 (2000).
[388] Daniel Sperling, supra note 79, at 333-34.

apply advanced directives in these situations as the requirements in each statute differ from state to state. In a 2012 study completed by the *Center For Women Policy Studies* ("2012 CWPS Study"), the center found the 31 states with pregnancy exclusions in their advanced directive statutes could be placed in five general categories: (1) pregnancy automatically invalidates an advanced directive; (2) pregnancy exclusions are similar to those in the Model *Uniform Rights of the Terminally Ill Act;* (3) the viability standard determines enforceability of advanced directive; (4) advance directive statutes are silent in regards to pregnancy; (5) explicit advanced directives are followed regardless of pregnancy.[389]

A. Pregnancy Automatically Invalidates an Advanced Directive.

Currently thirteen state statutes, including Texas, automatically invalidate an advanced directive if the patient is pregnant, regardless of the gestational age of the fetus (Alabama, Connecticut, Idaho, Indiana, Kansas, Kentucky, Michigan, Missouri, South Carolina, Texas, Utah, Washington, and Wisconsin).[390] These states have the most restrictive pregnancy exclusion statutes, requiring pregnant patients to remain on life-sustaining treatment until she gives birth.[391] These ultra-conservative statutes mandate a total disregard of an advanced directive during a patient's entire pregnancy, despite the mother or family's wishes. Further, none of these statutes make an exception for patients who will be caused continuous and severe pain or who will be physically harmed by being forced to receive life-sustaining treatment.[392] Moreover, the 2012 CWPS Study theorized these statutes directly violate the undue burden test of *Casey* as these laws wholly deny a woman's right to abortion, "whether the fetus is developed to 22 weeks or simply two days."[393] Additionally, the study found these statutes have two effects: (1) pregnant patients rendered incompetent cannot communicate their choice to have an abortion, which would be perfectly legal in other circumstances and; (2) women capable of communicating their choice are also ignored as their right to abortion is extinguished while on life-sustaining treatment.[394] Thus, under these statutes, a pregnant woman can never obtain an abortion once on life-support.

B. Pregnancy Exclusions are Similar to those in the Model *Uniform Rights of the Terminally Ill Act.*

In an attempt to create uniformity among state laws, the National Conference of Commissioners on Uniform State Laws is responsible for drafting model legislation that serve as statutory guidelines for the states. Specifically, the Commissioners drafted the *Uniform Rights of the Terminally Ill Act* ("URTIA"), which states, "life sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with the continued applications of life-sustaining treatment."[395] However, the URTIA only covers living wills and only applies to situations where a patient has a terminal condition, not where a mother is in a permanently comatose or vegetative state.[396] Namely, the UTRIA requires terminally ill pregnant patients to be given life-sustaining treatment if it is "probable" the fetus will develop to the stage of "live birth," regardless of woman's expressed wishes to the contrary.[397] Thus, in the fourteen states that follow the URTIA, a patient's right to an abortion is destroyed at the point physicians determine a "live birth" is probable (Alaska, Arizona, Arkansas, Illinois, Iowa, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Pennsylvania, Rhode Island, and South Dakota).[398] In addi-

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[389] Greene & Wolfe, supra note 33, at *3-5.

[390] *Id.* at 3. Alabama, Ala. Code §22-8A-4(a) (West 2014); Connecticut, Conn. Gen. Stat. Ann. § 19a-574 (West 2014); Idaho, Idaho Code § 16-36-48(d) (West 2013); Kansas, Kan. Stat. § 65- 28,103(a)(4) (1992); Kentucky, Ky. Rev. Stat. § 311.629 (West 2013); Michigan, Mich. Comp. Laws § 700.496(7) (c) (Supp. 1994); Missouri, Mo. Stat. § 459.025 (Vernon 1992); South Carolina, S.C. Code §44-77-70 (West 2013); Texas, Tex. Health & Safety Code §166.049 (West 2001 & Supp. 2004); Utah, Utah Code §75-2-1109 (1993); Washington, Wash. Rev. Code. § 70.122.030(1) (c) (West 1992 & Supp. 1994); Wisconsin, Wis. Stat. §154.03 (West 1997 & Supp. 2004).

[391] *Id.*

[392] *Id.*

[393] *Id.* at 5.

[394] *Id.*

[395] *Id.* at 2.

[396] *Id.*

[397] *Id.* at 4.

[398] *Id.* at 3. Alaska, Alaska Stat. § 13.52.055 (West 2014); Arizona, Ariz. Rev. Stat. § 36-3262 (West 2003 & Supp. 2004); Arkansas, Ark. Code § 20-17-206 (Michie 2013); Illinois, 755 ILL. COMP. STAT. ANN. 35/3(c) (West 1992 & Supp. 2004); Iowa, Iowa Code § 144A.6(2) (West 1989); Montana, Mont. Code § 50-9-106 (2003); Nebraska, Neb. Rev. Stat. § 20-408 (Michie 1997); Nevada, Nev. Rev. Stat. § 449.624 (Michie 2000); New Hampshire, N.H. Rev. Stat. § 137-H:14 (1996); North Dakota, N.D. Cent. Code § 23-06.4-03 (2002); Ohio, Ohio Rev. Code §§ 1337.13, 1337.15, 1337.17, 2133.06, 2133.08 (Anderson 2002

tion to the reasonable probability of a live birth requirement, the New Hampshire, North Dakota, Pennsylvania and South Dakota statutes also require the assurance that physical harm or prolonged severe pain to a pregnant patient can be alleviated.[399]

C. The Viability Standard Determines Enforceability of an Advanced Directive.

Currently four states use a viability standard to determine whether an advanced directive is enforceable (Colorado, Delaware, Florida, and Georgia).[400] Specifically, Colorado requires fetal viability before an advanced directive can be voided.[401] If viability is found, "the declaration shall be given no force or effect until the patient is no longer pregnant."[402] Under Delaware law, "[a] life-sustaining procedure may not be withheld or withdrawn from a patient known to be pregnant, so long as it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life-sustaining procedure."[403] Florida defines "viability" as the point "when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb."[404] However in Florida, the mother's health and life "constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict."[405] Lastly, Georgia requires that the fetus be non-viable and the mother must have expressly addressed in her advanced directive that the directive should be carried out if the fetus is not viable.[406] Moreover, if both of these criteria are not met, an advanced directive stating the mother should be removed from life-support will be ignored.[407]

D. Advance Directive Statutes are Silent in Regards to Pregnancy.

Although every state has an advanced directive statute, fourteen states lack statutory language stating whether being pregnant will affect a directive's validity (California, Hawaii, Louisiana, Maine, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregano, Tennessee, Virginia, West Virginia, and Wyoming; and the District of Columbia).[408] In these states, the courts may decide how to proceed. Yet, compelling or withdrawing medical treatment by court order can take a significant amount of time (as seen in the Marlise Muñoz case). Moreover, scholars argue the money wasted in time-consuming and expensive litigation could be better-spent educating patients and providing treatments that are desired.[409] However, most states do have "conscience clauses" even if the statute is otherwise silent on the issue, allowing medical professional and institutions to choose not to withdraw life-sustaining treatment.[410] Particularly, Hawaii's advanced directive statute provides:

& Supp. 2003); Pennsylvania, 20 Pa. Cons. Stat. § 5414 (West Supp. 2004); Rhode Island, R.I. Gen. Laws § 23-4.11-6 (1996); South Dakota, S.D. Codified Laws § 34-12D-10 (Michie 1994).

[399] Id. at 4.

[400] *Id.* Colorado, Colo. Rev. Stat. §15-18-104 (West 1997 & Supp. 2004); Delaware, Del. Code tit. 16, § 2503(j) (West 2003); Florida, Fla. Stat. § 765.113 (West 1997 & Supp. 2005); Georgia, Ga. Code § 31-32-9(a)(1) (West 2013).

[401] Colo. Rev. Stat. §15-18-104 (West 1997 & Supp. 2004).

[402] *Id.*

[403] Del. Code tit. 16, § 2503(j) (2003).

[404] Fla. Stat. § 390.0111 (West 2013).

[405] *Id.*

[406] Ga. Code § 31-32-9(West 2007).

[407] *Id.*

[408] Greene & Wolfe, supra note 33, at *4. California, Cal. Prob. Code § 4670-8 (West 1991 & Supp. 2005); Hawaii, Haw. Rev. Stat. § 327E-3 (West 2004) (repealed 1999); Louisiana, La. Rev. Stat. §§ 40:1299.58.1 to .10 (West 1992); Maine, ME. Rev. Stat. tit. 18-A, §§ 5-701 to -714 (West Supp. 1993); Massachusetts, Mass. Gen. Laws ch. 201D, §§ 1-17 (West Supp. 1994); Mississippi, Miss. Code §§ 4141-101 to -121 (1993); New Mexico, N.M. Stat. §§ 24-7-1 to -10 (Michie 1991); New York, N.Y. Pub. Health Laws §§ 2980-2994 (McKinney 1993); North Carolina, N.C. Gen. Stat. §§ 90-320 to -323 (1993); Oregon, Or. Rev. Stat. §§ 127.605 to .650 (1989 & Supp. 1994); Tennessee, Tenn. Code §§ 32-11-101 to -112 (Supp. 1994); Virginia, Va. Code §§ 54.1-2981 to -2993 (Michie 1991 & Supp. 1994); West Virginia, W. Va. Code §§16-30B-1 to -16 (Supp. 1994); Wyoming, Wyo. Stat. §§35-22-101 to -109 (1994); District of Columbia, D.C. Code §§ 6-2421 to -2430 (1989).

[409] Marguerite A. Driessen, *Avoiding the Melissa Rowland Dilemma: Why Disobeying a Doctor Should not be a Crime*, 10 Mich. St. U. J. Med. & L. *1, 54 (2006) (discusses the criminal prosecution and forced medical treatment of pregnant women based on drug abuse, mental illness and refusal to undergo medical treatment while pregnant. The author suggests, "[r]ather than spending money on costly criminal actions based on novel enforcement theories that at the end of the day cause more harm that they initiated to prevent, the funds should be put into providing prenatal care, education services, and drug treatment").

[410] *Id.*

Return to Table of Contents

> A health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy of the institution, which is expressly based on reasons of conscience and if the policy was timely communicated to the patient, or to a person then authorized to make health-care decisions for the patient.[411]

Thus, judicial and medical interpretation of statutes that do not directly address the validity of advanced directives during pregnancy arguably create uncertainty in treatment of patients, frustrating the purpose of advanced directives and the wishes of the families involved.

E. Explicit Advanced Directives are Followed Regardless of Pregnancy.

Lastly, five states guarantee a patient's wishes regarding pregnancy will be followed if a mother expressly addressed the issue in her advanced directive (Maryland, Minnesota, New Jersey, Oklahoma, and Vermont).[412] This liberal stance respects a mother's right to control her body and grants patients the greatest level of autonomy. Further, these statutes explain that a pregnancy could complicate the validity of an advanced directive and provide women with a method to assure their wishes will be followed.[413] This approach acknowledges the interest of the state in the potential fetal life, while honoring the mother's right to withdraw treatment. It also encourages doctors and hospitals to discuss the medical possibility with women who are or may become pregnant. For example, Minnesota created a rebuttal presumption that treatment should be continued if a patient is pregnant but, "[t]his presumption is negated by health care directive provisions . . . or . . . in the absence of such provisions, by clear and convincing evidence that the patient's wishes were to the contrary."[414]

Similarly, Vermont's statute expressly provides, "(a) [a]n adult may do any or all of the following in an advanced directive: (8) direct which life sustaining treatment the principal would desire or not desire if the principal is pregnant at the time an advance directive becomes effective."[415] Moreover, Vermont expands the rights of patients by providing that an absence of an advanced directive or explicit wishes (i.e. covering pregnancy) "shall have no effect on determining the principal's intent or wishes regarding health care or any other matter."[416] Additionally, most of the statutes in this category provide sample forms allowing mothers to expressly state what type of medical treatments they wish to receive if pregnant.[417] Specifically, Maryland provides a sample advanced directive that states, "F. In case of pregnancy: (optional, for women of child-bearing years only: form valid if left blank) If I am pregnant, my decision concerning life-sustaining procedures shall be modified as follows:"[418] States that allow a woman's express instructions to be followed regardless of pregnancy provide the greatest clarity for health care providers and patients, allowing for uniform results based on the unambiguous language of the statute. Thus, this statutory method creates a proper balance between the mother's autonomy and privacy and the state's interest in protecting the life of the fetus. Because of the wide variety of legislative treatment of advanced directives when a patient is pregnant, these often vague and complex legislative schemes pose many troubling issues for the rights and health of women.

III. PROBLEMS ARISING FROM BRAIN-DEAD PREGNANCIES UNDER AMBIGUOUS ADVANCED DIRECTIVE STATUTES.

The recent and dramatic case of Marlise Muñoz illustrates the troubling legal conflicts and public policy issues that arise from misapplied or ambiguous advanced directive statutes. Specifically, legislative definitions of "probability of live birth," "viability," and even "patient" are incredibly vague, and highly susceptible to widely inconsistent application. Namely, there are four primary problems raised by vague and ambiguous advanced directive statues: (1) the State's interest in the potential life of the fetus may unduly burden the rights of the mother and family; (2) advanced directive statute ambiguities place undue

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[411] Hawaii, Haw. Rev. Stat. § 327E-7 (West 2013).
[412] Greene & Wolfe, supra note 33, at *4-5. Maryland, Md. Code, Health-Gen. § 5-603(F) (West 2014); Minn. Stat. §145C.10(g) (West 1999 & Supp. 2004); New Jersey, N.J. Stat. Ann. § 26:2H-56 (West 1992); Oklahoma, Okla. Stat. tit. 63, § 3101.8(c) (West 2006); Vermont, Vt. Stat.. tit. 18, § 9702(a)(8) (West 2010).
[413] *Id.*
[414] Minn. Stat. §145C.10(g) (West 1999 & Supp. 2004).
[415] Vermont, Vt. Stat.. tit. 18, § 9702(a)(8) (West 2010).
[416] Vermont, Vt. Stat.. tit. 18, § 9702(b) (West 2010).
[417] Greene & Wolfe, supra note 32, at *5.
[418] Md. Code, Health-Gen. § 5-603 (F) (West 2014).

burdens on hospitals and doctors to legally determine if a woman's pregnancy changes the decision making of whether she is a patient, who is alive and the fetus's viability, (3) mothers and families may have a lack of notice as to their respective rights under advanced directive statutes; and (4) these statutes may be misapplied, placing the protection of potential fetal life above the liberty rights of a brain-dead mother. More importantly, these problems go the core of this debate, namely who is ultimately responsible for the life of an unborn child in these difficult situations? Neither doctors, hospitals, nor the legislature should simply assume that a pregnant patient would want to continue the pregnancy under the circumstances as:

> Even if in life and health she joyfully and willingly assented to the pregnancy, we cannot assume that now, under very different circumstances, she would desire intensive support of her cadaver to achieve that end. While she might have wanted, for example, to bring [another] child into a close and loving two-parent family, she might not at all [have] wanted to burden with [another] child a grieving single parent who is already overwhelmed by the care of the [children] who exist. Nor would she necessarily have wanted to produce a motherless child particularly if the father's ability and willingness to rear the child [given the circumstances] can't be counted on.[419]

More to the point, scholars argue when analyzing these situations the parties should remember that it all starts and ends with the mother, whose wishes and rights are paramount to those of her unborn child.[420] For this reason, in Part IV, the author will propose a new three-prong approach to address the primary problems under the current system and provide the proper balance of power to address the medical needs and emotional wants of pregnant patients and their unborn children.

A. State's Interest in Fetal Life May Unduly Burden Rights of Mother and Family.

While all states have come as far as having an advanced directive statute, the breadth of terms and definitions provided by these statutes create uncertainty for the treatment of pregnant patients and may unjustly expand the State's ability to intervene for the sake of the unborn child. Notably, statutes that automatically invalidate an advanced directive when the patient is pregnant and compel life-sustaining treatment be given ignore Supreme Court precedent under the guise of "fetal life."[421] Similarly, a mother's rights are unduly burdened in states following the UTRIA requirement that life-sustaining treatment to be given to pregnant patients so long as it is "probable the fetus will develop to the point of live birth with the continued life-sustaining treatment."[422] The term "probable live birth" is impermissibly vague and allows the State to argue this encompasses the entire duration of the pregnancy as long as the woman remains on life-support. This encroachment on a mother's right is analogous to the pregnancy exclusions that automatically invalidate advanced directives. Arguably similar to the Marlise Muñoz case, no doctor, hospital or legislature can determine with medical certainty if or when a fetus will reach a development stage ensuring a live birth is "probable."[423]

In the same vein, states that use the viability standard threatened the reliability of treatment as the point of "viability" has yet to be defined by the Court or legislature.[424] Given advances in medical technology, the Supreme Court in *Casey* stated a fetus may possibly reach a point of "viability" before 23-weeks, but no precise legal definition exists as to when this point occurs.[425] Moreover, the definition of "viability" is fluid and widely debated within both political and medical communities. Thus, such a vague

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[419] Sperling, supra note 23, at 490 (quoting Hilde Lindemann Nelson, *The Architect and the Bee: Some Reflections on Postmortem Pregnancy*, 8 Bioethics 247, 259 (1994)).

[420] *Id.* at 500. (quoting Judith Javier Thomas, *A Defense of Abortion*, 5th ed. Contemporary Issues in Bioethics 202, 209 (1999) (stating "[t]he mother and the unborn child are not like two tenants in a small house, which has, by an unfortunate mistake, been rented to both: the mother owns the house")).

[421] J.L. Ecker, supra note 34, at 889 (referencing Def.'s Brief in Resp. to Pl.'s Mot. to Compel at 3:1, *Munoz v. John Peter Smith Hospital*, No. 096-270080-14, 2014 WL 285056 (N.D. Tex. Jan. 23, 2014)) (Stating the law "was enacted to protect the unborn child against the wishes of a decision maker who would terminate the child's life along with the mother's")); *Roe*, supra note 49, at 156 (stating that a fetus is afforded no constitutional rights in the context of abortions (and by analogy termination by withdrawal of life-sustaining treatment)).

[422] Greene & Wolfe, supra note 33, at *6.

[423] *Id.*

[424] *Casey*, supra notes 45-49, at 879.

[425] *Id.*

standard is susceptible to personal interpretation by both treating physicians and governmental representatives when faced with situations like that of Muñoz.

In states that impermissibly invalidate a woman's advanced directive based on pregnancy, the potential for state intrusion is equally troubling as the fate' of a mother's rights lies squarely in the hands of the judicial system. Specifically, there have been several cases in which women have tried to proactively bring this issue before the courts.[426] However, these cases have ignored the constitutional questions pregnancy exclusion raise, as all the cases were dismissed for lack of standing.[427] Notably, in *University Health Service v. Piazzi*, a Georgia court granted a hospital's petition to keep a brain-dead pregnancy woman on life support until the fetus could be delivered, over the objections of her husband and family.[428] Donna Piazzi had not drafted a living will or advanced directive expressing her intentions in such a situation. Furthermore, the court found Piazzi would have lacked the power to terminate life-sustaining treatment even if she had had a living will in place.[429] The Court came to the disturbing conclusion that the privacy rights of the mother were extinguished when she became brain dead, justifying the State's insistence that her cadaver remain on life-support until the birth of her child.[430] Despite Georgia's public policy requiring the maintenance of life-sustaining treatments so long as a reasonable probability exists that the fetus can develop and survive (which was the reasoning behind the court's decision) the fetus nevertheless died of multiple organ failure less than forty-eight hours after delivery.[431]

In contrast to expansive interpretation of state rights by the court in *Piazzi*, two other courts have dismissed claims based on similar pregnancy exclusions clauses for lack of justiciability. In *DiNino v. Gorton*,[432] JoAnn DiNino sued the state of Washington and sought a declaratory judgment that her advanced directive was valid and enforceable, even if she were pregnant; arguing the state law invalidating a directive during pregnancy was unconstitutional.[433] While the trial court held the statute violated DiNino's constitutional right to privacy as it interfered with her ability to make reproductive decisions prior to viability, the Washington Supreme Court reversed the decision.[434] Instead, the Supreme Court held the case did not present justiciable issues, but rather presented a "purely hypothetical and speculative controversy" as DiNino was neither terminally ill nor pregnant at the time of the suit.[435] However the dissent found the majority's finding of non-justiciability illogical and would have instead allowed the case to be heard.[436]

Similarly, in *Gabrynowicz v. Heitkamp*,[437] the court dismissed a woman's claim challenging the constitutionality of her state's pregnancy exclusion for being non-justiciable as she was neither pregnant nor suffering from a terminal condition at the time of the case.[438] The plaintiffs were husband and wife, hoping to execute a living will and durable power of attorney for her husband that would allow the wife's wishes to be followed regardless of a pregnancy. Specifically, the couple argued that North Dakota's pregnancy clauses are unconstitutional because they: (1) impose undue burdens on the right to make medical decisions and terminate pregnancy under the First, Fourth, Ninth, and Fourteenth Amendments; (2) deprive women of bodily integrity and liberty without due process under the Fourteenth Amendment; (3)

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[426] Sperling, supra note 23, at 336-40.
[427] *Id.* (In these cases, the woman lacked standing because either she was not pregnant, or she was not terminally ill, and was therefore was not injured by existing law).
[428] *Univ. Health Servs., Inc. v. Piazzi*, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986)
[429] *Id.*
[430] *Id.* The court stated, "[t]he privacy rights of the mother are not factor in this case, because the mother is dead as defined by Georgia law . . . and the United States Supreme Court decisions upholding the rights of women to abort non-viable fetuses are inapplicable because those decisions are based on the mother's right of privacy, which was extinguished upon the brain death of Donna Piazzi."
[431] *Id.*
[432] 684 P.2d 1297, 1291-1301 (Wash. 1984) (en banc).
[433] *Id.* at 1299.
[434] *Id.* at 1299-1300.
[435] *Id.* at 1300.
[436] *Id.* at 1301 (Justice Dimmick's dissenting opinion in part read, "[b]y the majority's reasoning, a woman must be pregnant and terminally ill before the issue is ripe for determination. Whatever the impact of the [the law] in that circumstance, a woman whose directive will then be 'justiciable' will never benefit from a ruling on the matter. In fact, the case would run a very real danger of being declared mot before a judicial decision could be made. And, if in its discretion, the court choses to address the issues on mooted facts, would that determination be based on any less speculation that a determination under the circumstances now before us?").
[437] 904 F. Supp. 1061, 1062-43 (N.D. 1995).
[438] *Id.* at 1064

Return to Table of Contents

discriminate on the basis of gender in violation of the equal protection clause of the Fourteenth Amendment; (4) impose the State's policy protecting fetal life in violation of a woman's First and Fourteenth Amendment right to make an expression of belief; and, (5) violate freedom of religion under the First and Fourteenth Amendments.[439]

B. Statute Ambiguities Place Undue Burdens on Hospitals and Doctors.

In order to treat a patient, incompetent, pregnant, or otherwise, the treating physician must have consent.[440] Consent is a fundamental doctrine in law and medical ethics that allows medical intervention only where the consent of the individual (or authorized representative) has been obtained.[441] Notably, "the requirement of consent derives from the 'greatest right' – the right to inviolability of a person and to bodily integrity."[442] Furthermore, consent can be either express or implied based on the circumstances.[443] Express consent can be given through a directive or power of attorney signed before the patient becomes incompetent.[444] Implied consent, on the other hand, is more complex and often hard to prove.[445] Examples of implied consent include procedures that will be done unless the patient or next of kin objects, conversations before the procedure that imply the patient is consenting to the treatment, and medical emergencies in which it is assumed the patient would have consented had he or she been able to.[446] Therefore, barring an emergency, a treating physician must acquire express or implied consent from any patient before providing treatment and care.[447] For this reason, many patients chose to have an advanced directive in place to ensure the boundaries of their consent are clear if they are ever no longer able to communicate their wishes directly. However, even if a woman had the forethought to complete an advanced directive, it is highly unlikely she contemplated becoming incompetent while pregnant and directly addressed this issue in her written directive.[448] Because consent is an essential requirement of treatment, it should not be assumed that an incompetent pregnant patient would have chosen to continue a pregnancy just because her directive is silent on the issue or she has no directive in place.[449] Similarly, it should not be assumed a pregnant woman would have consented to continued life-sustaining treatment.[450] Given the minuet possibility of these scenarios and the vast range of statutory pregnancy exclusion requirements imposed by state statutes, physicians should defer to the wishes of the families in these cases.[451] Otherwise, physicians and hospitals may be placed at an intersection of competing interests. Like in the case of Marlise Muñoz, families and physicians may conflict in what each believe is the proper course of medical treat-

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[439] *Id.* at 1062-63.
[440] Sperling, supra note 23, at 486.
[441] *Id.*
[442] *Id.* at 486. (quoting *Pratt v. Davis*, 118 Ill. App. 161, 166 (1905).
[443] John D. Plum, *Internet Medicine and the Evolving Legal Status of the Physician-Patient Relationship*, 24 J. Legal. Med. 413, 427 (2003).
[444] Casey & Walker, supra note 76, at 430.
[445] Sperling, supra note 23, at 488.
[446] *Id.* at 489.
[447] *Id.*
[448] *Id.* at 490 ("Indeed, it is unreasonable to believe that, prior to brain death, a young woman has already considered the situation of brain death during pregnancy").
[449] Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 Colum. J. Gender & L. 85, 138 (1997) (stating, "even problematically assuming that a woman pregnant with a viable fetus has implicitly consented to the state's prohibiting its intentional killing by abortion, the incompetent woman decidedly has not necessarily consented to undergo intrusive medical treatment for the fetus's benefit. An abortion is under the woman's control, at least to the extent that she is "put on notice" that if she wishes to abort, she must do so before fetal viability. The incompetent pregnant woman affected by the pregnancy restrictions had no "notice" of her impending illness and incompetency. Thus, she in no way has *knowingly* waived her right to refuse life-prolonging medical treatment, or impliedly consented to such treatment, merely because she did not obtain an abortion before fetal viability").
[450] Sperling, supra note 23, at 486-490.
[451] Craig A. Conway, *Baby Doe and Beyond: Examining the Practical and Philosophical Influences Impacting Medical Decision-Making on Behalf of Marginally Viable Newborns*, 25 Ga. St. U. L. Rev. 1097, 1104 (2009) (quoting Raymond S. Duff & A.G.M. Campbell, *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 New Eng. J. Med. 890, 894 (Oct. 25, 1973) ("Since families live with and are most affected by the decisions, it therefore appears that society and the health care professions should provide only general guideline for decision making Moreover, since variations between situations are so great, and the situations themselves are so complex, it follows that much latitude in decision making should be expected and tolerated")).

Return to Table of Contents

ment.[452] Moreover, physicians may be looked upon by a third party or governmental entity that may not only seek to override treatment decision, but also bring civil or criminal charges against them if they act improperly.[453] Thus, pregnancy exclusions statutes may cause physicians and hospitals to have to choose between an adversarial position with either the family or the State.[454]

Before advances in medical technology, the physician could only treat the mother and had to assume that by ensuring her health, the health of the fetus would be enhanced.[455] However, with the advent of ultrasound and amniocentesis technology, physicians can now see the fetus in a direct way.[456] These advanced have altered the medical model of treatment of pregnant mothers from a unity model to a duality model, as physicians now see the fetus as a "second patient."[457] Yet, if physicians and hospitals can compel treatment in the name of the unborn child, this may create an adversarial relationship between both the physician and pregnant patient, and the mother and fetus.[458] Namely, treating mothers and fetuses are separate entities "presents conflicts between the beneficence and non-maleficence that physicians owe to both patients."[459] Additionally, forcing treatment upon patients undermines the doctor/patient trust necessary for women and next of kin to openly communicate with physicians. Physicians may also be less likely to explain the long-term medical implications of a decision if current statutory law allows them to compel treatment.[460] By allowing hospitals to force mothers to remain on life-sustaining treatment, neither the families nor treating physicians are incentivized to grant full-disclosure of information to the other side. Thus, pregnancy exclusions perversely change the doctor/patient relationship from one of advocacy to one of potential adversary.

Similarly, the lack of clear legislative definitions may cause confusion as to whether a woman's pregnancy status changes the decision-making of hospitals and doctors as to whether she is a patient, who is alive and the fetus's viability. For example, the definition of "viability" continues to be a hotly contested issue within the scientific community, particularly in light of advances in reproductive medicine.[461] Moreover, while the Court in *Casey* stated viability *may* be earlier than 23-weeks' gestation, the Court has refused to give "viability" a specific legal definition.[462] Without a precise legal definition, making a medical determination of viability is subject to political and personal agendas, which is what makes this am-

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[452] *Id.* at 1120.
[453] *Id.* (citing Earl E. Shelp, *Born to Die? Deciding the Fate of Critically Ill Newborns*, 80, 88 (The Free Press 1986)).
[454] Michelle N. Meyer, *Would Marlise Munoz's Fetus Have Survived? Should It Have?*, Bioethics Program's Online Symposium on the Munoz and McMath Cases, Jan. 27, 2014, http://thebioethicsprogram.wordpress.com/2014/01/27/would-marlise-munozs-fetus-have-survived-should-it-have/ ("It is perfectly coherent- and, in my view, compelling- to argue that the hospital was forcing unwanted parenthood, and indeed perhaps very expensive, emotionally fraught parenthood upon Eric Muñoz"); *Cf.* Ecker, supra note 34, at 891 ("Practically speaking what is a clinician to do when what a hospital's attorney says must be done seems different from what should be done?. As Martin, Luther King Jr., famously wrote 'One has a moral responsibility to disobey unjust laws.' If asked to violate a pregnant woman's wishes regarding her end-of-life care, physicians could appropriately chose to support the patient by declaring a conscientious objection…in cases like this Texas tragedy, conscientious objection would align with the patient's and family's wishes and against a state's interference with those wishes. It would seem both wrong and difficult for the state to compel a provider to participate in a patent's care against her and her families wishes").
[455] Sperling, supra note 23, at 492.
[456] *Id.*
[457] *Id.*
[458] Kaplan, supra note 57, at 204 (stating "the prospect of compelled treatment creates an adversarial relationship between patient and physician") (quoting Jana C. Merrick, *Caring for the Fetus to Protect the Born Child? Ethical and Legal Dilemmas in Coerced Obstetrical Intervention*, The Politics of Pregnancy: Policy Dilemmas in the Maternal-Fetal Relationship 63, 73 (Janna C. Merrick & Robert H. Blank eds., 1993) (finding compelling treatment may "create adversarial relations between the woman and fetus – and the subsequently born child—if [the woman] feels her own health and welfare are being sacrificed")).
[459] *Id.* at 493.
[460] *See Id.* at 205.
[461] Greene & Wolfe, supra note 33, at *6.
[462] *Casey*, 505 U.S. at 860. ("We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. . . But . . have no bearing on the validity of *Roe* 's central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future").

Return to Table of Contents

biguous "statutory phrasing so dangerous to reproductive rights."[463] Given the fluid definition of "viability" within scientific, medical, religions and ethical spheres, it is difficult to assume that a treating physician's individual ideology will be completely absent from this determination.[464] For this reason, hospitals and doctors are unduly burdened by ambiguous pregnancy exclusions; treating the mother and advising the respective family may be influenced not by medical determinations but concerns over civil liability arising from the unclear statutory requirements. Notably, in the case of Marlise Muñoz, it was speculated that the decision to remove her from life-support may have been influenced by the determination that her fetus was not viable.[465] Thus, decisions in these unique and heart-wrenching scenarios are additionally complicated if there is a possibility the fetus will be severely premature and/or handicapped. These factors transform the issue from determining a mother's rights into a moral and ethical debate over whether the fetus has a right to life and quality of life concerns:

> Treatment decisions for severely handicapped and premature newborns are among the most disturbing and divisive of the legal and ethical dilemmas posed by increasingly sophisticated medical technologies. Because the paradigm of the rational, autonomous patient cannot apply [in these cases], the American legal tradition provides no guidance in the issues of whether and when to withhold medical treatment. The birth of a severely handicapped or premature child thus forces society to choose between competing visions of what gives human life value and to determine the role of modern medical technology in that vision.

Hence, requiring a brain-dead pregnant woman to remain on life-support despite her wishes undermines the traditional physician-patient relationship. It forces physicians to violate their commitment to act in the best interest of the patient, and instead become the unborn child's doctor. It demands that doctors use a duality medical model, treating the mother and fetus each with reverence. Moreover, what is already a sinuous and complex medical determination as to the possible viability of the fetus is further complicated when the possibility of severe prematurity and/or handicap exists. Pregnancy exclusions that automatically invalidate an advance directive or require a medical finding of "viability" or "probable live birth" obligate doctors and hospitals to make treatment decisions based on a woman's pregnancy status, in spite of long-term implications to the fetus. This unworkable solution impermissibly interferes both with the decision-making process of the medical community and the respective families. Therefore, as they stand, pregnancy exclusions statutes may place undue burdens on physicians and hospitals.

C. Mothers and Families May Have a Lack of Notice as to Their Respective Rights.

As of 2012, states have at least five general ways of approaching what, if any, effect pregnancy has on a woman's advanced directive.[466] Given the large disparity in treatment based on current statutory pregnancy exclusions, women and their families may have a lack of notice as to their respective rights.[467]

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[463] Greene & Wolfe, supra note 33, at *6 (finding "the term 'viability' is susceptible to the influences of politics, "[i]ts definitions varies among political agendas, and it is malleable by the individual, including the doctors who are in charge of determining the fate of their patients").

[464] *Id.*

[465] Meyer, supra note 157, at *2 ("Despite some overly confident commentary on both "sides" of this case suggesting a clear answer one way or another –i.e., that there was no point in retaining the ventilator because the fetus could never be viable or was doomed to be born with catastrophic abnormalities; or, on the other hand, but for the removal of the ventilator, the 'unborn baby' was clearly on track to being born healthy- the truth is we simply don't know"); *Cf.* Jeffrey Weiss, *If Ruling Doesn't End Munoz Case, Fetal Viability Could Be Relevant*, Dallas Morning News, Jan. 25, 2014, http://www.dallasnews.com/news/metro/20140125-if-ruling-doesnt-end-munoz-case-fetal-viability-could-be-relevant.ece ("Fetal viability was not mentioned in the judge's decision. But if the case continues, that could become a factor. If the equipment had been shut off as little as a week ago, most doctors say, there would have been no option regarding the fetus. But every week of additional development could make a substantial difference in the odds of survival outside the womb… That's also where many people say moral, ethical and even legal obligations change… There's at least one additional complication, however: The family says the fetus has significant developmental problems and deformities. That, experts say, means that viability may come later than 24 weeks — or not at all").

[466] Greene & Wolfe, supra note 33, at *3.

[467] Katherine Taylor & Lynn Paltrow, *Marlise Munoz Case Shines Light on Dehumanizing Pregnancy Exclusions' Laws*, Reproductive & Sexual Health and Justice News, Analysis and Commentary, Jan. 9, 2013, http://rhrealitycheck.org/article/2014/01/09/marlise-munoz-case-shines-light-on-dehumanizing-pregnancy-exclusion-laws/ ("In fact, many states with such [pregnancy exclusion] laws think so little of women that they don't inform them of pregnancy exclu-

While *Roe* and its progeny are controlling federal law,[468] because no uniformity exists among state pregnancy exclusion statutes, a woman may be unaware that her rights may differ state to state if she becomes incompetent while pregnant. Even if a woman completes an advance directive, she may nevertheless be in a state that allows her wishes to be invalidated simply because she happens to be pregnant at the time of her brain-death.[469] Notably, "there have been calls for women to receive better information about what their state advance care planning law stipulate in relation to pregnancy" given the lack of uniformity among state laws.[470] Similarly, restrictive pregnancy exclusions like those found in Texas may have perverse effects on the medical treatment of female patients, depending upon the state in which a medical emergency happens.[471] The incongruent treatment of pregnancy by states is further complicated by the lack of clarity in which these statutes are written as, "they often appear under ambiguous or unrelated titles."[472] For example, Alaska lists statutes dealing with advanced directives under the "Descendants' Estates, Guardianships, Transfers, and Trusts" chapter[473], while Alabama lists these statutes under its "Termination of Life-Support Procedures" chapter.[474] Moreover, other states have inconsistencies within the actual content of the statutes.[475] For example, Kentucky has different pregnancy exclusions standards for medical proxies (requiring the probability of live birth or harm/prolonged pain to invalidate the directive) and living wills (pregnancy automatically invalidated a directive).[476]

Similarly, a woman's rights may be directly impacted by interstate travel. Due to the wide discrepancy in state statutes regarding pregnancy exclusions, a woman's rights may be directly affected if she happens to become incapacitated in one state versus another while pregnant.[477] To the point, more than

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sions in living will materials such as in handbooks and sample forms. Nor, with the exception of Pennsylvania, do these laws explain who will pay the exorbitant medical cost of using women's bodies. That state has decided it will pay for its unconsented use of women's bodies. Apparently, in some circles, objections to government-supported health care disappears if the money serves the dual purpose of sustaining fetal life and denying women their rights"); Susan J. Nanovic, *The Willing Will: Preservation of the Right-To-Die Demands Clarity and Consistency*, 95 Dick. L. Rev. 209, n 138 (1990) (suggesting "if the patient travels frequently to one area, steps should be taken to conform the documents to the laws of that area so that the document is honored").

[468] See infra PART I. A-C.

[469] Katherine A. Taylor, *Pregnancy Exclusions are Bad Law*, The Bioethics' Program Online Symposium on the Munoz and McMath Cases, Feb. 5, 2014, http://thebioethicsprogram.wordpress.com/2014/02/05/state-pregnancy-exclusions-are-bad-law/ ("These pregnancy exclusion laws exist not just in the "red" state of Texas, but in thirty-one states across the nation… Ms. Munoz had an important interest in controlling in advance whether to refuse life-sustaining treatment. It is this interest that advance directive statutes convert into a legal right to execute a living will and appoint a health care proxy. Yet that right is given by these statutes with one hand and taken away by the other –the Texas pregnancy exclusion conferred on Marlise Munoz a lesser right than others to refuse life sustaining treatment in advance (as she orally did), because her right was made conditional on whether she was pregnant when the treatment would be removed. The fact that she was only 14 weeks pregnant did not matter in Texas, and would not matter in most states that have enacted pregnancy exclusions").

[470] Malcolm Parker, *Brain Death, Pregnancy and Ethics: The Case of Marlise Munoz*, The Conversation, Jan. 24, 2014, http://theconversation.com/brain-death-pregnancy-and-ethics-the-case-of-marlise-munoz-22076 ("There is considerable variation elsewhere [outside Texas], with factors including the probability that the fetus will develop to the point of birth, and the existence of advanced whishes on the mother, playing variable limiting roles. Some states have no relevant legislation, while a small number allow women to state possible wishes about pregnancy in their advance care plans").

[471] Fernandez, supra note 3, at A1 (quoting an attorney for Eric Muñoz's lawyer as stating the hospital's position "amounted to a sweeping public policy declaration with broad public policy implications" as, "paramedics who arrived at crash scenes would be required to give dying women pregnancy tests to ensure they were following the law").

[472] Greene & Wolfe, supra note 33, at *6.

[473] Alaska Stat. § 13.52.055 (West 2014).

[474] Alabama, Ala. Code §22-8A-4(a) (West 2014).

[475] Greene & Wolfe, supra note 33, at *6.

[476] Ky. Rev. Stat. § 311.629(4) (West 2013) ("Notwithstanding the execution of an advance directive, life sustaining treatment and artificially-provided nutrition and hydration shall be provided to a pregnant woman unless, to a reasonable degree of medical certainty, as certified on the woman's medical chart by the attending physician and one (1) other physician who has examined the woman, the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication"); *Cf.* Ky. Rev. Stat. § 311.625 (West 2013) ("If I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this directive shall have no force or effect during the course of my pregnancy").

[477] Karla A . Menniger, *Advanced Directives for Medical and Psychiatric Care*, 102 Am. Jur. POF 3d 95 §19 (April 2014) ("Although some states have provisions allowing advance directives from other states to be honored, others do not, so if a person moves or travels to another state, it is possible that his or her advance directive would not be honored. While there have been sporadic efforts to pass legislation creating an advance directive that would be honored in all states, there appears to be no current initiative for such legislation") (citing Sabatino, *National Advance Directives: One Attempt to Scale the Barriers*, 1 NAELA J. 131 (2005)).

Return to Table of Contents

106,000,000 female drivers traveled on U.S. highways in 2012,[478] and each vehicle was driven an average of 11,705 miles.[479] Further, there were 33,561 people fatally injured in motor vehicle crashes that year.[480] Notably, these statistics "include only persons injured in a highway vehicular crash that died within 30 days."[481] These statistics highlight the potential risk of serious injury, incapacitation, or death that pregnant women face every day simply from traveling on U.S. highways. When coupled with other forms of interstate travel, the potential impact of pregnancy exclusions transcends the realm of theoretical and becomes a significant, practical problem for women and families. Whether or not a woman has an advanced directive already in place that explicitly discusses her wishes if she becomes incapacitated while pregnant, these rights may be extinguished simply because she travels over state lines.

More perversely, a woman's fundamental right to interstate travel may be infringed upon if she is afraid to travel while pregnant because of such statutes. The Supreme Court has long established that it is the fundamental right of all citizens to be able to freely travel within the country.[482] Notably, in *Shapiro v. Thompson*, the Supreme Court held:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.[483]

Thus, it is wholly incompatible with the Constitution that a pregnant woman would be forced to choose between her fundamental right to travel and never traveling during pregnancy for fear of becoming incapacitated in the wrong state. Pregnancy exclusion statutes prevent women and families from having adequate notice of their respective rights for a variety of reasons. Inconsistencies in both the location and application of advanced directive laws may prevent women from finding and properly interpreting state pregnancy exclusion laws. Further, it is unrealistic to assume a pregnant woman would not travel across state lines at some point during the nine-months preceding the birth of her child. Therefore, while every citizen has a fundamental right to interstate travel, a woman may not realize her rights may change state-to-state if she becomes incapacitated while pregnant.

D. Statutes May Place Protection of Fetal Life Above that of Brain-Dead Mothers.

While the likelihood a patient will be declared brain-dead during her pregnancy is remote at best,[484] scholars are nevertheless troubled by the public policy implications of pregnancy exclusion statues.[485] Notably, scholars warn such laws, "set a dangerous and never before seen precedent for legal demands on the parent/child relationship, as it values placing a child's rights above the rights of its parents."[486] To the point, pregnancy exclusions are arguably, "based on the social stereotype that women's roles as mother's approximately require of them extreme self-sacrifice for their offspring."[487] Further, some scholars argue

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[478] "Licensed Drivers By Sex and Ratio to Population – 2012/1," Table DL-C1. In *U.S. Department of Transportation, Federal Highway Administration: Highway Statistics 2012*, 2014. Available at https://www.fhwa.dot.gov/policyinformation/statistics/2012/dl1c.cfm; Accessed 04/25/14 (finding there were 106,829,713 licensed female drivers on the road in 2012, making up 50.44% of the total 211,814, 830 drivers on U.S. highways).

[479] "Annual Vehicle Distance Traveled in Miles and Related Data," Table VM-1. In *U.S. Department of Transportation, Federal Highway Administration: Highway Statistics 2012*, 2014. Available at https://www.fhwa.dot.gov/policyinformation/statistics/2012/vm1.cfm ; Accessed 04/25/14.

[480] "Persons Fatally Injured In Motor Vehicle Crashes, 1967-2012," Table FI-210. In *U.S. Department of Transportation, Federal Highway Administration: Highway Statistics 2012*, Nov. 2013. Available at https://www.fhwa.dot.gov/policyinformation/statistics/2012/fi210.cfm ; Accessed 04/25/14.

[481] *Id.* n 1.

[482] *United States v. Wheeler*, 254 U.S. 281, 293 (1920); *Shapiro v. Thompson* , 394 U.S. 618, 629 (1969).

[483] *Shapiro*, 394 U.S. at 629.

[484] Esmaelizadeh, supra note 11, at 1.

[485] Greene & Wolfe, supra note 33, at *6; Sperling, supra note 23, at 490 ("Continuing treatment is a more invasive and potentially disrespectful procedure than terminating treatment . . . [thus] clear and convincing evidence would be required to justify such an assumption [that a brain-dead patient would want to continue her pregnancy "only from the fact that she is pregnant"]; Kaplan, supra note 56, at 199.

[486] Greene & Wolfe, supra note 33, at *6.

[487] Taylor, supra note 152, at 164.

Return to Table of Contents

these statutes surpass simply trying to protect the life of a viable fetus.[488] Yet, it is important to note the fetus has no constitutional rights as a "person" before birth.[489] While the state arguably has an interest in the potential life of the fetus, the Supreme Court nevertheless refused to include grant the fetus protection of legal rights independent of its mother while in utero. Thus, even a "right to life" argument cannot justify the imposition of such exclusions as this right only comes to fruition at the moment of live birth.[490] Moreover, "the core element of the right to life is the claim not to be killed *unjustly*."[491] Therefore, the removal of unwanted life-support from the mother is not the unjust killing of the fetus, but rather the death of the mother simply ceases the potential life of the fetus.[492] Specifically, even if the fetus had an independent right to life, this right does not guarantee a fetus the ongoing use of another's body in order to reach viability.[493]

While some may argue life-sustaining treatments should be maintained based on a morality argument protecting the life of the fetus, opponents argue morality requires we respect the autonomy of the mother's body above all else.[494] These laws impermissibly place the rights of the fetus above those of the mothers as they, "trivialize the significance of the mother's self-defining and conscientious choice by automatically overriding it . . . they control the woman's body, devalue it, and bring it near a state of involuntary servitude."[495] Moreover, like in the case of Marlise Muñoz, this scenario ignores the possibility that the "woman may not have wishes to produce a motherless child and burden her grieving partner with sole care of a small infant."[496] Thus, in its attempt to protect the life of the fetus, the state may be simultaneously ignoring the lives of the remaining family members.

Yet, these statutes do not simply place the mother in a potentially adversarial relationship with her unborn child, they also cause her to have unequal footing with men. Pregnancy exclusion statutes appear to place women patients in a different class than men,[497] imposing reproductive burdens not required of their male counterparts.[498] Notably, the Court in *Shimp* held "one human being is under no legal compulsion to give aid or take action to save another human being" even where the refusal of treatment would mean death for the requesting party.[499] Yet how can such medical impositions be justifiable under pregnancy exclusion statutes simply because they involve a pregnant woman instead of a man? This alarming contradiction implies states have the right to medically intervene simply based on the patient's ability to carry a child. In other words, the rights of a particular patient can be infringed upon simply because of his

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[488] *Id.* at 91 ("Rather, they protect the fetus *qua* fetus. By forcing the pregnant woman to stay alive as a fetal incubator, the restrictions in essence accord the fetus a *right* to be born, most even before fetal viability").
[489] See infra PART I. A-C.
[490] See infra PART I. A-C; *Roe*, 410 U.S. 113, 160 (The Court held that a "fetus becomes viable," when it is "potentially able to live outside the mother's womb, albeit with artificial aid).
[491] Sperling, supra note 23, at 477 (citing Judith J. Thomson, *A Defense of Abortion*, Contemporary Issues In Bioethics 202, 206 (Tom L. Beauchamp & LeRoy Walters, eds. 5th ed. 1999).
[492] *Id.*
[493] *Id.*
[494] Taylor, supra note 152, at 150 (stating there is good reason why society, "may be morally repelled by the fate of these women. These cases illustrate an extreme form of objectification, a 'technological objectification' whereby the woman's dead or comatose body literally is used, possibly for months, as a fetal incubator with out her permission, in the complete absence of her human agency and control . . . giving literal meaning to metaphors describing pregnant women as 'fetal containers' or 'breeders').
[495] *Id.* (citing Timothy J. Burch, *Incubatory or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes*, 54 Md. L. Rev. 528, 555 (1995)).
[496] Sperling, supra note 23, at 490.
[497] Johnson, supra note 64, at 287 ("Even more concerning is the fact that even if it is determined the state has a sufficiently important interest in the life of a potential fetus, no court has ever determined such situation warrants ordering that a male patient's advance directive be ignored in order to serve the very same interest in life").
[498] Kaplan, supra note 57, at 190 (quoting Dawn E. Johnson, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 Yale L.J. 599, 612 (1986) ("If the state were to deprive women of their right to choose to have an abortion, it would impose on women a duty to bear unwanted children; by creating fetal rights susceptible to use against pregnant women, the state compels who desire to bear children to reorganize their lives in accordance to judicially-defined norms of behavior")).
[499] *McFall v. Shimp*, 10 Pa. D. & C3d 90, 91-92 (1978) (holding, "[f]or a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence . . . Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends").

Return to Table of Contents

or her gender. Thus, allowing a patient's medical treatment to be dictated by their pregnancy status places women at risk of being "second class citizens:"[500]

> Compelling medical treatment of pregnant women distinguishes women as a special class with limited autonomy, infringing upon both their liberty and equality interests. Compelling medical treatment of pregnant women implicated women's liberty by abridging their ability to control their own bodies; in doing so it burdens women in ways men are not burdened and both relies, and reinforces gender stereotypes about women's role as mothers. . . Rather than commandeering the bodies of pregnant women, the most effective way to ensure healthy pregnancies and births is to ensure that every medical decision a pregnant woman makes is fully informed, uncoerced, and supported by her ability to access quality medical care and effect her choice in the safest way possible. [501]

As they stand, pregnancy exclusion statutes "designate pregnant women as a unique category of persons with limited autonomy."[502] Scholars argue these exclusions discriminate against women based on their gender, pregnancy status and incompetency, and must be changed to protect pregnant women and their families.[503] For these reasons, the author suggests two alternatives in Part VI in order to find a proper balance between the interest of the State and the family's privacy and autonomy.

IV. PROPOSED METHODOLOGY FOR THE TREATMENT OF INCOMPETENT PREGNANT PATIENTS.

Given the potentially life-changing implications pregnancy exclusion statutes can have on women and her families, the current scheme of advance directive statutes must be changed. Notably, many scholars argue current pregnancy exclusion statutes may be unconstitutional and impermissibly target pregnant as a unique class of persons.[504] To deal with the numerous problems arising from brain-dead pregnancies under ambiguous advance directive statutes, the author suggests two proposals. First, in an ideal world, a federal statute would be enacted to preempt all state pregnancy exclusion laws. The federal law would declare previous pregnancy exclusion statutes unconstitutional, making any previous state law on the issue null and void. In the alternative, the author suggests a three-prong proposal that would deal with the practical, current issues arising under state pregnancy exclusion statutes. The author proposes a new method for balancing the State's interest in the lives of unborn children and the family's right to autonomy and privacy through the creation of legislative clarification, hospital consistency, and family collaboration. This suggested three-prong approach would provide for a better outcome in difficult cases like that of Marlise Muñoz, even if a federal statute addressing the issue were never enacted.

A. Proposed Federal Advanced Directive Statute Addressing Incompetent Pregnant Patients.

The "emotionally charged national debate over end-of life care, abortion, and [state pregnancy exclusion laws]," [505] raised in the Marlise Muñoz case, could have been prevented with proper federal legislation. Notably, Muñoz's husband and family would not have been forced to seek judicial intervention for a law that is arguably unconstitutional.[506] While the heart-breaking tragedy of Muñoz will admittedly hap-

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[500] Kaplan, supra note 57, at 192 (quoting Thomas B. Mackenzie et al, Commentary, *Case Studies: When a Pregnant women Endangers her Fetus*, 16 Hastings Center Rep. 25, 25 (1986) (compelling medical treatment for the benefit of the fetus raises "the danger of creating of pregnant women as a second class of citizen, without basic legal rights of bodily integrity an self-determination")).

[501] *Id.* at 199, 206.

[502] *Id.* at 205.

[503] Sperling, supra note 30, at 342 (finding pregnancy clauses distinguish pregnant patients from non pregnant patients, and "also discriminate toward them on a gender basis and on the basis of their incompetency." Further, the author states the "American model should be rejected" in hope it "helps future pregnant women and their loving families and friends better handle these difficult circumstance of incompetency").

[504] See infra PART III. A-D.

[505] Fernandez, supra 3, at A1.

[506] Pl.'s Mot. to Compel Defs. to Remove Marlise Munoz from "Life Sustaining" Measures and Application for Unopposed Expedited Relief at 5:2-7:3, *Munoz v. John Peter Smith Hospital*, No. 096-017-270080-14, 2014 WL 285060 (N.D. Tex. Jan. 14,

pen to a minuet number of patients in the future, scholars argue this topic "should be of grave concern to everyone who cares for and about both women and our nation's moral health."[507] More specifically, a woman's constitutional rights can be broadly implicated simply because of the state she happens to be in if she becomes incapacitated while pregnant.[508] For this reason, it is imperative a federal statute is enacted to protect all women, in all states.

To ease the burden these difficult situations place on the decision-making of families, physicians and society, the author proposes a new federal advanced directive statute addressing incompetent pregnant patients. Most significantly, the creation of a federal pregnancy exclusion law would protect the medical autonomy and constitutional rights of women nationwide. The proposed federal law would have three primary attributes: first, it would make state pregnancy exclusion laws unconstitutional; second, the statute would require pregnant patients to fill out a federal advanced directive form at their first pre-natal visit; and third, the law would create a cause of action against states if the statute is not followed.

Under the first, and most important prong of the proposed federal law, all previous state pregnancy exclusion laws will be made null and void for lack of constitutionality. For drafting guidance, the federal law should mimic the advance directive statutes found in Maryland and Vermont.[509] Specifically, the federal law would guarantee a patient's wishes regarding pregnancy will be followed if a woman expressly addressed the issue in her advanced directive.[510] Additionally, the federal statute should mirror the language in Vermont's statute that allows for flexibility in case a patient does not have a directive in place at the time of incompetency.[511] Under a flexible model, and in the absence of an advanced directive, a family of an incompetent pregnant woman will still be able to ensure the mother's wishes are met if they can meet the "clear and convincing" standard established in *Cruzan*.[512] Moreover, a federal statute that allows a woman's express instructions to be followed regardless of pregnancy will provide the greatest clarity for health care providers and patients, allowing for uniform results based on the unambiguous language of the proposed statute.

In order to provide female patients with the greatest level of legal protection and medical autonomy, a woman should have an advanced directive in place as soon as she enters child-rearing years. Yet, this lofty expectation may be unreasonable given that as of 2006, only 36% of patients had some kind of advance directive in place.[513] To combat the diminutive number of Americans that have taken the time to complete an advance directive, the proposed federal statute would require all women to fill out such a document at their first pre-natal visit. The purpose of this form would be two-fold: it will provide pregnant patients with a greater opportunity to provide informed consent, and the standardized form will help ensure a larger percentage of women have advanced directives in place in case they ever become incompetent while pregnant. Similar to the *Patient Self-Determination Act* that requires health care providers receiving Medicare and Medicaid funding to inform all adult patients of their constitutional right to prepare an advanced directive,[514] here this duty would be extended to any pre-natal treatment provider. By requiring all female patients to fill out an advance directive form at their first pre-natal visit, physicians can broach the topic as early in the pregnancy as possible, before any issues of incompetency have come to fruition.

Specifically, the federal standardized advance directive form would provide women with medical definitions regarding possibly incompetency in the simplest terms possible. The document would track

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2014) (Muñoz's husband argued the law violated his wife's Fourteenth Amendment right to privacy under the Due Process Clause, or alternatively, her Fourteenth Amendment right to equal protection under the Equal Protection Clause).

[507] J.L. Ecker, *Death in Pregnancy – An American Tragedy*, 370 New Eng. J. of Med. 889, 890-91 (March 6, 2014).

[508] See infra PART II. A-E; See infra PART III. A-D

[509] Greene & Wolfe, supra note 33, at *4-5 (discussing the fifth category of states allowing explicit advance directive to be followed regardless of pregnancy); Maryland, Md. Code, Health-Gen. § 5-603(F) (West 2014); Vermont, Vt. Stat.. tit. 18, § 9702(a)(8) (West 2010).

[510] The federal statute should follow the language found in Vermont. Vt. Stat.. tit. 18, § 9702(a)(8) (West 2010) ("(a) An adult may do any or all of the following in an advanced directive: (8) direct which life sustaining treatment the principal would desire or not desire if the principal is pregnant at the time an advance directive becomes effective").

[511] Vt. Stat. tit. 18, § 9702(b) (West 2010) (Vermont's statute provides that an absence of an advanced directive or explicit wishes (i.e. covering pregnancy) "shall have no effect on determining the principal's intent or wishes regarding health care or any other matter").

[512] *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990).

[513] Casey & Walker, supra note 76, at 430 (citing Ben Kusmic, Note, *Swing Low Sweet Chariot: Abandoning the Disinterested Witness Requirement for Advance Directives*, 32 J.L & Med. 93, 97 (2006).

[514] Greene & Wolfe, supra note 33, at *7.

Return to Table of Contents

the language of the UDDA to define brain-death.[515] Additionally, the form would explain the difference between an irreversible coma and a permanent vegetative state. Armed with these medical definitions, the form will expressly ask what, if any, life-sustaining treatment the patient desires if she happens to be pregnant at the time. This form would also state that without explicit directions to the contrary, 24-weeks gestation will be used as the marker for possible viability. Namely, the document will ask whether a determination of viability would impact a woman's decision in the situation. Moreover, the form would allow women to decide whether a determination of viability should be made based on the 24-week standard or her express wishes that viability be considered at an earlier point in the pregnancy. This level of detail on the form will hopefully encourage female patients to discuss this possibility with their doctor, providing additional insight into the mother's wishes if she becomes incompetent. More importantly, it will create greater certainty and uniformity in the treatment of mothers and their fetuses compared to the current viability standard.

Notably, from a medical standpoint, there would be relatively few downsides to the creation of a 24-week gestation viability standard. According to the American Congress of Obstetricians and Gynecologists, "[m]ost obstetrician-gynecologists understand fetal viability as occurring near 24 weeks gestation utilizing [last menstrual period or "LMP"] dating."[516] Further, a 2009 JAMA study[517] found that the vast majority of infants born prior to 24 completed weeks (LMP) died prior to or during birth, "In this study, 93% of infants at 22 weeks died, 66% at 23 weeks, and 40% at 24 weeks [and] 91% of those that lived were admitted to the NICU."[518] More specifically in the context of Supreme Court precedent:

> At the time *Roe* was decided, viability was usually placed at around 7 months (28 weeks [gestational age]), although the Court acknowledged this it might occur earlier, even at 24 weeks. While the point of viability may be somewhat earlier than the one cited in *Roe v. Wade*, medical science appears to have reached a biological limit in its ability to save premature infants. If a baby is born before 23 or 24 weeks of pregnancy, it simply cannot survive, because its lungs are too immature to function, even with the help of respirators . . . There have been reports of fetuses surviving at 22 or 21 weeks, although these are difficult to confirm, because of doubts about gestational age. In any event, such events are truly rare.[519]

Moreover, using a 24-week gestation standard for viability should not burden a woman's constitutional rights. Under the proposed federal statute, mothers will have the ability to require doctors use an earlier gestational timeframe to determine viability if they choose.[520] Therefore, utilizing a standard 24-week marker in combination with an express opt-out feature appears to properly balance the medical reality of fetal survival with respect for a woman's private autonomy and belief system.[521]

Lastly, the proposed federal advanced directive statute would create a cause of action against the state if a mother's wishes were not followed. In cases like Marlise Muñoz, the family would be able to sue the hospital for damages and remedies under the statute. Because the federal statute would invalidate state pregnancy exclusion laws, a family would be required to seek an injunction in federal court if a dis-

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[515] UDAA § 1, 12 U.L.A. 384, 386 (According to the UDDA's definition, death is defined as "either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem." Further, a determination of death "must be made in accordance with accepted medical practices).

[516] ACOG Statement on HR 3803, The American Congress of Obstetricians and Gynecologists, Jun. 18, 2012. Available at http://www.acog.org/~/media/Departments/Government%20Relations%20and%20Outreach/20120618DCAborStmnt.pdf; Accessed 04/28/2014.

[517] *Id.*

[518] *Id.* (citing Express Group, *One-Year Survival of Extremely Preterm Infants After Active Perinatal Care in Sweden*. *JAMA* 2009; 301: 2225-2233).

[519] Bonnie Steinbeck, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses* 100 (2d ed. 2011).

[520] April L Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 Tenn. L. Rev. 563, 566 (2002 WL 31161822) ("In a majority of the reported cases, women resist the treatment suggestions of physicians, at least in part, on the basis of deeply held religious beliefs").

[521] Jacqueline B. Tomasso, *Separation of the Conjoined Twins: A Comparative Analysis of the Right to Privacy and Religious Freedom in Great Britain and the United States*, 54 Rutgers L. Rev. 771, 790 (2002) "If the state's interest does not outweigh the individual's free exercise of religion, the courts will not order medical treatment") (quoting Wons v. Pub. Health Trust of Dade County, 500 So. 2d 679, 686 (Fla. Dist. Ct. App. 1987)).

pute arises. The proposed statute would allow families to bring a claim of "wrongful prolongation of living" on behalf of the mother. [522] Moreover, the statute would allow a claim for "wrongful life" due to a significantly impaired fetus being born as a result of the state's refusal to comply with the mother's wishes before the 24-week viability marker.[523] Additionally under the proposed statute, the federal government would be able to pull funding from states if the statute is not followed.[524] Thus, by creating a cause of action for the families in combination with the potential risk of losing federal funding, states would be more likely to comply with the proposed federal statute. By providing families with greater legal protection through the creation of judicial remedies and possible award of damages, the proposed federal statute would create a proper balance between the rights of the public state and private family. Due to the potential difficulties in getting a federal advanced directive statute passed, the author suggests, in the alternative, a proposed methodology to address current state pregnancy exclusion statutes.

B. Proposed Methodology: Three-Prong Approach of Clarity, Consistency and Collaboration.

This article hopes to illustrate the need for immediate reform in the treatment of incompetent pregnant patients given the dramatic and tangible effects pregnancy exclusion statutes can have on a family and society at large, While some may argue these cases are far and few between, "rare" cases like Marlise Muñoz's are becoming increasingly more common with advances in medical technology. Notably, there have been at least two cases of brain-dead pregnant patients since late 2013.[525] Moreover, these scenarios have real and far-reaching impact on the financial[526] and moral health[527] of the nation. Specifically in the Muñoz case, experts estimated, "taken together, even a conservative estimate of costs exceeds $1 million, and could be more than $1.6 million [with the hospital bill alone ranging from an estimated $439,500 to $984,500]."[528] While it was reported that the hospital in that case decided not to bill Muñoz's family,[529] it is difficult to argue a million dollar price tag will have no effect on the taxpayers or insurance carriers within Muñoz's community. Thus, even if a federal statute addressing this matter is not enacted promptly, immediate changes must be made before another Marlise Muñoz case occurs. For this reason, the author proposed a new methodology and the creation of a three-prong balancing test. Namely, the creation of (1) legislative clarification of medical definitions, (2) consistency in hospital procedures and policy, and (3) collaboration with individual families found in these difficult situations will allow for the greatest balance between the interests of the state and the families in these unique situations. This suggested approach

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[522] Thaddeus M. Pope, *Clinicians May Not Administer Life-Sustaining Treatments Without Consent: Civil, Criminal and Disciplinary Sanctions*, 9 J. Health & Biomedical L. 213, 256 (2013) (""Wrongful living' seems to neatly capture the essence of the nonconsensual administration of life-sustaining treatment"); *Cf.* Nadia N. Sawicki, *A New Life For Living, 58 N.Y.L. Sch. L. Rev. 279, 280 (citing* Nicole Marie Saitta & Samuel D. Hodge, Jr., *Wrongful Prolongation of Life--A Cause of Action That Has Not Gained Traction Even Though a Physician Has Disregarded a "Do Not Resuscitate" Order*, 30 Temp. J. Sci. Tech. & Envtl. L. 221, 221, 238 (2011) (concluding that "[t]he only viable remedy" for ensuring compliance with end-of-life wishes is by way of an injunction, and that recovery of damages is "not a realistic option at the present time.")).

[523] Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 Ala. L. Rev. 327, 327 (Winter, 2004) ("Wrongful life refers to a negligence claim asserted by a child who suffers from birth defects, such as painful and debilitating diseases resulting from a physician's malpractice in failing to inform the mother of potential birth defects, either preconception or during pregnancy, and consequently, depriving her of the option of avoiding conception or terminating the pregnancy"); Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law and Culture*, 65 Stan. L. Rev. 457, n 160 (2013) (In discussing monetary damages in wrongful life case, "[f]or the most part, they award damages for the extraordinary costs of raising a severely disabled child").

[524] Denis Binder, *The Spending Clause as a Positive Source of Environmental Protection: A Primer*, 4 Chap. L. Rev. 147, 149 (2001) ("Congress is free, therefore, to condition the receipt of federal funds upon compliance with federal statutes and administrative directives") (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

[525] Eddy R. Smith, *A Time to be Born and a Time to Die: Pregnancy and End-of-Life Care*, 50-APR Tenn. B.J. 28, 31 (April, 2014).

[526] Sarah Wickline, A Brain-Dead Mother, A Million Dollar Baby, MedPage Today, Jan. 10, 2014, http://www.medpagetoday.com/OBGYN/Pregnancy/43736.

[527] Susan Dwyer, Op-Ed, *Munoz Lesson: How the Law Fails Us at Beginning and End of Life*, Aljazeera America, Jan. 26, 2014, http://america.aljazeera.com/opinions/2014/1/the-munoz-lessonhowthelawfailsusatthebeginningandendoflife.html (citing Frank Bruni, Op-Ed, *The Cruelest Pregnancy*, New York Times, Jan. 18, 2014, SR3).

[528] Wickline, supra note 223, at http://www.medpagetoday.com/OBGYN/Pregnancy/43736.

[529] Jobin Panicker, JPS Hospital Won't Send Bill to Husband of Brain-Dead Woman, WFAA, March 14, 2014, http://www.wfaa.com/news/health/JPS-Hospital-wont-send-a-bill-for-brain-dead-womans-treatment-250351941.html ("The husband of Marlise Muñoz will not be billed for his wife's controversial 62-day hospital stay . . . but her insurance company will").

would provide for a better outcome even if the constitutionality of state pregnancy exclusion statutes were not addressed through federal legislation.

1. Proposed Legislative Clarification of Medical Definitions.

The first prong under the proposed methodology calls for legislative clarification of medical definitions. As they currently exist, state pregnancy exclusion statutes vary widely in both the definitions of medical terms and application to patients.[530] To provide uniformity and consistency within the treatment of incompetent pregnant patients, the state legislature at a minimum should provide medical definitions of "live birth," "viability," and clarify whether a patient who meets the definition for brain-death still qualifies as a "patient."[531] Notably, even at the time of creation, the drafting group responsible for writing Texas's *Advance Directives Act* did not explicitly discuss the possible effects or application of the statute.[532] While such expert affidavits may be useful in discerning the drafter's intent, the author suggests it is this very type of confusion between legislative creation and practical application that illustrated the need for additional statutory clarification. If the drafters never intended for the Texas pregnancy exclusion statute to apply to patients that have met the medical definition of brain-death, this should be expressly stated in the statute. Otherwise, families are left to fight within the judicial system as to the meaning and application of such statutes. While medical parameters are already in place giving physicians criteria to establish "brain-death,"[533] no such guidelines currently exist to guarantee an assessment of "live birth" or viability" will not include false positives. Thus, where a patient's rights hinge on medical knowledge outside the realm of the average layperson, such definitions should be plainly spelled out within the statute. Specifically, like was the case in the creation of the Texas statute, the drafting group of pregnancy exclusions should not be limited to only physicians.[534]

Similarly, states should also provide a process-based mechanism to allow for an alternative to judicial-decision making when conflicts arise.[535] For example, the Texas *Advance Directives Act* allows a hospital committee to review cases when the treating physician refuses to honor a family's wishes that continued medical treatment be provided to their loved one. [536] Notably, the physician cannot be a part of the committee, and the statute provides that if a committee agrees that continued life-sustaining treatment is inappropriate, "[t]he physician and the health care facility are not obligated to provide life-sustaining treatment after the 10th day."[537] In such cases, judicial intervention is limited to granting an extension to the ten-day waiting period if a court finds, "by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive will be found [as an alternative facility] if the time extension is to be granted."[538] However, given the complexities such cases can involve and the immediacy in which some medical decisions must be made, judicial review involving incompetent pregnant patients should be saved as a last resort.

2. Proposed Consistency in Hospital Procedures and Policies.

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[530] See infra PART II. A-E; See infra PART III. A-D

[531] See infra PART II. B-C; See infra PART III. A-D

[532] Aff. of Thomas WM. Mayo. Ex. B, at 2:2-3, *Munoz v. John Peter Smith Hospital*, No. 096-270080-14, 2014 WL 285056 (N.D. Tex. Jan. 23, 2014) (stating, "I recall pointing out that some academic commentary questioned the constitutionality of such provisions, but there was no general enthusiasm in favor od dropping the provision, so it stayed in our drafts. What brief discussion as did occur never considered the possible application of §166.049 to a dead person").

[533] David C. Magnus et al., *Accepting Brain Death*, 370 New Eng. J. of Med. 889, 893 (March 6, 2014) ("There are clear medical criteria that can be reliably and reproducibly utilized to determine that [brain] death has occurred. If professional standards are followed properly, there are no false positives").

[534] Aff. of Thomas WM. Mayo. Ex. B, at 1:4, *Munoz v. John Peter Smith Hospital*, No. 096-270080-14, 2014 WL 285056 (N.D. Tex. Jan. 23, 2014) ("The drafting group consisted of representatives from state agencies that either pay for or provide end-of-life care, professional organizations (including the Texas Hospital Association and Texas Medical Association), the Catholic archdiocese of Austin, and the Texas Right to Life and National Right to Life Committees, as well as other health professionals and lawyers with experience in end-of-life issues").

[535] Conway, supra note 154, at 1171.

[536] Tex. Health & Safety Code §166.046 (West 2003).

[537] *Id.* § (e).

[538] *Id.* § (g).

Return to Table of Contents

Under the second prong of the proposed methodology, consistency in hospital procedures and policies are necessary to protect pregnant patients and their families. Hospitals and physicians should develop policies and procedures ensuring that effective counseling and medical care are provided to the families caught in these situations. It has been argued awareness and sensitivity training in these difficult situations should begin at the medical school level.[539] However, even if these issues are discussed at the hypothetical level among students, some scholars disagree that treatment uniformity can ever be reached (as seen in the analogous treatment of marginally-viable newborns):

> True consensus is lacking among medical professionals nationwide regarding how best to deal with philosophical federal legislative initiatives favoring the sanctity of life over all other values. Legislating that human life is sacred and to be preserved at all costs ignores a more complex set of philosophical, financial, and emotional concerns of the average parent when thinking about the future quality of life of his or her severely disabled child or for the physician treating a struggling newborn who only experiences pain.[540]

Yet, even if universal policy guidelines regarding the valuation of human life cannot be developed, effective counseling and efficient hospital ethics committees can help create some consistency in end-of-life treatment. Notably, before a fetus's birth, the American College of Obstetricians and Gynecologists suggest, at the very least, that pregnant patients and their families be provided with a summary of the possible complications of extreme prematurity, potential long-term neurodevelopmental disabilities and the fetus's range of survival based on gestational age and development progress.[541] Training physicians and nurses how to discuss these issues with families is thus imperative to "create meaning in the situation in order to facilitate the special grieving process that attaches to the medical, legal, and ethical dilemmas that arise."[542]

Additionally, all hospitals should have a healthcare ethics committee (hereafter "HEC") and it should be relied upon heavily when resolving difficult cases like Marlise Muñoz's.[543] Notably, since *Quinlan*, many judges have stated HECs are a more appropriate venue for end-of-life decisions.[544] Because "such committees are generally compromised of physicians, social workers, nurses, administrators clergy, and even laypersons,"[545] the committee will likely have a more complete medical picture of the patient, including long-term prognosis than the judiciary can. Notably, to prevent future situations like Muñoz's, it would also be advantageous to have more than one attorney on a hospital's HEC.[546] With a well-rounded committee to analyze end-of-life decisions both from a medical and legal vantage point, HECs should be able to collaborate with families to reach the best possible outcome for their particular situation. Furthermore, it is proposed that if a conflict arises between the hospital or treating physician and the family, the family should have a hearing before the HEC with three days of a disagreement. This hearing would both allow the family to express their point of view and create a written record of the decision-making process. If statutory medical definitions are clear and hospitals have consistency in its policies and procedures, the likelihood of conflict among medical professionals and families in these cases should be significant reduced.

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[539] Sperling, supra note 23, at 499 (stating, "medical and nursing schools should be dedicated to teaching students about advance directive and pregnancy provisions . . . to keep medical professionals up to date on changes in advance directive law and the specific provisions of the [state] in which they practice").

[540] Conway, supra note 154, at 1173.

[541] *Id.* at 1169 (citing Am. College of Obstetricians & Gynecologists, *Perinatal Care at the Threshold of Viability*, 100 Obstetrics & Gynecology 617, 618 (2002)).

[542] Sperling, supra note 23, at 499.

[543] Thaddeus M. Pope, *Multi-Institutional Healthcare Ethics Committees: The Procedurally Fair Internal Dispute Resolution Mechanism*, 31 Campbell L. Rev. 257, 257 (2009) ("HECs are typically multidisciplinary groups comprised of representatives from different departments of the healthcare facility--medicine, nursing, law, pastoral care, and social work, for example. HECs were established to support and advise patients, families, and caregivers as they work together to find solutions for delicate circumstances").

[544] *Id.* at 263 ("*Quinlan* changed that state of affairs by 'giving credence to the importance of such committees for end-of-life cases.' Over the next decade, appellate courts in many states similarly endorsed the notion that most end-of-life health decision making could be, and should be, handled by ethics committees") (citing Glen McGee et al., *Successes and Failure of Hospital Ethics Committees: A National Survey of Ethics Committee Chairs*, 11 Cambridge Q. Healthcare Ethics 87, 87 (2002)).

[545] Conway, supra note 154, at 1171.

[546] *See* Sperling, supra note 23, at 500 (suggesting, "the state should also play a role in educating attorneys and the public about advance directives and their legal effect in a multitude of circumstances, including pregnancy").

Return to Table of Contents

3. Proposed Collaboration With Individual Families.

The third, and final prong, under the proposed methodology calls for collaboration between the hospitals and individual families in these cases. To the point, "[i]t is not the legislator or the physician that must ultimately financially, emotionally, and physically care for a severely disabled infant with no hopes for real interaction or relationships – it is the [family's] responsibility."[547] Thus, creating and following an advanced directive should involve discussions of the patient's values and beliefs.[548] Ideally, the treating physician, the biological father and mother's other family can reach a consensus regarding the mother's probable wishes and the best course of action as to whether life-support will be continued or removed.[549] Notably, this style of patient and family-centered care allows families to contribute medical decisions made in collaboration with medical professional.[550] Scholars suggest the use of such a cooperative model "in making difficult end-of-life decisions would help eliminate, or at least reduce clinical "pitfalls" in the current legislative framework."[551]

Specifically, effective counseling and reliance on HECs will better protect both the hospitals and individual families. By providing families with the in-depth medical information necessary to create informed consent, hospitals are limiting their liability by preventing future lawsuits. Additionally, by requiring disputes to be heard before the HEC, hospitals will have a written record of the committee's decision-making process as well as documentation of the family's wishes. By following the "clear and convincing" standard established by *Cruzan*,[552] families will be able to state their case before the HEC as to why they believe the patient would have wanted one treatment option over the other. This hearing would also provide the families with the greatest chance to ensure the mother's wishes are followed without the need for judicial intervention. Additionally, the "clear and convincing" evidentiary bar can also help insulate the hospital from future negligence claims if there is documentation as to whether the family met its burden. Implementing such safeguards should adequately protect the rights of the individual families, the decision-making process of the hospital, and the interest of the State.

Conclusion

As the Marlise Muñoz case illustrated, legal conflicts arise from ambiguities under advanced directives statutes over the legal definitions and consequences of terms such as "brain dead" "viable" "life-sustaining" and seemingly basic terms like "patient". More significantly, state pregnancy exclusion statutes that automatically invalidate a woman's advanced directive or allow states to compel continued treatment if there is a "probability of live birth," are arguably constitutionally invalid on their face. Notably, a woman's reproductive and end-of life freedoms are rooted in her right to privacy and medical autonomy.[553] Thus, it seems nonsensical to take medical decision-making authority out of her private family's hands and placed wholly within the control of the public state's discretion.

As the number of unique and heartbreaking cases like Muñoz's increase, so does the need for immediate legislative reform. At the minimum, legislative clarification of medical definitions, consistency in hospital procedures and policies, and collaboration with individual families found in these difficult situations must be adopted immediately. This suggested three-prong approach would allow for a proper balance between the state's interest for the lives of unborn fetuses and the family's right to autonomy and privacy. Without such change, the rights of women and their respective families will continue to be impermissibly burdened and violated. Despite the outcry from scholar and ethicists condemning such stat-

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[547] Conway, supra note 154, at 1174.

[548] Casey & Walker, supra note 76, at 442 ("Only when individuals engage is such value-based discussions with their family friends, clergy, attorney, and healthcare provider, and then document such discussions and values, can advanced directives becomes more effective in clinical settings . . . only through the use of the patient's values, preferences, and beliefs can the best possible treatment result come to fruition") (citing Daniel Hickey, *The Disutility of Advance Directives: We Know the Problems, But Are There Solutions?*, 36 J. Health L. 455, 465 (2003)).

[549] Gregorian, supra note 45, at 422.

[550] *See* *Id.* at 422-24.

[551] Casey & Walker, supra note 76, at 442.

[552] *Cruzan*, 497 U.S. 261, 279.

[553] See infra PART I. A-E.

Return to Table of Contents

ues, "the legal landscape remains essentially unchanged almost two decades later."[554] While scholar Katherine Taylor first criticized such laws back in 1997, sadly her words still ring true today:

> That [31] states have enacted these restrictions constitutes one of the most perverse statutory threats of "state-imposed coercion of pregnant women' existing today. . . [as they] so blatantly violate the liberties of individual women, and so plainly and disturbingly subordinate women to men. Social justice requires that constitutional constraints be imposed on the methods by which the state may protect fetal life. Accordingly, women, rather than the state must be allowed to decide whether they want to delay their death for the sake of the fetus, or to leave that decision to their healthcare proxy . . . The harm that befalls all women, and the injustices that result, are simply too great to allow states to compel pregnancy women to remain alive solely to survive as fetal gestators in violation of their most basic freedoms.[555]

Thus, this is not simply an issue affecting women, but rather has grave implications for every man, women and child. It is time society finally takes notice, pushes back, and refuses to allow another case like that of Marlise Muñoz to occur if we are to protect the moral integrity of the nation and the private autonomy of the family.

DEDUCTIBILITY OF LEGAL FEES IN DIVORCE

By Cathie Reisler[556]

Even with today's no-fault divorce laws, divorce isn't easy or inexpensive. But by addressing tax issue's up front, while negotiating the terms of your client's divorce, you may be able to reduce some expenses. The use of tax planning can enable the parties to use the deductibility of certain legal fees.

Fees paid to the extent that they are for tax planning advice and fees paid to produce income that is includable in the recipient's gross income are deductible. This means your client is permitted to deduct those expenses that are incurred to produce taxable income, to provide research and advice on property transfers, to secure an interest in a qualified retirement plan, and to determine dependency exemptions for children. These expenses are deductible as Miscellaneous Expenses on Schedule A of the 1040, to the extent that their total in anyone year exceeds the 2 % limit of Adjusted Gross Income (you must be able to itemize deductions).

However to qualify for this deduction your invoice to your client must be allocated between tax and nontax matters. This can be done by itemizing you between those that involve tax advice and the production of income from other services.

IRS Publication 529 states provides that your client can usually deduct legal expenses that he/she incurs in attempting to produce or collect taxable income or that he/she pays in connection with the determination, collection, or refund of any tax.

A client can also deduct legal expenses that are:

- For tax advice related to a divorce, if the bill specifies how much is for tax advice and it is determined in a reasonable way, or
- To collect taxable alimony.

Your client needs to be aware that just because something is designated as alimony in their divorce documents that doesn't mean it is alimony for tax purposes. There are other tests that must be meet such as; the parties cannot file a joint tax return, the parties cannot be members of the same household, the payments must not extend beyond the payee's death and the method of payment is restricted.

These legal expenses are allowable to the extent they exceed 2 % of your client's Adjusted Gross Income in a given year. However, the party defending against providing alimony, an increase in alimony or collection of back alimony is not permitted a deduction.

Almost if not all divorces include some counseling on taxes whether it pertains to alimony, the transfer of income producing assets, child dependency exemptions, securing an interest in a qualified retire-

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[554] Katherine A. Taylor, *Pregnancy Exclusions are Bad Law*, The Bioethics' Program Online Symposium on the Munoz and McMath Cases, Feb. 5, 2014, http://thebioethicsprogram.wordpress.com/2014/02/05/state-pregnancy-exclusions-are-bad-law/

[555] Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 Colum. J. Gender & L. 85, 165 (1997).

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Return to Table of Contents

ment plan or the gathering of information for actual tax preparation. At the onset of the proceedings, you should break down your legal fees between deductible and non-deductible charges so that your client might be able to deduct some of your fees. According to IRS Revenue Ruling 72-245, the Internal Revenue Service will accept a lawyer's allocation of his or her fee between tax and nontax matters where the attorney allocates primarily on the basis of the amount of time attributable to each, the customary charge in the locality for similar services and the results obtained in the divorce negotiations. Based on this Revenue Ruling the allocation should be on the basis of time attributable to each and that on the conclusion of the case you send a letter to your client that identifies the tax verses the nontax matter expenses. Attorney fees paid to increase and/or to collect delinquent spousal support may also be deductible and should be itemized.

The rules and requirements are stringent and therefore important to know at the onset of your client's proceedings. Since alimony payments are included in the recipient's gross income legal expenses to collect alimony can be deducted. Child support has no tax implications to the payee or the payer and therefore legal expenses associated with the collection of child support are not deductible. Legal fees attributable to tax research and tax advice pursuant to divorce are a permissible tax deduction but this deduction is limited to the amount that exceeds 2 % of your Adjusted Gross Income and your client must be able to itemize deductions.

There is no current deduction for legal fees incurred in a divorce action to retain ownership of income producing assets, such as a rental property but even though these fees may not currently be deductible they could result in a future tax benefit when the asset is sold. Fees incurred in establishing and defending title to property can be capitalized and added to the basis of the property. These fees can increase the basis of the property for purposes of figuring gain or loss on a later sale. Defense of ownership or perfection of title to property and legal expenses to recover property that was fraudulently concealed may be capitalized against that property thereby increasing depreciation of the property and/or reducing any potential capital gain.

Tax law impinges on almost every aspect of a family law case. Paying attention to what may provide a tax deduction can reduce some of your client's expenses incurred in a divorce proceeding. Addressing this issue up front while negotiating the terms of your client's divorce can possibly save your client money.

About the Author

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PURSUING CHILD SUPPORT AGAINST INCARCERATED PARENTS; A HOPELESS ENDEAVOR

By Michael Krocker[1]

I. Introduction

An examination of the individual level of child support obligations for incarcerated parents may not inspire policy change, but the aggregate impact reveals that these obligations can congest child support dockets and overall almost certainly injure many families. Particularly, when federal and state governments seek reimbursement against incarcerated parents for government assistance including medical assistance, the government creates a vast number of custodial parents with un-payable child support obligations and exacerbates compliance upon release due to the excessive amount of arrearages accrued during incarceration. Analyzing data from 2008, the U.S. Census Bureau determined that 28.3% "of all custodial parents had incomes below" the poverty line,[2] suggesting the rate of government assistance among fami-

[1] Michael Krocker received a J.D. from the University of Texas at Austin School of Law in May, 2014.
[2] Timothy Grall. *Custodial Mother and Fathers and Their Child Support: 2009*, U.S. Census Bureau, 1 (2011), http://www.census.gov/prod/2011pubs/p60-240.pdf.

Return to Table of Contents

lies within the child support system. This probable rate of government assistance demonstrates that many child support obligations granted against incarcerated parents are part of an effort by the government to recoup the cost of assistance rather than strictly to assist children and families.

Child support orders granted against incarcerated parents can ultimately lead to unrealistically payable arrearages owed to the federal and state governments, as well as to the custodial parent. These arrearages exacerbate the effectiveness of the child support system as a whole and place unreasonable child support obligations on non-custodial parents, making it less likely that they will attempt to, or be able to, comply with their child support obligations. The government's attempts to acquire this reimbursement harm the child support system as a whole by requiring continuous attempts to force compliance with unrealistic child support orders and subsequently congesting dockets that could otherwise invest more time in pursuing realistic child support obligations, in which children and families alone rather than in combination with the government are entitled to the funds. In 2009, 70.8% of custodial parents received some child support in 2009, but only 41.2% received all the child support due to them that year.[3] Child support obligations against incarcerated parents contribute to the rate of non-compliance and under compliance in the child support system and prevent courts from more effectively pursuing cases where higher compliance is a realistic possibility.

The efforts of state governments and the federal government has led to a child support system in which half of the 105 billion dollars in accrued child support debt in 2006 was owed to the government rather than a family or child.[4] This figure reveals a dramatic failure on the part of the government to actually secure reimbursement for government assistance and has "result[ed] in minimal, if any, net fiscal benefit to government" while harming children and society.[5] While the government has ignored the best interests of the children (the purported nationwide legal standard in child support matters) in favor of its welfare cost recovery efforts,[6] the specific focus of this article is the plight of incarcerated parents in Texas and how their child support obligations contribute to the inefficiency of the child support system as a whole.

This article begins with an examination of the size of the prison population nationwide and within Texas to establish the scope of the population impacted by these policies followed by an examination of the Office of the Attorney General of Texas Child Support Division's size and case load to portray the larger landscape of child support within the state. The next section discusses the statutes of the federal government and Texas that give rise to government reimbursement for assistance and the ability of Texas courts to award child support obligations against incarcerated parents. While several law review articles address the national nature of the problem including Daniel Hatcher's *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State* and Jessica Pearson's *Building Debt While Doing Time: Child Support and Incarceration*, the objective of this article is to examine the particular mechanisms of Texas law that function in combination with federal statutes. To this end, the third section applies the Texas statutory regime to two hypothetical situations where the outcomes demonstrate the flaws of the current statutory regime.

The fourth section highlights facets of the Texas courts that may alleviate the continuing creation of these cases and the burden of future cases, including judicial and prosecutorial discretion. The final section of the article discusses possible legislative solutions on both the state and federal level with federal legislative reform providing the only possible method to address the cases already trapped within the system.

II. Incarceration Statistics and the Scope of the Population Impacted by These Policies

A. The Incarcerated Population

At the close of 2012, The U.S. Bureau of Statistics estimated that a total of 1,571,013 individuals were incarcerated nationwide.[7] Of that total, Texas as a state had a prison population of 172,224 individuals, not including those serving time in federal facilities, which exceeded the prison population of any

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[3] *Id.* at 3.
[4] Daniel Hatcher, Child Support Harming Children Subordinating the Best Interests of Children to the Fiscal Interests of the State, 42 WAKE FOREST L. REV. 1029, 1029 (2007).
[5] *Id. at* 1082.
[6] *Id. at* 1029.
[7] E. Ann Carson and Daniela Golinelli. *Prisoners in 2012-Advance Counts*, Bureau of Justice Statistics, 1 (2013), http://www.bjs.gov/content/pub/pdf/p12ac.pdf.

other state.[8] As of 2007, 1.7 million children, 2.3% of the minor population, had a parent that was currently incarcerated, with 809,800 prisoners, more than half the prison population, having minor children.[9] Notably nationwide in 2007, there were 65,600 incarcerated mothers who reported having a total of 147,400 children.[10] The current size of the prison population and the number of minor children with an incarcerated parent begins to suggest the size of the population affected by child support orders granted against incarcerated parents.

The prison population is not static, of course, and rotates in and out of the general population over time. As of 1997, an estimated 5.1% of the total U.S. population will be incarcerated in a state or federal facility at some point in their lifetime, with nearly one tenth of all males and three tenths of African-American males being incarcerated for some period.[11] In 2009, the mean of time served by prisoners released that year was twenty-eight months, while the median was sixteen months.[12] Furthermore, a study conducted concerning prisoners released in 1994 determined that 25.4% were resentenced to prison within three years of their release.[13] Given the number of currently incarcerated parents and the number of people projected to be incarcerated in their lifetimes as well as the length of sentences and the rate of recidivism, child support obligations granted against incarcerated parents impact a very sizeable portion of the population. These orders lead to the accumulation of arrears while incarcerated, which are detrimental to the financial standing of the obligor and exacerbate the rate of compliance with child support orders. Once released, these former prisoners during their reintegration into society face the financial demands for not only their current child support obligation, but also the arrearages that accumulated while they were incarcerated.

However, different states employ different legal regimes when assigning child support obligations to incarcerated parents, causing the impact of such obligations to vary based on jurisdiction. The three primary legal regimes for assigning or maintaining child support obligations against incarcerated parents are: (1) "The No Justification Approach" in which incarceration is not a valid reason to reduce or eliminate a child support obligation; (2) "The Complete Justification Approach" where incarceration justifies eliminating or reducing child support obligations; and (3) "The One Factor Approach" in which incarceration is one factor among many to be considered when assigning a child support obligation.[14] Texas, the focus of this article, employs the one factor approach, leaving the decision to the court's discretion.[15] In 2005, twenty-one states did not consider incarceration to be a valid reason to terminate, reduce, or not assign a child support obligation.[16] Courts in these twenty-one states, like Texas courts that employ their discretion to award such child support obligations, face the docket congestion that these cases can create during the enforcement phase.

B. The Texas Child Support Division

The task of the Office of the Attorney General of Texas Child Support Division is a sizeable one. In the fiscal year ending in August 2012, the Child Support Division collected $3.5 billion dollars and obtained 65,000 child support establishment orders.[17] However, the $3.5 billion dollars collected may at first glance be a deceptive figure: it includes funds that were distributed to the federal and state governments

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[8] *Id.* at 3.
[9] Lauren E. Glaze and Laura M. Maruschak, *Parents in Prison and Their Minor Children*, Bureau of Justice Statistics, 1 (2008), http://www.bjs.gov/content/pub/pdf/pptmc.pdf.
[10] *Id.* at 2.
[11] Thomas P. Bonczar and Allen J. Beck, *Lifetime Likelihood of Going to State or Federal Prison*, Bureau of Justice Statistics, 1 (1997), http://bjs.gov/content/pub/pdf/Llgsfp.pdf.
[12] Thomas P. Bonczar, *Table 9. First Releases from State Prison, 2009: Sentence Length, Time Served, and Percent of Sentence Served in Prison, by Offense*, Bureau of Justice Statistics, (2011) http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2056.
[13] Patrick A. Langan and David J. Levin, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics, 1(2002), http://www.bjs.gov/content/pub/pdf/rpr94.pdf.
[14] Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, JUDGES' JOURNAL, 2004, at 6.
[15] *Id.*
[16] Office of Child Support Enforcement, Project to Avoid Increasing Delinquencies. SUPPORT FACT SHEET SERIES, June 2012, at 5 n.9, http://www.acf.hhs.gov/sites/default/files/ocse/realistic_child_support_orders_for_incarcerated_parents.pdf.
[17] Greg Abbott, *We Can Help You Collect Your Child Support* (2013), https://www.oag.state.tx.us/agency/weeklyag/2013/0213collectchildsupport.pdf.

Return to Table of Contents

rather than families for government assistance reimbursement[18] as well as child support obligations where payments arrive regularly and the state took no action other than disbursement.

In 2011, the Texas Child Support Division had a full time equivalent staff of 2,712 employees working a total of 1,272,936 cases.[19] These statistics mean that, per full time equivalent employee, the Texas division handles 469 cases and collects a little over $1.1 million in child support. The number of cases handled by the division and the limited number of employees suggests that the re-allocation of resources from the pursuit of child support obligations for incarcerated parents to other more realistically obtainable child support orders and worthwhile enforcement proceedings would increase the success rates of the agency and yield even higher numbers, helping more children throughout the state.

A comparison of Texas's Child Support Division to that of other states reveals the particular relevance of the threat of docket congestion to Texas. Texas collected the most money among all the states for the 2011 fiscal year.[20] California had the second highest collection amount at $2.2 billion with a full time equivalent staff of 8,608 individuals working 1.4 million cases, of which 330,000 pertain to parents that have never received government assistance.[21] The Texas Child Support Division, on the other hand, handled 791,070 cases that year in which assistance from the government had never been received by the family, accounting for 62% of the division's total case load.[22] These numbers suggest that the Texas child support system, compared to those of other states that tend to have fewer non-government assistance cases, especially suffers from the impact of docket congestion due to the number of cases where arrears accrued while a parent was incarcerated. Furthermore, Texas possesses a large number of non-government assistance cases that would benefit in terms of agency and court time allocations if the number of cases concerning incarcerated parents were reduced and no longer consumed as much agency and court time.

III. Statutory Justification for Seeking Reimbursement for Government Assistance from Incarcerated Parents in Texas

Incarcerated individuals with minor children in Texas face a mixture of federal and state statutes that enable both the national and state governments to secure reimbursements for government assistance from child support obligations. This legal regime begins with the basic legal principal that the government can acquire the rights of child support recipients in exchange for government assistance.[23] Such a principle in and of itself is not inherently flawed. However, the government's prioritization of fund distribution from collected child support prioritizes the family only when the family is not currently receiving support[24] except for tax refund checks, which are within the state's discretion to disburse first to the family or not and provide more than half the arrears payments in government assistance cases.[25] When jurisdictions award child support obligations against incarcerated parents, an unforeseen consequence is docket congestion and a drop in compliance with child support orders. The Bradley Amendment,[26] an amendment that originally sought to prevent non-custodial parents from relocating to favorable jurisdictions where they could obtain a retroactive modification to greatly reduce their arrears,[27] ensures that these child support orders cannot be retroactively modified, locking the support order into the system and preventing courts from attempting to reassess these orders at a later date. The result is a number of cases trapped in the system where the child support obligation continued to accrue or was established while a parent was incarcerated, resulting in an unrealistic order that requires numerous enforcement actions to produce limited results.

While the federal law enables the government to seek reimbursement for government assistance and solidifies the permanence of the arrears through the Bradley Amendment, Texas law establishes the

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[18] 42 U.S.C. § 657(a)(1) (2006).
[19] Office of Child Support Enforcement, FY2011 Preliminary Report – State Box Scores (2012), http://www.acf.hhs.gov/programs/css/resource/fy2011-preliminary-report-state-box-scores.
[20] *Id.*
[21] *Id.*
[22] *See Id.*
[23] 42 U.S.C. § 608(a)(3) (2008).
[24] 42 U.S.C. § 657(a)(2)(B) (2006).
[25] Daniel Hatcher, Child Support Harming Children Subordinating the Best Interests of Children to the Fiscal Interests of the State, 42 WAKE FOREST L. REV. 1029, 1053 (2007) (looking to 42 U.S.C. § 657(a)(2)(B) and *Hearing on Child Support Enforcement Reforms Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 106th Cong. (2000)).
[26] 42 U.S.C. § 666(a)(9)(C) (2007).
[27] SEN. REP. NO. 99-348, SIXTH OMNIBUS BUDGET RECONCILIATION ACT, 1986, 155 (1986).

Return to Table of Contents

methodology for calculating child support. The statutory scheme of Texas features the minimum wage presumption in which the court may assign child support based on the minimum wage and a forty hour workweek in the absence of other evidence of income.[28] The doctrine of intentional underemployment or unemployment also allows courts to examine the obligor's earning potential[29] or employ the minimum wage presumption to assume what that earning potential is. While the use of these two legal mechanisms can be beneficial in many child support situations, its application to incarcerated parents both while incarcerated and after their release amounts to a denial of a societal reality and a recipe for practically guaranteed partial compliance and highly probable non-compliance. Because of the ability of courts to make default judgments,[30] an incarcerated parent's ability to appear in court and contest the establishment of an order is limited. However, because the application of these two legal mechanisms is within the discretion of the court under Texas law,[31] some courts may not employ the mechanism against incarcerated parents while others may. Courts that choose not to apply the minimum wage presumption to incarcerated parents will not suffer from the docket congestion brought about from the creation of such obligations.

A. The Federal Level

The legal principle, underlying the expansion of the child support system in the 1970s,[32] is the government's ability to acquire the right to child support in government assistance cases. When a family receives assistance from the government, as "a condition" of receiving the assistance "a member of the family [must] assign to the State any right the family member may have… to support from any other person."[33] The amount of this assignment is not to exceed "the total amount of assistance so paid to the family[.]"[34] This legal principal itself is not unreasonable and as a policy leads to positive outcomes concerning child support rights against individuals able, though perhaps not willing, to pay child support. It incentivizes states to create agencies to pursue child support obligations in the hopes of recovering state funds allocated to these families through assistance. Considering that more than half of the Texas Child Support Division's case load consists of cases without current or past government assistance,[35] the incentive for the creation of this agency has benefitted a wide array of individuals outside the initial scope of that incentive.

In anticipation of non-cooperation from families receiving government support, the statutory design contains a coercive mechanism. The assignment of current support and accumulated arrears is coerced from these families through the possibility of "[r]eduction" of "n[o] less than 25 percent" "or elimination of assistance for noncooperation in establishing paternity or obtaining child support" in the absence of "any good cause or other exception" as established by the state.[36] While this coercion is not necessarily abrasive in most situations, it can behave rather maliciously in a few scenarios involving incarceration. After all regardless of the marital or relationship status of a couple child support may be ordered,[37] when one parent is incarcerated a single-parent household is created and may apply for government assistance. In such an instance, the state could pursue a child support claim against the incarcerated parent and later extract its reimbursement from the family unit itself provided the couple reconciles or never experienced discord and after release resumes cohabitating in a single household.

The statutory design accounts for the distribution of the child support funds among the family, the state, and the federal government. When the family currently receives assistance, the federal government collects its reimbursement first from the child support payments, and the state may then decide to retain or

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[28] T.F.C. § 154.068 (1995).
[29] T.F.C. § 154.066 (1995).
[30] T.F.C. § 157.115 (1995).
[31] T.F.C. § 154.123 (1995).
[32] Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POVERTY L. & POL'Y 127, 137 (1964).
[33] 42 U.S.C. § 608(a)(3) (2008).
[34] 42 U.S.C. § 608(a)(3) (2008).
[35] *See* Office of Child Support Enforcement, FY2011 Preliminary Report – State Box Scores (2012), http://www.acf.hhs.gov/programs/css/resource/fy2011-preliminary-report-state-box-scores.
[36] 42 U.S.C. § 608(2) (2008).
[37] T.F.C. § 154.010 (1995).

pass on its share with any remaining amount being paid to the family.[38] If a state may elect to waive its reimbursement, this will trigger a parallel release of the federal arrears.[39] For a family currently receiving government support, if the monthly child support payments do not exceed the amount of monthly government support, the government will claim the sum and none will be allotted to the family. In households suffering from poverty, the best interests of the child dictate that the family should receive its share prior to the government given the direness of the situation. However, government policy prioritizes its own fiscal interests rather than the wellbeing of the child in the disbursement of funds to families currently on support.

For families that formerly received assistance, the statutory language creates an alternative distribution scheme for payments that exceed the current support.[40] The statute prioritizes the distribution of funds first to the family when some arrearages are owed to the family rather than the federal government or state.[41] When arrearages are no longer owed to the family, the federal government receives its share and the state may then retain or release its portion of the arrearages to the family.[42] Such a distribution scheme prioritizes the family once they are no longer receiving support, but ultimately the policies given voice in this statute adversely impact child support situations where government assistance is re-claimed from incarcerated parents, especially those currently receiving support.

Unfortunately, the adverse outcomes from these policies can persist indefinitely in a child support system, limited only by the old-age of the non-custodial parent and his reception of social security benefits[43] or a disability that prevents him from being able to work.[44] The Bradley Amendment enables the continued presence of such defects by crippling a court's ability to retroactively modify child support orders, allowing modifications only from the date of service of the opposing party with the modification petition. [45] The amendment sought to prevent non-custodial parents from relocating to a jurisdiction that permitted retroactive modifications in order to eliminate or greatly reduce their child support debt.[46] While the original intent of the amendment was positive, the lack of foresight concerning its impact gave rise to the inability to modify unrealistic orders granted against incarcerated parents. The Senate simply failed to fully consider the consequences of the amendment. The Senate Report concerning the Bradley Amendment appears under "Miscellaneous Provisions" on a single page, totals two paragraphs, and lacks any mention of incarcerated individuals.[47] This amendment in combination with the right of states and the federal government to seek reimbursement for government assistance creates the foundation of this statutory scheme.

B. The State Level

While the federal statutes may be the overarching statutory design, Texas sets its own policy in determining when support is appropriate and how much should be ordered. The State of Texas provides guideline percentages of net income for setting child support. Courts "may determine the child support amount for the children before the court by applying the percentages in the table [(available in Appendix A)] to the obligor's net resource[.]"[48] This table takes into account both the number of children before the court and other children for whom the obligor has a financial responsibility either within his own home or through other child support orders.[49] For example, the support for two children before the court and no others would be a 25% of the obligor's net income while one child before the court and a legal responsibility for another child would result in a guideline determination of 16% of the obligor's net income.[50] This chart weighs the interests of the children in various households in an effort to effectively balance the best interests of all the obligor's children.

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[38] 42 U.S.C. § 657(a)(1) (2006).
[39] OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY SUPPORTING TWO PARENT FAMILIES/COMPROMISE OF ARREARAGES (1999) *available at* http://www.acf.hhs.gov/programs/css/resource/policy-supporting-two-parent-families/compromise-of-arrearages.
[40] 42 U.S.C. § 657(a)(2)(B) (2006).
[41] 42 U.S.C. § 657(a)(2)(B) (2006).
[42] 42 U.S.C. § 657(a)(2)(B) (2006).
[43] T.F.C. § 154.133 (2001)
[44] T.F.C. § 154.132 (1999).
[45] 42 U.S.C. § 666(a)(9)(C) (2007).
[46] SEN. REP. NO. 99-348, SIXTH OMNIBUS BUDGET RECONCILIATION ACT, 1986, 155 (1986).
[47] *Id.*
[48] T.F.C. § 154.129 (1995).
[49] *Id.*
[50] *Id.*

Return to Table of Contents

While the chart mentioned above may seem reasonable, the courts have an additional duty to assign medical support provided that the obligor does not provide medical insurance for the child,[51] increasing the total net income the obligations can consume. Courts "shall order medical support for the child"[52] based on a "'reasonable cost'… that does not exceed 9% of the obligor's annual resources, as described" for all of the obligor's children "for which the obligor is responsible under a medical support order."[53] The statute indicates that this 9% should be calculated based on the obligor's net resources.[54] This provision, while reasonable by itself, can exacerbate the plight of incarcerated non-custodial parents by increasing their total obligation by up to 9% of their income. This 9% increase can be especially daunting when the non-custodial parent is incarcerated and has no income, ultimately increasing the debt he faces once released.

In a situation where neither parent possesses access to affordable health insurance, the court will order the parent "awarded the exclusive right to designate the child's primary residence or, to the extent permitted by law, the other parent to apply immediately on behalf of the child for participation in a government medical assistance program or health plan."[55] For incarcerated parents, there is no hope of obtaining child support through an employer, making the prison population more susceptible to the demands of medical support. The medical insurance for the children of incarcerated parents may come from either the custodial parent or through Medicaid. If the child participates in a government medical assistance program or health plan, the court shall order cash medical support.[56]

Because Medicaid qualifies as government assistance, the federal and state government can acquire the custodial parent's right to medical support just as they can for child support or "any" right to support.[57] However, the Children's Health Insurance Program (CHIP) features enrollment fees and co-pays based on the family's income rather than being cost-free like Medicaid.[58] Therefore, the custodial parent receives the medical support in cases with CHIP to assist the mother with the costs of the program.[59] Although some Texas legislators are discussing the idea of discontinuing the Medicaid and CHIP programs within the state in reaction to Obamacare,[60] the current policy suggests that if the custodial parent makes payments of some sort for the child's healthcare, she is entitled to the medical support despite the healthcare being subsidized through the state or federal government.

While this statutory regime for medical support exacerbates the support situation for incarcerated parents, the incarcerated parents may alter the current medical support order without going through a court by providing health insurance for the child. Built-in to the statutory design is a requirement that if the obligor has the opportunity to and provides the child with health insurance, this obligation can be terminated by notifying the child support agency.[61] Therefore, the obligor can terminate this obligation simply by providing the medical insurance and notifying the child support agency, rather than filing for a court modification and having to come before the judge again. However, despite this efficient statutory design, the medical support claimed by the federal and state government can further exacerbate situations involving incarcerated parents by increasing their total obligation and arrears during incarceration and after their release as long as they are unable to provide health insurance. Furthermore, an incarcerated parent would only be able to provide health insurance after release and locating a job with benefits that would make the insurance affordable in relation to his wage.

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[51] T.F.C. § 154.182 (2007).
[52] T.F.C. § 154.008 (2007).
[53] T.F.C. § 154.181 (2007).
[54] T.F.C. § 154.062(b) (2007).
[55] T.F.C. § 154.182(b-2) (2007).
[56] *Id.*
[57] 42 U.S.C. § 608(3) (2008).
[58] Texas Health and Human Services Comm'n, *CHIP/Medicaid Costs*, CHIPMEDICAID.ORG ((JAN. 4, 2014, 10:08 AM), http://www.chipmedicaid.org/en/Costs.
[59] Beverly Bird, *Child Support & Medical Insurance in Texas*, EHOW (JAN. 4, 2014, 10:04 AM), http://www.ehow.com/info_8366121_child-support-medical-insurance-texas.html.
[60] Emily Ramshaw, *Lawmakers Discussing Dropping Health Care Program*, THE TEXAS TRIBUNE (JAN. 1, 2014, 11:03 AM), http://www.texastribune.org/2010/11/06/lawmakers-discussing-dropping-health-care-program/.
[61] T.F.C. § 154.182(b-3) (2007).

Return to Table of Contents

1. The Minimum Wage Presumption and the Doctrine of Intentional Unemployment

Child support and medical support obligations would not be so detrimental to the child support system except for the minimum wage presumption. The minimum wage presumption dictates that the court in "the absence of evidence of the wage and salary income of a party" "shall presume that the party has wages or salary equal to the federal minimum wage for a 40-hour week."[62] This presumption allows the court to disregard the income realities of inmates. In federal prisons, wages for prisoners can range from twelve cents to a dollar and fifteen cents per hour, while Texas prisoners receive no pay for their labor.[63] Because federal minimum wage laws do not apply to incarcerated individuals, they are not even legally entitled to minimum wage.[64] Applying the minimum wage presumption to inmates functions as a denial of not only a factual and legal reality, but presumes a non-existent income that ultimately overburdens the entire child support system with cases that require significant enforcement and yield limited payment results.

The doctrine of intentional unemployment or underemployment allows the application of the minimum wage presumption to inmates. If the obligor's "actual income is significantly less than what the obligor could earn" due to "intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor."[65] The earning potential of the obligor may exceed minimum wage depending on job history, training, and education, but the court in the absence of such evidence is likely simply to apply the minimum wage presumption. Even though an inmate's earning potential while incarcerated is nonexistent in Texas state prisons and miniscule in Federal prisons,[66] the court may find that a prisoner's earning potential refers to his ability to earn a wage as if he were not incarcerated. While both the minimum wage presumption and the concept of intentional unemployment or underemployment have a proper place in the child support system, employing them against incarcerated parents creates unrealistic arrearages and undermines the efficiency of the child support system at large.

While the courts in Texas may apply these two doctrines to inmates, a court may also decline to impose them and not set a current child obligation for an incarcerated parent. A court may deviate from the guidelines to establish support if the guidelines function against the "best interest of the child" and "justifies a variance from the guidelines."[67] To assess the inappropriateness of guideline support, the court may consider "all relevant factors" including "debts or debt service assumed by either party[,]" "the obligee's net resources[,]" and "any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents."[68] Under this portion of the statutory scheme, a court could find that a current child support obligation for an incarcerated parent would overburden the parent during the reintegration process following release and impair the parent's ability to reintegrate into society and provide for his child in the future. This portion of the statute makes Texas a "one factor approach" jurisdiction when determining the child support of incarcerated parents, placing the current obligation for an incarcerated individual within the court's discretionary powers.[69]

2. Default Judgments

While some obligors may have an existing child support order prior to being sentenced to prison, other inmates will face default judgments for child support obligations during their prison sentence. For example, 70% of incarcerated parents received default child support obligations without making a court appearance in California.[70] While the percentage may not be identical for Texas inmates, it is a substantial component of the legal landscape for incarcerated parents and warrants an examination.

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[62] T.F.C. § 154.068 (1995).
[63] *Section III: The Prison Economy*, THE PRISON POLICY INITIATIVE (JAN. 2, 2014, 3:30 PM), http://www.prisonpolicy.org/prisonindex/prisonlabor.html.
[64] Steve Barnes, *Texas Court Says No to Minimum Wage for Inmate*, N.Y. TIMES (July 11, 2006), http://www.nytimes.com/2006/07/11/us/11brfs-002.html?_r=0.
[65] T.F.C. § 154.066 (1995).
[66] *Section III: The Prison Economy*, THE PRISON POLICY INITIATIVE (JAN. 2, 2014, 3:30 PM), http://www.prisonpolicy.org/prisonindex/prisonlabor.html.
[67] T.F.C. § 154.123(a) (1995).
[68] T.F.C. § 154.123(b) (1995).
[69] Pearson, *supra* note 13, at 6.
[70] Elaine *Sorensen, Understanding How Child Support Arrears Reached $18 Billion in California*, 94 AM. ECON. REV. 312, 314 (2004).

Return to Table of Contents

In Texas, a court may enter a default child support judgment against a party that "has been personally served, has filed an answer, or has entered an appearance" and does not appear to respond to the motion.[71] Without making an appearance or filing an answer, an inmate like any other obligor faces a probable default judgment. An inmate can file a writ of "*habeas corpus ad testificandum*, also known as a bench warrant," to request to "appear personally at pre-trial and trial hearings."[72] However, a court may make an implicit ruling on the bench warrant simply by proceeding to trial and entering a default judgment.[73] While "litigants cannot be denied access to the courts simply because they are inmates[,]" they do not "have an absolute right to appear **in** person **in** every court proceeding."[74] To make a determination regarding the bench warrant request, the Texas Supreme Court has created a test.

Under this test, a court should weigh a variety of factors to decide whether to grant a bench warrant including "the cost and inconvenience of transporting the prisoner to the courtroom[,]" "whether the prisoner's claims are substantial[,]" and that the prisoner's presence "cannot be effectively presented by deposition, telephone, or some other means[.]"[75] The cost of transporting each prospective obligor to court for a hearing in combination with the size of Texas's prison population demonstrates the fiscal impossibility of providing obligor's with the opportunity to appear in court. This financial limitation of the state forces inmates to rely either on their own pro se filed response or the appearance of counsel on their behalf.

However, an inmate is not entitled to a court-appointed attorney during the establishment phase of a child support order. If the court determines that "incarceration of the respondent is a possible result of the proceedings" in a "motion for enforcement or motion to revoke community service[,]" the individual may receive an appointed attorney provided the court finds the individual to be indigent.[76] However, the enforcement phase for incarcerated parents begins after the obligor's release when payment is realistically possible. Therefore, incarcerated parents are not entitled to a court-appointed attorney during the establishment proceeding when their counsel may have the best opportunity to argue the client's case under the law and gain a favorable order within the court's discretionary powers. Considering the likely financial means of incarcerated parents and their probable inability to effectively represent themselves pro se through a filed response, the courts have effectively crippled the ability of incarcerated parents to present their case, leaving the outcome of the default proceeding entirely to the court and its application of discretionary powers.

IV. Hypothetical Studies

By applying these federal laws and state calculation methods to hypothetical situations, such scenarios can demonstrate how a court may employ its discretion according to the guidelines. The two hypothetical studies that follow demonstrate two different situations, which reveal the inherent flaws of seeking reimbursement for government assistance from incarcerated parents

A. Hypothetical I

There is a married couple, Chuck and Wilma, with two children. Chuck receives a prison sentence for two years. Then Wilma applies for and receives government assistance as a single-parent household. The state automatically files a motion to establish a child support obligation, and the court will calculate the support without regard to "the marital status of the parents of the child[ren]."[77] If the custodial parent does not cooperate, the state may withdraw the support.[78] Wilma cooperates with the child support agency because the household needs the full amount of government assistance. The state then pursues retroactive child support in court beginning from the month assistance was first given to the family.[79] If the court

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[71] T.F.C. § 157.115 (1995).
[72] In The Interest of Z. L. T., 124 S.W.3d 163, 165 (Tex. 2003).
[73] *Id.*
[74] *Id.*
[75] *Id.* at 165-6.
[76] T.F.C. § 157.163 (1995).
[77] T.F.C. § 154.010 (2007).
[78] 42 U.S.C. § 608(2)(B) (2008).
[79] T.F.C. § 154.131 (2007).

Return to Table of Contents

does not employ its discretion to deny the child obligation support for the incarcerated parent, the child support accumulates at the monthly rate established by the guidelines based on the imputed income (most likely the minimum wage presumption will be used) and at a simple interest rate of 6% per year.[80]

The court finds Chuck's gross monthly income to be $1,256.66 using the minimum wage presumption.[81] Based on this gross income, the court determines that Chuck has a monthly net income of $1,117.42.[82] Because he has two children with Wilma and no others, the percentage applied to his net income is 25% for determining his monthly obligation,[83] making his monthly obligation $279.[84] However, the two children are also on Medicaid now because Chuck previously had them on his medical insurance through his employer. Wilma does not have access to medical insurance at a reasonable cost for the children. Therefore, the court can order up to 9% of Chuck's net income[85] or $101 for medical support.[86] However, the court decides to order just $50 a month in medical support,[87] which will reimburse the Medicaid program. Chuck's total monthly obligation while incarcerated is $329.[88] Chuck's debt for the first year amounts to $4,076.31.[89] By the end of the second year and Chuck's release, Chuck owes a total of $8,389.50.[90]

Upon his release, Chuck and Wilma resume living together with their two children. The family then makes record time in modifying their child support order and re-applying for government support and Medicaid as a two-parent household. While Wilma and Chuck will be able to discontinue the current support in court, Chuck's debt cannot be erased due to the Bradley Amendment and the fact that portions of the debt are owed to the government as reimbursements for assistance.[91] If money was not owed to the government or Texas and subsequently the federal government abandoned their respective interests in the arrearages, Wilma could simply forgive the arrears owed to her by agreement with Chuck, provided the court approves it.[92] However instead, the $8,389.50 will be extracted from the household with a portion paid back to it. If Wilma and the kids received $130 a month in government assistance for twenty-four months, the household owes $3,120 total[93] to both the state and federal government for that assistance. However, the government also has a claim to the medical support, amounting to $1,200.[94] Therefore, the government has a stake in $4,320[95] of the $8,389.50. However, the court order will not distinguish between the money owed to the government and the money owed to the custodial parent.[96] Therefore, Chuck and Wilma as a household will send roughly $4,069.50 to the State Disbursement Unit, merely to have it sent back to the household. Once, all the money owed to the household has been paid to itself through the disbursement agency, Wilma and Chuck will be able to begin paying the debt owed to the government.[97] Chuck and Wilma demonstrate the absurd outcome that can result from these policies re-

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[80] T.F.C. § 157.265(a) (2005).
[81] $7.25 an hour x 40 hours a week x 52 weeks a year ÷ 12 months a year = $1,256.66
[82] An individual's net income can vary, making this amount a hypothetical though approximately accurate one.
[83] T.F.C. § 154.129 (2007).
[84] $1117.42 x .25 = $279
[85] T.F.C. § 154.181 (2007).
[86] 0.09 x $1,117.42 = $101
[87] T.F.C. § 154.062(b) (2007); T.F.C. § 154.182(b-2) (2007).
[88] $279 for child support + $50 for cash medical support = $329
[89] $3,948 in principal debt with $128.31 in interest calculated by the formula: 78 (the number of months that interest accrues for each month with the first month counting twelve times and the last month counting once) x .005 (the monthly interest rate derived from 6% annually) x $329 (the monthly support rate)
[90] (2 x $4076.31 per a year) + (.06 annual interest rate x $3948 the principal from the first year) = $8,389.50
[91] OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY SUPPORTING TWO PARENT FAMILIES/COMPROMISE OF ARREARAGES (1999) *available at* http://www.acf.hhs.gov/programs/css/resource/policy-supporting-two-parent-families/compromise-of-arrearages; T.F.C. § 233.024 (1995).
[92] OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY SUPPORTING TWO PARENT FAMILIES/COMPROMISE OF ARREARAGES (1999) *available at* http://www.acf.hhs.gov/programs/css/resource/policy-supporting-two-parent-families/compromise-of-arrearages; T.F.C. § 233.024 (1995).
[93] $130 x 24 months = $3,120
[94] 24 months x $50 = $1,200
[95] $3,120 + $1,200 = $4,320
[96] In the Interest of Chante M. Armtead, No. 1996-CI-06644, WL 5248274, at 2 (D. Tex. April 7, 2004) (where arrears in defined as including "all past-due child-support and medical-support payments").
[97] OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY SUPPORTING TWO PARENT FAMILIES/COMPROMISE OF ARREARAGES (1999) *available at* http://www.acf.hhs.gov/programs/css/resource/policy-supporting-two-parent-families/compromise-of-arrearages (only Washington and Vermont have practices in place to encourage reunification by waiving arrearages owed to the state).

Return to Table of Contents

garding incarcerated parents and how if reunification of the parents occurs, the entire household can suffer financially.

B. Hypothetical II

While Chuck and Wilma's reunification presents the flaws of the statutory regime when parents reunite, Matthew in the following hypothetical demonstrates the more commonplace burdens placed on the non-custodial parent and the child support system at large. Matthew has three different children, occupying three different households with their respective mothers, and represents the image that the general public often perceives as the standard non-custodial parent. Matthew conceals his actual income from the fact finding efforts of the courts, which he manages to do by working in an industry where he makes most of his money in unreported daily wages. Therefore, all three of his child support orders employ the minimum wage presumption,[98] finding his gross monthly income to be $1,256.66 with a net income of $1,117.42. Each child is entitled to 16% of Matthew's presumed income based on his other child support obligations, amounting to $179 per month.[99] While Matthew's two youngest children receive Medicaid, his oldest child, Stewart, has insurance through his mother. In each case, the court awards $33 dollars in medical support.[100] Therefore, each individual obligation amounts to $212[101] for a total of $636 dollars a month due to satisfy all three obligations.

However, Matthew commits a crime and serves three years in prison. Although, he applies for modifications, the courts decide to continue his obligations employing the minimum wage presumption.[102] Each year per obligation, the principal increases $2,544[103] for a total principal of $7,632.[104] As each current year passes, $82.88[105] in interest accumulates for that year while for each past year the principal from the prior year or years accrues $152.64[106] in interest. Therefore, Matthew's debt from interest amounts to $706.56 per obligation.[107] For all three obligations, Matthew owes a total principal of $22,896[108] with an accumulated $2,119.68[109] in interest, making Matthew's entire debt $25,015.68[110] upon his release.

This accrued debt increases Matthew's monthly payments by sixty dollars a case because he must begin to pay the accruing interest and reduce the principal.[111] Therefore, the amount due each month per case would be $272,[112] making his total child support obligation for all three cases $816[113] a month. In other words, Matthew's current child support obligation has increased by 28%[114] so that the current amount due reflects collecting 73% of his presumed income.[115]

Matthew's net income demanded each month for child support has substantially increased due to the payments necessary for the debt accrued during his incarceration. Although courts can consider a wide array of factors when determining a child support obligation, courts do not tend to consider the impact of

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[98] T.F.C. § 154.068 (1995).
[99] $1,117.42 x .16 = $179
[100] 1/3 of the allowable 9%, which is $101 ÷ 3 = $33 (T.F.C. § 154.062(b) (2007); T.F.C. § 154.182(b-2) (2007).)
[101] $179 + $33 = $212
[102] T.F.C. § 154.068 (1995).
[103] 12 x $212 = $2,544
[104] 3 x $2,544 = $7,632
[105] 78 x .005 x $212 = $82.88
[106] $2,544 x .06 = $152.64
[107] (3 x $82.88) for each year as it currently passed + (3 x $152.64) for each year interest accrued on an entire year's principal = $706.56
[108] 3 x $7,632 = $22,896
[109] 3 x $706.56 = $2,119.68
[110] $22, 896 + $2,119.68 = $25,015.68
[111] $22,896 total principal x .06 annual interest ÷ 12 months in a year = $114.48 a month total or $38.16 a month per an obligation, meaning that paying $60 a month towards his debt per case, or an additional $180 total a month, would whittle away at the principal.
[112] $212 + $60 = $272
[113] 3 x $272 = $816
[114] $272 ÷ $212 or $816 ÷ $636 = 1.283
[115] (16% x 3or 48% for the child support) + the 9% total (or 3% per case for medical support) = the 57% that was the previous percentage of his income taken for child support and 57% x 1.28 to account for the increase = 73% of Matthew's presumed income.

Return to Table of Contents

the additional sums due each month towards arrears though they can take into accounts the debts of parties in general.[116] The court should consider "all relevant factors" when determining the amount of support with the statutory list being non-exclusive.[117] However, the hypothetical situation of Matthew demonstrates a situation where a court fails to consider the impact of the amount collected to pay arrearages. Thus, the court ignores an inherent deviation from the guidelines for incarcerated parents. The debt that accrues while a parent is incarcerated inevitably increases the amount demanded in payment each month after the inmate's release. For Matthew, this was an increase of 28%, transforming the monthly amount from 57% of his monthly income to 73%, placing an additional burden on him.

With his criminal record, Matthew's employment opportunities are scarce. However, he finds a job working thirty-two hours a week for minimum wage. Matthew's monthly gross salary is $1005.33.[118] Now, Matthew may have a net income of $900 a month. This income means that if Matthew were to pay his full child support obligation each month, he would pay 91% of his actual income in child support.[119] His employer assigns Matthew different shifts each week, preventing him from finding a second job. After his modification requests from prison, Matthew knows that the courts have no interest in reducing his current support amount to reflect his actual income. Eventually Matthew's employer receives a wage withholding notice, but only 50% of Matthew's net income can be withheld from his check.[120] Therefore, as long as Matthew retains his job, he can expect to receive $450 a month from his employer (the remaining 50% of his $900 net income). Matthew accrues an additional child support debt of $186 a month aside from any interest.[121] Eventually, Matthew's landlord evicts him for not being able to pay his rent, and such instability leads to Matthew losing his job as well.

As Matthew's homelessness demonstrates, the minimum wage presumption and the doctrine of intentional underemployment are inherently unrealistic considering the probable rate of full-time employment among former inmates. Among the entire population of "less-educated men[,]" ex-criminal offenders may increase the unemployment rate by "as much as 6.1 to 6.9 percentage points."[122] Even "mere contact with criminal justice system… severely limits subsequent employment opportunities[.]"[123] Aside from unemployment, these individuals work in a society where one-fifth of those employed circa 1990 held part-time positions.[124] Furthermore, the part-time employment may demand flexible scheduling, inhibiting an employee's ability to acquire a second job.[125] The rate of unemployment among former inmates in-combination with the rate of part-time employment makes the use of the doctrine of intentional underemployment and the minimum wage presumption against former inmates a blatant denial of a societal reality and makes Matthew's predicament more likely among formerly incarcerated parents with child support obligations during their imprisonment.

Now homeless, Matthew does have the advantage of more easily avoiding child support location services and contributes three more families to the number of families receiving no child support for a time. Matthew is eventually arrested for a minor crime and brought before the child support court. He then comes before the court on a regular basis on deferred commitment reviews to see if he can offer enough money towards his child support to delay serving his contempt sentence. Realizing the futility of appearing in court time and time again, Matthew stops appearing in court and resurfaces every once in a while from a minor arrest. The custodial parents in Matthew's cases cannot release his arrears without the blessing of the state and the court because all three received government support at some time.[126] Furthermore, two of the custodial parents are currently on support, preventing them from ending Matthew's current

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[116] T.F.C. § 154.123(b) (1995).
[117] T.F.C. § 154.123 (1995).
[118] $7.25 hourly rate x 32 hours worked a week x 52 weeks in a year ÷ 12 months in a year = $1005.33
[119] $816 ÷ $900 = 90.7%
[120] T.F.C. § 158.009 (1997).
[121] $636 current obligation - $450 wages withheld = $186.
[122] John Schmitt and Kris Warner. *Ex-offenders and the Labor Market*. Center for Econ. and Pol'y Res. (CEPR), 14 (2010), *available at* http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf.
[123] Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOCIOLOGY 937, 960 (2003), *available at* http://www.princeton.edu/~pager/pager_ajs.pdf.
[124] Chris Tilly, *Reasons for the Continuing Growth of Part-Time Employment*, MONTHLY LABOR REV. 10, 11 (1991) *available at* http://www.bls.gov/OPUB/MLR/1991/03/art2full.pdf.
[125] *See Id.*
[126] OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY SUPPORTING TWO PARENT FAMILIES/COMPROMISE OF ARREARAGES (1999) *available at* http://www.acf.hhs.gov/programs/css/resource/policy-supporting-two-parent-families/compromise-of-arrearages; T.F.C. § 233.024 (1995).

Return to Table of Contents

obligation even if they wanted to do so. Matthew alternates between partial compliance with his orders and non-compliance over the years. His three cases congest the dockets and continue to consume the child support agency's resources. Eventually, maybe Matthew will end up on disability and be unable to work, allowing the agency to claim a small portion of the check and end the enforcement cycle.[127] Otherwise, Matthew must find a job that enables him to subsist on 50% of his net income or continue working off the books and being in and out of child support court.

V. Child Support Safety Valves: Discretion and Negotiation

Situations like Matthew's can be avoided through the use of three safety valves in the child support system that can either help reduce or exacerbate the docket congestion that child support obligation against incarcerated parents produce: 1) judicial discretion, 2) the ability of the parties to negotiate and make an agreement between themselves that considers incarceration and of which the court approves and the state endorses when arrears are owed to the government, and 3) prosecutorial discretion. Two of these safety valves, prosecutorial and judicial discretion, are not inhibited by the presence of government assistance in the custodial household. State agency prosecutors may decide not to pursue child support against an incarcerated parent when presenting their case to the court while courts regardless of the prosecutor's requests may employ their discretion to award or not award such child support.[128] The court's discretion, unlike that of the prosecutor, is not inhibited by the policies of the state collection agency and represents the single strongest method in Texas for currently preventing new cases like Matthew's from arising.

However, the government's interest in arrearages greatly inhibits the ability of the custodial and non-custodial parent to negotiate. The government's interest in the amount owed by the non-custodial parent prevents a custodial parent from being able to forgive arrears and negotiate fully with the non-custodial parent unless the state agrees to release the arrears owed for government reimbursement.[129] When the state releases its arrears, the federal government's interest is automatically also waived.[130] In cases involving an incarcerated parent and government assistance, the ability of the parties to make such agreements could prevent some of these cases from continuing to congest dockets by allowing the custodial parent to release the arrears and continue current support if the state would agree to the release of arrears and the court approved the agreement by signing it.[131] However, this possible solution requires the consent of the state to release arrears and the court's approval in the form of a signature. The necessity of these two blessings requires a mandate in child support agency policy approved by the state government and the consent of the judge, which makes this solution possibility somewhat unviable and difficult to obtain. Unless Texas as a state alters its policy in these cases, such releases of arrears by agreement are impossible.

Even if courts employ their discretion, the strongest tool to prevent these situations, to no longer award support against incarcerated parents and the state agency uses its prosecutorial discretion to stop requesting such support, the past cases in which such support was awarded will continue to induce docket congestion. The problem is not merely one of future cases, but also includes past orders and ongoing cases. Due to the Bradley Amendment, such cases will continue to haunt child support dockets.

VI. Possible Legislative Solutions

A. Texas House Bill 191 (introduced 2013)

Representative Dutton proposed House Bill 191 from the 2013 session sought to "exempt a parent who has been incarcerated for at least 90 days from accumulating child support debt" with a mandate "that an incarcerated parent who has the means to pay child support must continue to pay it."[132] However,

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[127] T.F.C. § 154.132 (1999).
[128] T.F.C. § 154.123 (1995).
[129] OFFICE OF CHILD SUPPORT ENFORCEMENT, POLICY SUPPORTING TWO PARENT FAMILIES/COMPROMISE OF ARREARAGES (1999) *available at* http://www.acf.hhs.gov/programs/css/resource/policy-supporting-two-parent-families/compromise-of-arrearages.
[130] *Id.*
[131] *Id.*; T.F.C. § 233.024 (1995).
[132] Jorge Renaud, *Support Texas Children by Modifying Support Orders of Incarcerated* Parents (Fact Sheet H.B. 91) *available at* http://www.texascjc.org/sites/default/files/publications/HB%20191%20Fact%20Sheet%20(2013).pdf.

Return to Table of Contents

this bill died in committee.[133] The real advantage to such a piece of legislation is that it could streamline the modification process for the incarcerated and help the state agency and courts avoid a wave of traditional modifications requiring relevant factor analysis. However, this bill would not alter the previous obligations awarded against incarcerated parents that have since been released. The Bradley Amendment bars such retroactive legislation. Furthermore, Representative Dutton may not have been the ideal advocate for advancing this bill through the legislature with his own child support woes.[134]

B. A Possible Federal Bill

The most effective solution would be to amend the Bradley Amendment so that individuals could request retroactive modifications for periods when they were incarcerated. Presumably, in the spirit of the original amendment, no other grounds would justify a retroactive modification. However, additional legislation would be needed to automate and streamline modifications that suspend the current child support obligations of incarcerated parents. This modification would remain true to the spirit of the original Bradley Amendment while helping to resolve these issues nationwide.[135]

VII. Conclusion

Because Texas courts exercise discretion in child support obligations against incarcerated parents, these cases are more likely to clog the dockets of specific courts that award current child support obligations against incarcerated non-custodial parents. Therefore depending on the practices of the court, the impact of such cases may be minimal or substantial. However, in courts, which suffer from the docket congestion induced by such cases, both the court staff and the state agency suffer from personnel fatigue and a reduction in overall effectiveness in regards to compliance. By reducing this docket congestion, ideally courts and the state agency could better serve the parties that come before the court.

The state could alter its policy in order to release the arrears in these cases for the period, in which the non-custodial parent was incarcerated, and enable agreements between the parties with the consent of the court although the state seems unlikely to abandon its fiscal interests, even if that interest is merely debt owed rather than actual money. While the cases of the past may continue to congest dockets without the above action by the state or an amendment to the Bradley Amendment, future cases that mirror the situations of Matthew and Chuck can be avoided in the future through the exercise of judicial and prosecutorial discretion.

Despite the solutions applied to future cases, action must be taken to alleviate the strain that the child support system currently suffers from the previously established child support obligations for incarcerated parents. Without a change in state policy in regards to arrears owed to the government or an alteration of the Bradley Amendment, the child support system will continue to face the strains of these cases while families will continue to suffer from the fallout of these policies. For Chuck's family, the government extracted its reimbursement from the household itself while Matthew's ability to re-integrate into society and pay current child support was crippled by his debt accrued during his incarceration. Without action, these trends will continue with both future and past cases.

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[133] *83rd Legislative Session Bills: H.B. 191*, THE TEXAS TRIBUNE, *available at* https://www.texastribune.org/session/83R/bills/HB191/.

[134] Peggy O'hare, *Rep. Dutton Ordered to Pay Back Child Support*, HOUSTON CHRON. (Dec. 11, 2007) http://www.chron.com/neighborhood/pasadena-news/article/Rep-Dutton-ordered-to-pay-back-child-support-1826832.php.

[135] A search reveals that though there's outlying support to amend the Bradley Amendment, no legitimate advocate or advocacy group seems to be pushing for an amendment.

Return to Table of Contents

Appendix A

MULTIPLE FAMILY ADJUSTED GUIDELINES[136]

(% OF NET RESOURCES)

Number of children before the court								
Number		**1**	**2**	**3**	**4**	**5**	**6**	**7**
of other	**0**	20	25	30	35	40	40	40
children	**1**	17.5	22.5	27.38	32.20	37.33	37.71	38
for	**2**	16	20.63	25.2	30.33	35.43	36	36.44
whom	**3**	14.75	19	24	29	34	34.67	35.2
the obli-	**4**	13.6	18.33	23.14	28	32.89	33.6	34.18
gor has a	**5**	13.33	17.86	22.5	27.22	32	32.73	33.33
duty of	**6**	13.14	17.5	22	26.6	31.27	32	32.62
Support	**7**	13	17.22	21.6	26.09	30.67	31.38	32

[136] T.F.C. § 154.129 (1995) (This table has been re-formatted to some extent, but the substance remains identical).

Return to Table of Contents

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

DOMESTIC VIOLENCE

MOTHER'S POST-DECREE REQUEST FOR A SECOND PROTECTIVE ORDER AGAINST FATHER WAS NOT BARRED BY RES JUDICATA BECAUSE THE TRIAL COURT HAD EXPRESSLY FOUND IN THE FINAL DIVORCE DECREE THAT FATHER HAD COMMITTED FAMILY VIOLENCE

¶14-5-01. ***Coffman v. Melton,*** ___ S.W.3d ___, 2014 WL 4377466, 14-13-00661-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (09-04-14).

Facts: During Mother and Father's divorce proceedings, the trial court signed an Agreed Final Protective Order, in which the trial court found, and the parties agreed, that the order was necessary and in the best interest of Mother and Mother's family to protect them from Father's calls, harassment, and threats. The trial court also found that Father had committed family violence and that family violence was likely to occur again in the future.

Less than a month before the prior order was set to expire, Mother filed an application for a second protective order. Mother testified of violations of the first protective order and confirmed allegations made in her first protective order. Specifically, Father had physically abused her, spit on her, plastered false and vulgar things on the side of her home, and threatened to take the Children from her and out of Texas. On cross-examination, Mother admitted she had not heard from Father in almost two years.

After the hearing, the trial court granted Mother's application for a second protective order. Father appealed, arguing that Mother's request was barred by res judicata and that the evidence was legally and factually insufficient to support the trial court's judgment.

Holding: Affirmed

Opinion: This case was transferred from the 9th COA to the 14th COA by the Tex. Sup. Ct. Thus, per TRAP 41.3, the case was decided using precedent of the 9th COA.

Here, Father misplaced reliance on cases involving claims barred by res judicata. Father directed the COA to cases in which prior judgments found no family violence and, thus, prevented a party from obtaining a post-decree protective order based on evidence of pre-decree family violence. However, in this case, the opposite situation was presented. The Parties' final decree contained an express finding of family violence. In fact, Father's access to his Children was denied based on that finding. In addition, because the TFC limits the time period for which a protective order may be granted, an application for a new protective order seeks additional relief that could not have been sought during the prior proceeding. Mother's request was not barred by res judicata.

Further, Mother testified about Father's two violations of the first protective order, and the trial court took judicial notice of the proceedings on the first protective order, including the trial court's memory that the evidence at the first protective order hearing demonstrated "egregious and frightening" acts of family violence. Mother also testified that her fears of Father had grown worse and that Father "doesn't follow the rules" and had disobeyed parts of the final decree. The trial court also had a copy of the first Agreed Final Protective Order, in which Father agreed the order was necessary and in the best interest of Mother and Mother's family. Because evidence of past violence can constitute evidence of future violence, this evidence was sufficient to support the trial court's finding that violence was likely to occur in the future.

Editors Comment: *This case seems to come perilously close to holding that once there's a Protective Order, there can always be a Protective Order. But Mother testified to two violations of the Protective Order, one of which involved "plastering false and vulgar things about her and her family on the walls of the couple's home." That was enough for the Protective Order to be extended. J.V.*

Return to Table of Contents

DIVORCE
TEMPORARY ORDERS

TRIAL COURT ERRED IN MODIFYING AGREED TEMPORARY ORDERS BECAUSE THE MODIFIED ORDER DID NOT ENHANCE THE CHILD'S SAFETY AND WELFARE; MODIFIED ORDER FAILED TO GIVE DUE REGARD TO THE STABILITY OF THE CHILD'S CURRENT LIVING SITUATION.

¶14-5-02. *In re Casanova*, No. 05-14-01166-CV, 2014 WL 6486127 (Tex. App.—Dallas 2014, orig. proceeding) (mem. op.) (11-20-14).

Facts: Mother and Father were married with one Child. The parents separated when the Child was 4 years old. At the time of the separation, Mother moved from Dallas to Tulsa to be with her family. Mother and Father agreed to let the Child finish out her school year in Dallas, and Mother would visit the Child in Dallas on the weekends. The parents further agreed that once that school year ended, they would share custody of the Child. The Child stayed with Mother Monday through Thursday and stayed with Father Thursday through Sunday. The parties agreed to temporary orders that appointed them JMCs and granted Mother the exclusive right to designate the Child's primary residence in either Dallas or Tulsa. The agreed orders gave both parents the right, subject to agreement with the other parent, to make decision concerning the Child's education. The temporary orders were to remain in effect until the Child turned 18 or was otherwise emancipated. Mother and Father entered a lottery to attempt to obtain a place for the Child to attend a Tulsa magnet school. When the Child was selected, Mother enrolled the Child in kindergarten at the magnet school to begin in the fall of 2014. Subsequently, Father moved to modify the temporary orders to limit the Child's primary residence to Dallas and to require her to attend school in Dallas. After an evidentiary hearing, the trial court entered an order requiring Mother to move the Child back to Dallas by January 1, 2015. If Mother returned with the Child as ordered, she would retain the exclusive right to designate the primary residence of the Child, and Father would be granted weekend visitation. However, if Mother failed to return with the Child, Father would be granted the exclusive right to designate the Child's primary residence, and Mother would be given weekend visitation. Mother appealed, arguing that the trial court erred in modifying the agreed temporary orders when there had been no material and substantial change in circumstances. Mother additionally argued that the trial court's ordered failed to give due consideration for the Child's safety and welfare and the current living conditions of the parties.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Chapter 156 of the TFC is predicated on the doctrine of res judicata, and the policy concerns regarding finality of judgments and cessation of custody litigation are not implicated in the same was by modifications of temporary orders. Therefore, Chapter 156 does not apply to modifications of temporary orders.

However, per TFC 105.001(a), prior to modifying a temporary order, a court must consider whether the temporary orders are for "the safety and welfare" of the child. Because there was no evidence of a present threat to the Child's safety or welfare, the COA reviewed the trial court's order to determine whether the modified order enhanced the Child's safety or welfare. The trial court was required to measure each change the modified order imposed, particularly the geographic restriction on the Child's primary residence during the pendency of the divorce, against the yardstick of whether the change was necessary for the Child's safety and welfare.

While a trial court has broad discretion on custody, control, possession, and visitation matters, a trial court may not rely solely on its own ad hoc determinations. Rather, temporary orders must comport with

Return to Table of Contents

legislatively pronounced public policy guidelines, including providing the child a safe, stable, and nonviolent environment; and encouraging parents to share the rights and duties of raising their child. Further, "[a] court abuses its discretion in imposing temporary orders without due regard for the current living conditions of the parties, *especially* the stability of the child's current living situation, and without regard for the financial or practical ability of the parties to comply with the court's orders."

The Child was happy and thriving under the current custodial situation. Mother sought to retain the status quo of the Child's residence. For over a year, the Child had a parent in both Tulsa and Dallas, with whom she spent about equal time. The Child had developed a life in Tulsa, was selected to attend a magnet school, participated in extracurricular activities, made local friends, and had frequent contact with extended family in Tulsa. The trial court's order forced disruption in the Child's schooling by requiring her to change schools mid-year; gave little or no weight to the positive benefit of the Child's frequent contact with her extended family; and placed a new burden on Mother by removing Tulsa as a permissible primary residence without showing that the burden was necessary for the safety and welfare of the Child. Mother had a job that contributed to her ability to provide a better standard of living for the child and allowed her to be personally with the Child after school, which should have been a significant consideration in determining whether to alter the agreed temporary orders.

The trial court failed to give weight to the parents' agreement that Tulsa was an appropriate residence for the child. The trial court abused its discretion in substituting its judgment for that of the parents.

Editor's Comment: *This case is worth the read. First, it's unusual to see an appellate court find an abuse of discretion on a close custody call (in my opinion) on temporary orders. Second, this case is filled with quotable citations that will enhance any practitioner's next trial brief. So much of a family law attorney's courtroom experience is in temporary orders hearings, and this case provides a fairly detailed analysis of two important aspects of those hearings: 1) the standards required before modifying temporary orders; and 2) the statutory factors and public policy considerations in an analysis of a tough factual situation. This case is also interesting because it specifically holds that a litigant does* ***not*** *have to prove a material and substantial change in circumstances in order to modify temporary orders, but instead must prove the orders are for the safety and welfare of the child (and perhaps must "enhance" the child's safety and welfare?!) under Section 105.001. Did us Dallas attorneys just get handed an easier standard? Or a tougher one? I can't decide. Either way, read this case. R.T.*

Editor's Comment: *Father's grounds for modifying the temporary order were weak: He "expressed concern Mother had recently become less communicative and failed to advise him of an incident at the child's school that resulted in brief contact with child protective services." J.V.*

Editor's Comment: *Notice that mandamus proceedings are becoming more common in family law with the easing of the mandamus standard over the past few years. This case formally applies a burden of proof to temporary orders and modification of temporary orders proceedings. Some lawyers confuse the standard for modification of final order with the standard for modification of temporary orders. This case definitively states that "changed circumstance" is not the standard to modify temporary orders. Instead, the standard is "safety and welfare" of the child. In review of the "safety and welfare" standard, the trial court should review factors such as: safe, stable, nonviolent environment; shared parenting; maintaining status quo; current living situation. Additionally, the trial court should disregard the financial ability of the parties. So in an attempt to modify temporary orders, the evidence should focus on any "threat to the safety and welfare" from the current temporary orders. M.M.O.*

Return to Table of Contents

DIVORCE
DIVISION OF PROPERTY

WIFE'S COMMUNITY INTEREST IN HUSBAND'S MILITARY RETIREMENT DEFINED BY *BERRY* AND THE USFSPA; DIVORCE DECREE'S FAILURE TO SPECIFY DENOMINATOR IN DIVORCE DECREE DID NOT INDICATE AN INTENT NOT TO FOLLOW *BERRY*.

¶14-5-03. ***Douglas v. Douglas,*** ___ S.W.3d ___, 2014 WL 6090420, 08-12-00259-CV (Tex. App.—El Paso 2014, no pet. h.) (11-14-14).

Facts: Husband and Wife divorced after about 15 years of marriage. At the time of the divorce, Husband was a Captain in the U.S. Air Force with 150 months of creditable service. The divorce decree awarded Wife her community interest in Husband's military retirement. The decree specifically provided that she was entitled to "one-half (1/2) times a fraction of which the numerator (150) is the number of months that the parties were married during which time [Husband] had credible time in the United States Air Force toward retirement, prior to the date of divorce (150 months), and the denominator of which is the number of months that [Husband] shall have of credible service toward his military retirement, times gross retirement benefits receivable, if [Husband] were eligible for retirement at the time of the divorce, at his present rank of Captain." After the divorce, Husband remained in the Air Force for another 177 months before retiring. After his retirement, Wife applied to the Defense Finance and Accounting Service (DFAS) for her share and included a certified copy of the decree. DFAS notified Wife that it could not approve her application because the language was faulty. It advised Wife that the deficiency could be remedied by a clarifying order that expressed her interest as a fixed sum or a percentage interest.

Wife moved to clarify the decree. After a hearing, the trial court issued a clarifying order providing that Wife was entitled to 4.096% of the disposable military retired pay. In addition, the trial court found that Husband was in arrears for almost $10,000. In its findings of facts and conclusions of law, the trial court did not clearly explain how it arrived at 4.096%. Wife appealed, and Husband cross-appealed. Both argued that the trial court used the wrong formula to calculate the percentage. Under Wife's formula, she urged that she was entitled to 1/2 of Husband's hypothetical gross retirement pay at the time of the divorce, or $1,404.03. Under Husband's formula, he argued that Wife was entitled to 1.7421% of his retired pay at the time of his retirement, or $134.48. Husband argued that by failing to specify the denominator in the decree, which was a known value at that time, the trial court had not intended to use the *Berry* formula to calculate Wife's percentage interest. Husband contested that Wife's interest was governed by the fraction formula established in *Taggert*, and the value of her interest was governed by *Berry*. Husband additionally argued that the trial court erred in finding him in arrears and in failing to award him attorney's fees.

Wife's formula:

$$50\% \times \frac{\text{150 months of service during marriage}}{\text{150 months of service credited toward marriage}} \times \text{gross retirement benefits receivable}$$

Husband's formula:

$$\frac{50\% \times \frac{\text{150 months of service during marriage}}{\text{372 months of service credited toward marriage}} \times 23.7500\% \times \$2808.60 \text{ (base pay of Captain at divorce)}}{\$7{,}719.00 \text{ (total monthly amount received based on 372 months of service)}}$$

Holding: Affirmed in Part; Reversed and Rendered in Part; Reversed and Remanded in Part

Return to Table of Contents

Opinion: Under the *Berry* formula, a non-member spouse's community interest in the member spouse's retirement plan is determined by dividing the number of months married (the numerator) by the number of months employed under the plan at the time of divorce (*Berry* denominator), and the value of the interest is determined as of the date of divorce, rather than at retirement. Contrarily, under the former *Taggert* formula, the community interest is determined by dividing the number of months married (the numerator) by the total number of months employed at retirement (*Taggert* denominator).

Here, the trial court failed to specify the value of the denominator; however, this failure did not mean that the trial court did not intend to use the *Berry* formula. Further, Husband produced no support for his contention that a hybrid formula should be used. Moreover, the formula proffered by Husband would have impermissibly diluted Wife's community interest in the retirement plan.

Under to Uniformed Services Former Spouses Protection Act (USFSPA), which was in effect at the time of the Parties' divorce, Husband's hypothetical gross pay was to be computed by multiplying his retired pay base at the time of divorce by the retired pay multiplier, which is 2.5% of his creditable service. The Parties agreed that Husband's retired pay base at the time of divorce was $2,808.60. At the time of divorce, Husband had 150 months, or 12.5 years, of creditable service. Thus, Husband's retired pay multiplier was .3125 (2.5% x 12.5), and his monthly hypothetical gross pay was $877.50 (.3125 x $2,808.60).

The COA noted Husband's argument that his hypothetical gross retired pay should have been calculated under the provisions of the Temporary Early Retirement Authority (TERA) was without merit because TERA was neither in effect at the time of the Parties' divorce, nor would Husband have been entitled for early retirement under TERA had it been in effect.

To be enforceable under USFSPA, an award of an interest in military retirement must be expressed as either a fixed dollar amount or as a percentage of disposable retired pay. To convert Wife's award into a fraction, the COA multiplied her 50% community interest by the hypothetical gross pay ($877.50) divided by Husband's retired gross pay ($7,719.00). Therefore, Wife was entitled to 5.68078766679622 percent of Husband's disposable retired pay.

Further, because the trial court's clarifying order was not rendered until 41 months after Husband retired, Wife was entitled to arrearages for any payments not made by Husband during that time period. Finally, Husband was not entitled to attorney's fees because he was not the prevailing party.

Editor's Comment: *Life for the family law bar would have been so much simpler had the Texas Supreme Court admitted in Berry that it made a mistake in Taggart instead of attempting to reconcile the two cases. J.V.*

TRIAL COURT IMPROPERLY DIVESTED HUSBAND OF HIS SEPARATE PROPERTY HOME BY AWARDING WIFE A ONE-HALF INTEREST IN THE HOME'S EQUITY.

¶14-5-04. ***Rivas v. Rivas,*** ___ S.W.3d ___, 2014 WL 6090415, 08-12-00228-CV (Tex. App.—El Paso 2014, no pet. h.) (11-14-14).

Facts: Husband inherited a home from his father. The home had been paid for in full prior to Husband's father's death. During their divorce proceedings, Wife testified that she had no legal interest in Husband's home. Wife sought reimbursement for, inter alia, improvements and waste of community assets, and she asked the trial court to impose an equitable lien on Husband's home to secure the reimbursement claims. The trial court denied these claims for reimbursement. However, despite finding that the home was Husband's separate estate, the trial court awarded Wife a one-half interest in the equity of the home and ordered Husband to pay Wife her share of the equity within ninety days. Husband appealed, arguing the trial court improperly divested him of his separate property.

Holding: Reversed and Remanded

Opinion: Husband's home was established as his separate property as a matter of law. He introduced evidence establishing that the home had no mortgage and was inherited from his father. Wife testified that

she had no legal interest in the home. The trial court clearly erred when it divested Husband of his separate property and awarded Wife a one-half interest in the home's value.

Editor's Comment: *Chief Judge McClure's opinion includes a nice summary of appellate burdens when arguing mischaracterization. In this case, the trial court committed reversible error by mischaracterizing Husband's separate property as community property and awarding it to Wife. But in these alternative situations, an appealing spouse must not only demonstrate mischaracterization but also show harm - that because of the mischaracterization, the overall division of property constituted an abuse of discretion: (1) when a trial court divides the community estate by awarding a spouse property that the spouse claims is the spouse's separate property; and (2) when a trial court confirms one spouse's separate property over the other spouse's claim that it is community property. J.V.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

WIFE ESTABLISHED THAT DEFENDANT-DEBTOR-HUSBAND HAD CONSTRUCTIVE NOTICE OF SERVICE IN GARNISHMENT ACTION BECAUSE EVIDENCE SHOWED HE AVOIDED AND REFUSED SERVICE TO A VALID BUSINESS ADDRESS

¶14-5-05. ***Jacobs v. Jacobs,*** ___ S.W.3d ___, 2014 WL 4923263, 14-13-00442-CV and 14-13-00462-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (10-02-14).

Facts: Husband—who is an attorney—and Wife divorced, and a decree was entered based on their MSA. Husband subsequently refused to comply with the decree by refusing to transfer certain assets to Wife. Wife filed suit to enforce the property division, and the trial court granted Wife injunctive relief in temporary orders. Husband filed an interlocutory appeal claiming that the trial court did not have jurisdiction to grant Wife's relief due to an arbitration clause in the MSA. The COA held that the trial court did not err in not sending the Parties to arbitration because the claims asserted by Wife were expressly excluded from the MSA's arbitration provision.

While that appeal was pending, Wife filed applications for prejudgment writs of garnishment against Husband's nonexempt funds and assets held by Garnishees—two banks with whom Husband maintained accounts. Prejudgment writs of garnishment were issued the same day. Garnishees were properly served, and each filed timely answers. Wife attempted to serve Husband by personal service, certified mail, and first-class mail. Attempts at personal service were unsuccessful. One certified mailing was returned as "unclaimed," and the other certified mailing was returned "refused." The two first-class mailings were not returned. Husband did not file an answer. Wife filed motions for summary judgment on her prejudgment garnishment claims. Two days before the hearing on Wife's MSJs, Husband filed motions to vacate or dissolve the prejudgment writs. After an evidentiary hearing, the trial court denied Husband's motions and granted Wife's MSJs. Husband appealed, represented himself, and, among other issues presented, challenged the trial court's ruling based on improper service of the garnishment writs.

Holding: Affirmed

Opinion: Under Texas Rule of Civil Procedure 663a, a defendant debtor in a garnishment action must be served with a copy of the writ of garnishment, the application for the writ with any supporting affidavits, and orders of the court. Service must be made "in any manner prescribed for service of citation or as provided in [Texas Rule of Civil Procedure] 21a." Neither TRCP 21a nor TRCP 663a require proof of actual acceptance of service by the debtor. Even if a party does not have actual notice, the serving party may

establish "constructive notice" by demonstrating compliance with TRCP 21a and presenting evidence that the intended recipient engaged in selective acceptance or refusal of certified mail relating to the case. Certified mail that has been returned "refused" tends to indicate that the party had actual notice, as distinguished from certified mail returned as "unclaimed," which does allow the same inference.

Here, Wife attempted service on Husband as properly authorized by TRCP 21a, but Husband avoided and refused service. Both the Garnishees were served on the Wednesday before Thanksgiving. Wife's counsel received confirmation of service the following Monday. The next day, Wife attempted personal service at both Husband's home and business addresses. At each address, Husband's brother and employees claimed that Husband was "not in." The constable who attempted service noted that Husband was "avoiding service" at a "good [work] address." The same day, Wife also attempted service by certified mail to Husband's home and business addresses. The mailing to his residence was returned as "unclaimed," and the mailing to his business was returned as "refused." The COA noted that the business address used by Wife was the same address that was included on Husband's appellate brief, the State Bar website, and the fax cover sheet for his motions to vacate or dissolve. Further, Husband did not dispute that he voluntarily appeared, and his trial counsel presented evidence and argument at the hearing on the Parties' motions. Wife met her burden to show proper service through constructive notice.

Editor's Comment: *If you are an attorney representing yourself, don't refuse notice by certified mail at the same address you list on the State Bar website, your brief to the court of appeals or your fax cover sheets. J.V.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

WIFE REBUTTED PRESUMPTION AGAINST SPOUSAL MAINTENANCE BY SHOWING THAT SHE EXERCISED DILIGENCE IN EARNING SUFFICIENT INCOME DURING MARRIAGE AND AFTER THE PARTIES SEPARATED; ELIGIBILITY FOR MAINTENANCE WAS BASED ON WIFE'S *CURRENT* ABILITY TO PROVIDE FOR HER MINIMUM REASONABLE NEEDS, NOT WHETHER SHE COULD DO SO WITH ADDITIONAL TRAINING OR EDUCATION.

¶14-5-06. ***Day v. Day,*** ___ S.W.3d ___, 2014 WL 6601655, 01-13-00839-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (11-20-14).

Facts: Husband and Wife separated, and Wife acted as the primary caregiver for their only Child. After a five-year separation, Wife filed for divorce. During the proceedings, the Child graduated from high school. In her petition for divorce, Wife alleged that Husband had wasted community funds and asked the trial court to award her a reconstitution of the estate through court-ordered maintenance. After a trial, the trial court ordered Husband to pay spousal maintenance for 75 months. Husband appealed and argued that although Wife did not currently earn sufficient income to meet her minimum reasonable needs, she presented no evidence that she lacked the ability to earn more. In addition, Husband argued that Wife had not exercised diligence in earning sufficient income or in developing the necessary skills to provide for her minimum reasonable needs.

Holding: Affirmed

Opinion: Under Texas Family Code Section 8.051(2), a spouse may be entitled to spousal maintenance if she lacks the ability to earn sufficient income to meet her reasonable needs and the marriage lasted at least ten years. This section of the TFC focuses on whether the spouse *currently* meets her minimum reasonable needs, not whether she may be able to do so in the future. Texas Family Code Section 8.053 provides the statutory presumptions against granting spousal maintenance. Unlike Texas Family Code Section 8.053(a)(2), Texas Family Code Section 8.053(a)(1) is not limited to the time during the spouses' period

of separation, thus efforts made during the marriage could be considered. Further, in 2011, the statute was amended to change the requirement from "diligence in seeking *suitable employment*" to "diligence in *earning sufficient income*." Therefore, any efforts to increase income and decrease expenses could be considered under this subsection.

Here, Wife was unable to meet her minimum reasonable needs because her income was about $1900 per month, and her expenses were about $3000 per month. Wife already worked full time plus some overtime. She had no assets from which she could earn rental income. While the parties were married, Wife was the primary caregiver for the Child and was frequently the only source of steady, regular income for the family. When the couple separated, Wife had been unemployed for a couple of months, but she was able to obtain and keep a job for over five years, and her annual pay increased from $30,000 to $34,000 during that time. She drastically limited her expenses, exhausted her savings, and sold separate property in order to care for the Child until the Child graduated from high school. To reduce expenses, Wife quit a substance abuse habit and negotiated reduced attorney's fees. In addition, she did not buy furniture for her home or replace or repair her seven-year-old car. Wife sold separate real property acquired before marriage, took out personal loans, and used inherited money from her parents to support herself and the Child.

Editor's Comment: *Texas Family Code § 8.053(a)(1) permits maintenance when a spouse exercises diligence in "earning sufficient income" to provide for the spouse's minimum reasonable needs. This case holds that this test can be met by taking steps to make ends meet, such as cutting expenses, selling separate property, exhausting one's inheritance and taking out loans. J.V.*

SAPCR
STANDING AND PROCEDURE

CALIFORNIA JUDGMENT DECLARING TWO MEN BOTH FATHERS OF THE CHILD WAS PROPERLY REGISTERED IN TEXAS AND ESTABLISHED THEIR PATERNITY; JURY VERDICT GRANTING NON-BIOLOGICAL FATHER SMC AND BIOLOGICAL FATHER PC WAS PROPER WHEN CONSIDERING THE BEST INTEREST OF THE CHILD

¶14-5-07. ***Berwick v. Wagner,*** ___ S.W.3d ___, 2014 WL 4493470, 01-12-00872-CV (Tex. App.—Houston [1st] 2014, no pet. h.) (09-11-14).

Facts: Berwick and Wagner, two men, began a relationship in 1994. In 2003, they married in Canada, and in 2005, they registered in California as domestic partners. Formalizing the relationship was important to Berwick because he was a big advocate of gay marriage rights. The couple discussed starting a family and sought to understand what having same-sex parents could mean to their future children. In 2005, they entered a gestational surrogacy agreement with a married woman in California. The surrogate was impregnated with Berwick's sperm and a donated ova. After the Child was born, a California court entered an order adjudicating the parentage of the Child. The California order declared that both Berwick and Wagner were the legal parents of the Child, and the surrogate and her husband were not the Child's legal parents. The Child's last name was the two men's names hyphenated.

When the Child was born, Berwick and Wagner each took 12-week leaves from work and hired a full-time nanny. Afterwards, Wagner returned to work, and Berwick became able to work from home. For three years, they lived as a happy, loving family.

In 2008, Berwick told Wagner that he was beginning to question his sexual orientation, and he could "no longer succumb to his homosexual tendencies." In an undelivered letter, Berwick called Wagner his best friend and soul mate but also said that homosexuality was a mental illness.

Berwick's vernacular and vocabulary changed over the next few weeks and began saying that homosexuality was "sinful and evil and disgusting and vile and that homosexuals have Satan within them." He also said that the Child should have a mother instead of a nanny and told Wagner that he was "not really [the Child's] father."

Berwick went on a weekend retreat, and when he returned, he had decided that he was not really gay. Berwick told Wagner that Berwick's mother and sister considered homosexuality to be a sin and had advised Berwick to accept nothing less than 100% custody and to kick Wagner out of the home.

Berwick began researching how to divorce Wagner and told Wagner that he wanted to change the Child's last name to remove Wagner's name. Wagner filed a SAPCR seeking an order naming both Fathers JMCs. Wagner registered the California judgment as a foreign judgment under the Texas Family Code. Berwick counterclaimed, seeking SMC. The trial court concluded that confirmation of the California judgment was proper and that Wagner had standing to bring his SAPCR. The COA confirmed the trial court's order regarding the California judgment and Wagner's standing, and the Texas Supreme Court denied Berwick's petition for review.

The Parties entered a Rule 11 Agreement to preserve the status quo for the Child. Both Fathers and the Child stayed in the home together, but each Father would alternately spend a weekend away, giving the other exclusive parenting time.

Subsequently, Berwick began dating a woman, and the two were married less than a year later. Because Berwick's new wife's house was close by, Wagner suggested that Berwick move in with her and come visit the Child at the family home. Instead, Berwick and his new wife moved into the family home with Wagner and the Child. This living arrangement was contentious. Berwick and his wife put padlocks on some interior doors, took pictures of the whole house, and filed a false police report against Wagner. Wagner became convinced that Berwick was attempting to build a false record against him, so he started carrying a tape recorder with him every day to record their interactions. Berwick was not cooperative in co-parenting. Berwick identified himself to the Child's school as the Child's only father. Berwick purchased secondary health insurance coverage for the Child, and then changed all of the Child's healthcare providers and provided his wife's contact information to the Child's medical providers to keep Wagner from receiving communications. Berwick fired the nanny without notifying Wagner. Berwick told Wagner that if he "really loved" the Child, he would leave.

The case went to trial before a jury. After the two-week trial, based on the jury's findings, the trial court ordered appointed Wagner as SMC and Berwick as PC. The trial court denied Berwick's request to change the Child's name. Berwick filed an accelerated appeal.

Holding: Affirmed

Opinion: Berwick first argued that the California order was unenforceable because it was contrary to Texas law. The U.S Constitution requires states to give full faith and credit to judicial proceedings of other states. "The full faith and credit clause requires that a valid judgment from one state be enforced in other states regardless of the laws or public policy of other state. California had jurisdiction to adjudicate the parentage of the Child, the California judgment declared Wagner to be a legal parent, and this judgment was properly registered in Texas.

Berwick next argued that the trial court abused its discretion by excluding evidence that he was the Child's biological father. Although parents are favored over non-parents, Texas law does not distinguish biological parents from a parent who acquired "parent" status through other legal channels, such as adoption. In addition, Berwick failed to show that the exclusion of evidence that he was the biological father of the Child led to an improper judgment. Wagner's counsel noted that "we are not naïve enough to think that some of these jurors haven't figured it out." For example, the jury had heard recordings of Berwick telling Wagner that he needed to "get his own family," "his own little boy."

Berwick further argued that the trial court improperly struck five potential jurors based on their religious beliefs. A challenge for cause is proper if a potential juror will base his decisions on previously formed feelings rather than the evidence and cannot be fair and impartial. During the individual questioning of each of the five struck jurors, they confided that they could not base their verdict on the evidence because of their strong feelings about homosexuality generally.

Berwick additionally argued that the evidence was legally and factually insufficient to support the jury's findings. Joint managing conservatorship generally provides the conservators with joint decision

making authority. Here, Berwick's actions showed that he was not amenable to working cooperatively with Wagner to make joint decisions about the Child's residence, education, medical needs, or therapeutic needs. Berwick refused to encourage and accept a positive parent-child relationship between Wagner and the Child. While the jury agreed that both Berwick and Wagner were good parents, only Wagner showed the ability to co-parent the Child by accepting a positive parent-child relationship with the other parent and prioritizing the Child's welfare.

Finally, Berwick argued that the trial court erred in failing to submit the issue of changing the Child's name to the jury. However, there was no disputed issue of fact to present to the jury. In addition, Berwick did not argue that changing the Child's name was in the Child's best interest.

Editor's Comment: *Even if a judgment that two men are a child's parents is not "normally available" in Texas, the Full Faith and Credit clause requires Texas to recognize a California judgment so holding. J.V.*

KENTUCKY WAS THE CHILDREN'S HOME STATE BECAUSE THEY HAD LIVED THERE FOR MORE THAN SIX MONTHS, AND KENTUCKY HAD ISSUED A PROTECTIVE ORDER TO PROTECT MOTHER AND THE CHILDREN FROM FATHER'S DOMESTIC VIOLENCE.

¶14-5-08. *In re Busaleh*, No. 06-14-00073-CV, 2014 WL 4978642 (Tex. App.—Texarkana 2014, orig. proceeding) (mem. op.) (10-07-14).

Facts: Mother and Father moved to Saudi Arabia. Ten years later, Mother and the couples' two Children travelled to Texas under the pretense of visiting Mother's parents. Subsequently, Father moved to Texas, and Mother and the Children fled to Kentucky to escape Father's domestic violence. The State of Kentucky issued an emergency protective order against Father, granted temporary possession of the Children to Mother, and prohibited Father from having contact with the Children. Before the protective order expired, Father filed for divorce in Texas. Less than a month later, Kentucky issued an order of protection preventing Father from coming within 500 feet of Mother or the Children. Mother filed a special appearance and a plea to the jurisdiction in the Texas divorce proceedings. Although it was uncontested that the Children had lived in Kentucky for the previous 8 months, the trial court denied Mother's special appearance and plea to the jurisdiction. In addition, in spite of the protective order still in effect, the trial court issued temporary orders that appointed Mother and Father JMCs of the Children, provided a visitation schedule requiring Mother to deliver the Children to Father, and ordered Mother to move back to Texas or face contempt. Mother filed a petition for writ of mandamus, arguing that the finding that Texas was the Children's home state was an abuse of discretion.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The UCCJEA governs jurisdiction in child-custody proceedings. Texas Family Code Section 152.201 confers jurisdiction to the state that was the child's home state on the date of the commencement of proceedings or within six months before the commencement. It was uncontested that the Children had resided with Mother for nearly eight months leading up to the commencement of the proceedings. The fact that the Children periodically visited their grandparents in Texas was not determinative.

Further, Texas Family Code Section 152.102(4) defines "child custody proceeding" to include "protection from domestic violence." Thus, Kentucky had already established continuing, exclusive jurisdiction by issuing the protective order. Moreover, Texas had not acquired continuing, exclusive jurisdiction because the only prior SAPCR filed in Texas had been dismissed for want of jurisdiction.

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. M.M.O.*

Return to Table of Contents

NEW YORK DECREE PROVIDING SUPPORT FOR ADULT DISABLED CHILD COULD NOT BE MODIFIED BY TEXAS COURT BECAUSE FATHER CONTINUED TO RESIDE IN NEW YORK AND THE PARTIES HAD NOT AGREED TO ALTER JURISDICTION

¶14-5-09. ***In re Martinez,*** ___ S.W.3d ___, 2014 WL 5151282, 04-14-00536-CV (Tex. App.—San Antonio, orig. proceeding) (10-15-14).

Facts: Mother and Father married in New York and had a Child. Subsequently, the Parties divorced in New York, and a judgment was rendered based on a settlement agreement. Father was obligated to provide child support until the Child was emancipated, which was defined as when the Child reached the age of 21 or completed 4 years of college, whichever came last, but in no event past the age of 22.

A few years later, the Child was in a car accident that left her nearly quadriplegic. Mother asked Father to modify the agreement to allow her to move to Texas with the Child for the Child's health and well-being. Father agreed, and Mother and the Child moved. The Child never went to college. Shortly before the Child's 21st birthday, Mother filed a petition in New York to modify child support based on the Child's disability. The New York trial court dismissed Mother's motion with prejudice because New York law does not provide for support for adult disabled children, and Mother had failed to establish sufficient change in circumstances to warrant the relief requested.

Mother then filed an "original" SAPCR in Texas seeking the same relief. Father filed a plea to the jurisdiction and special appearance arguing Texas lacked both subject matter and personal jurisdiction. Mother argued that the petition was "original" because (1) by the time she filed in Texas, Father's obligation to provide support under the New York order had terminated, and thus no order was in effect; and (2) the New York order had never been registered in Texas, so Mother's petition was the first suit filed. The trial court dismissed both Father's plea to the jurisdiction and his special appearance and rendered temporary orders providing support for the Child. Father filed a petition for writ of mandamus and emergency stay.

Holding: Writ of Mandamus Conditionally Granted

Opinion: The Uniform Interstate Family Support Act ("UIFSA"), which has been adopted by all 50 states, governs modifications of a child support order rendered by another state and is codified in TFC Chapter 159. UIFSA was designed to "maintain a 'one-order-at-a-time world,'" and to ensure that only one controlling order would be enforced consistently across the 50 states. Under UIFSA, a court that renders a support decree maintains continuing, exclusive jurisdiction until (1) the obligor, obligee, *and* child leave the rendering state, or (2) the parties consent "in a record or in open court" to alter the jurisdiction. There is no other means by which a state with continuing, exclusive jurisdiction can lose that jurisdiction. Moreover, Texas Family Code Section 159.611(c) provides that a Texas court may not modify any aspect of a child support order, *including the duration of support*, that may not modified under the law of the issuing state. Texas Family Code Section 159.611(e) provides that in a modification proceeding, *the law of the state that issued the original order governs the duration of the child support obligation*.

TFC Chapter 4, Subchapter F governs obligations for support of minor or adult disabled children. Texas Family Code Section 154.309(c) provides that a court with continuing, exclusive jurisdiction of a SAPCR involving a disabled child retains that jurisdiction even after the child becomes an adult. Texas Family Code Section 154.305 only allows a party to file an *original* SAPCR if no other court has continuing, exclusive jurisdiction of the child.

New York law does not provide support for adult disabled children. The original support order was rendered in New York. Father continued to reside in New York, and the Parties had not consented to alter the jurisdiction. Thus, the duration of the support order was governed by New York law, and New York did not lose its continuing, exclusive jurisdiction over the Child after the Child became an adult. Mother was unable to file an "original" SAPCR because New York had continuing, exclusive jurisdiction, whether or not the foreign judgment was registered in Texas. To allow a party to circumvent UIFSA by failing to register a judgment would not comport with the purpose of UIFSA to "maintain a 'one-order-at-a-time world.'"

Return to Table of Contents

Editor's Comment: *The court holds that even though the New York order had expired by its own terms, and in any event New York law does not provide for the support of an adult disabled child, any proceedings to seek support for the adult disabled child must proceed in New York under the UIFSA. J.V.*

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. M.M.O.*

AGREED ORDER ADJUDICATING PARENTAGE ENTERED IN TEXAS VOID BECAUSE MEXICO WAS THE CHILD'S HOME STATE; VOID ORDER WAS SUBJECT TO COLLATERAL ATTACK.

¶14-5-10. ***In re S.A.H.,*** ___ S.W.3d ___, 2014 WL 6462580, 14-13-01063-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (11-18-14).

Facts: When the Child was 5-years-old, Mother filed an original petition in Houston to adjudicate parentage in Houston, Texas. Attached to her petition was an affidavit indicating that the Child had lived in Mexico since birth and that Father resided in, and could be served in, Houston. After genetic testing, the trial court entered an agreed order adjudicating Father as the Child's father and providing orders for conservatorship, possession and access, child support, and health care expenses. The orders included a finding that the trial court had "jurisdiction of this case and of all the parties" and that the parties had waived making a record. Additionally, the order indicated that the Child's county of residence was Mexico and included work and home addresses for each parent: Mother's in Mexico, and Father's in Houston. About 5 years later, Mother filed a SAPCR and a motion to enforce child support. Father answered and filed a petition to declare the original order void for lack of subject-matter jurisdiction. After an evidentiary hearing, the trial court entered an order declaring the original order void. Mother appealed.

Holding: Affirmed

Opinion: Subject-matter jurisdiction in child custody suits is governed by the UCCJEA. Texas has jurisdiction to make an initial child custody determination if Texas is the home state of the child, if no other state has jurisdiction, or if a court of the home state of the child has declined jurisdiction. Subject-matter jurisdiction cannot be conferred by consent, estoppel, or waiver. Here, although there was no indication in the record that the trial court considered evidence relating to subject matter jurisdiction at the original hearing, it was clear from Mother's petition and attached affidavit that the Child had only lived in Mexico since birth and had never lived in Texas. Therefore, Mexico was the Child's home state at—and for more than six months prior to—the commencement of the proceedings. Further, Mother alleged in her original petition that there was no case in which a Mexican court had declined to exercise jurisdiction.

SAPCR
ALTERNATIVE DISPUTE RESOLUTION

PARTIES COULD NOT CONTRACTUALLY FIX VENUE THROUGH AN MSA; TRIAL COURT WAS REQUIRED TO GRANT MOTHER'S MOTION TO TRANSFER PROCEEDINGS TO THE COUNTY WHERE THE CHILD RESIDED

¶14-5-11. ***In re Lovell-Osburn,*** ___ S.W.3d ___, 2014 WL 4931302, 14-14-00486-CV (Tex. App.—Houston 2014, no pet. h.) (09-30-14).

Facts: In their divorce, Mother and Father were named JMCs of their two Children. Mother was granted the exclusive right to designate the primary residence of the Children within Harris County or contiguous counties. Subsequently, Mother sought to modify the geographical restriction. While in mediation, Father claimed to be concerned that if the geographical restriction were modified, Mother could move outside of Harris County, and the trial court, which had the benefit of historic knowledge of the Parties' litigation, would lose its jurisdiction over the Children. The Parties entered an MSA that expanded the geographical provision to include the three additional counties to which Mother was considering moving, but also included a provision that any related future legal proceedings would be heard in Harris County. The trial court entered a judgment on the MSA.

Two years later, Mother filed a SAPCR in Harris County and concurrently filed a motion to transfer venue to Burleson County, where she and the Parties' minor child had been living for at least six months. The trial court, after an evidentiary hearing, denied Mother's motion to transfer. Mother filed a petition for writ of mandamus, claiming that transfer to Burleson County was mandatory and the trial court was required to grant her motion to transfer.

Holding: Writ of Mandamus Conditionally Granted

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

This case involves two competing sections of the Texas Family Code. Texas Family Code Section 153.0071 entitles a party to a compliant MSA to "judgment on the [MSA] notwithstanding Rule 11, [TRCP], or another rule of law." Texas Family Code section 155.201 provides that a court of continuing, exclusive jurisdiction "shall," upon timely motion, transfer a proceeding to the county where the child has resided for at least six months. This TFC venue provision is mandatory, and transfer is a ministerial duty of the trial court. Venue selection cannot be contracted by parties unless otherwise provided by statute.

The Parties did not dispute that the Child had lived in Burleson County for at least six months or that the Parties MSA included a venue provision agreeing that future disputes would be heard in Harris County.

In *In re Lee*, the Texas Supreme Court addressed the question of whether a trial court may deny a motion to enter a judgment on a compliant MSA based on a best interest analysis. The Texas Supreme Court did not reach the question of whether Texas Family Code 153.0071 requires a court to enter judgment on a compliant MSA under any and all circumstances, even if the agreement was illegal. Thus, the holding in *Lee* does not require a trial court to enter judgment on an MSA containing a void venue provision or to enforce such a judgment. To hold otherwise would open the door to parties including other various provisions in MSAs that would otherwise be contrary to public policy. The fact that the Parties entered an MSA purporting to contractually agree to fix venue in Harris County was not itself sufficient to override the mandatory venue provision of the TFC.

Dissenting Opinion: (J. Jamison)

In *Lee*, the Texas Supreme Court concluded that the public policy that "the amicable resolution of child-related disputes should be promoted forcefully" trumped the TFC mandate that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." The dissent questioned, "[h]ow can the majority say that the policy at issue here, establishing venue in the county of a child's primary residence, is more important that the policy trumped in *Lee*, the best interest of the child (specifically, in *Lee*, best interest concerns that were raised about the child residing with a registered sex offender)?"

The dissent opined that the majority viewed the question in Lee too narrowly. Further, no rule of statutory construction could account for allowing Texas Family Code Section 153.0071 to be controlling over the best interest mandate of Texas Family Code Section 153.002 but not the venue mandate of Texas Family Code Section 155.201. Further, allowing parties to contractually restrict venue does not foreclose the possibility that a provision of an MSA could be deemed unenforceable for criminal illegality. Following the Texas Supreme Court's holding in *Lee*, the venue provision in the Parties' MSA trumped the venue rule of TFC 155.201(b).

Return to Table of Contents

Editor's Comment: *In Lee, the Texas Supreme Court held that a trial court must approve an MSA that, if followed, kept Mother's new husband, a registered sex offender, away from the child. Here, the court of appeals required transfer of a SAPCR in the face of an MSA prohibiting transfer because the Texas Supreme Court has repeatedly held that the Family Code's venue provisions cannot be contractually overridden. With due respect to the dissent, the two decisions do not appear to conflict. J.V.*

Editor's Comment: *One of the first of no doubt many cases grappling with the aftershocks of In re Lee. Here, can a parties' MSA that tries to fix venue in the court of continuing and exclusive jurisdiction trump the mandatory venue transfer provisions of Section 155.201 when the child has resided in another county for six months or longer? In a divided opinion, the 14th District says NO. Mandatory venue transfer provisions win, this time. Was it the right result? Probably. R.T.*

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. The Lee decision has been quite the debate among trial court judges and is debated between the appellate court judges here. Since there is a conflicting opinion, maybe SCOTX will take this up. M.M.O.*

SAPCR
CONSERVATORSHIP

APPOINTMENT OF FATHER AND MATERNAL GRANDMOTHER AS JMC WAS IN THE CHILD'S BEST INTEREST; MATERNAL GRANDMOTHER HAD STANDING TO INTERVENE IN SAPCR BECAUSE APPOINTING FATHER AS SMC WOULD SIGNIFICANTLY IMPAIR THE CHILD'S PHYSICAL HEALTH OR EMOTIONAL DEVELOPMENT

¶14-5-12. ***In re L.D.F.,*** ___ S.W.3d ___, 2014 WL 4656630, 08-12-00347-CV (Tex. App.—El Paso 2014, no pet. h.) (09-19-14).

Facts: Mother and Father met while under psychiatric care at the same facility. Father had been diagnosed with bipolar disorder. Maternal Grandmother took possession of the Child, at Mother's request, after the Child's birth. Father filed a suit to establish his paternity of the Child and to be appointed SMC. Mother filed a general denial, and Maternal Grandmother filed a petition in intervention seeking SMC. At a hearing, Mother began to testify, but the trial court declared her to be incompetent to stand trial and serve as a witness. Father filed a plea to the jurisdiction, seeking to dismiss Maternal Grandmother's intervention. Father claimed that he and Mother were in a relationship and were attempting to find an apartment where they could live with the Child, but the plans were delayed because Mother had been kept in the hospital an additional three months "for some odd reason." After the SAPCR hearing, the trial court entered an order establishing Father as the Child's father and appointing Father and Maternal Grandmother as JMC and Mother as PC. The trial court entered a possession schedule that split the Child's time between Father and Maternal Grandmother. Father appealed, arguing that Maternal Grandmother lacked standing to intervene because when the trial court appointed him a JMC, it found that he was a parent who would not significantly impair the Child's health or emotional development. Father also argued that Maternal Grandmother failed to identify specific actions or omissions showing Father's appointment as SMC would significantly impair the Child's physical health or emotional development. Finally, Father complained that the trial court erred in appointing Maternal Grandmother as JMC when she only pleaded for SMC.

Holding: Affirmed

Return to Table of Contents

Opinion: Texas Family Code Section 102.004 grants grandparents standing to intervene in a SAPCR if certain requirements are met. Texas Family Code section 153.372 allows for the appointment of a non-parent as a JMC with a parent or another non-parent. Appointment of a parent in a limited conservatorship role does not preclude the appointment of a grandparent as a JMC. If a grandparent has standing to intervene under Section 102.004, that grandparent may seek both JMC and PC. Maternal Grandmother properly placed Father on notice that she was seeking custody of the Child by filing her pleading. The trial court had discretion to appoint Maternal Grandmother as JMC even though she sought only SMC.

In appointing Maternal Grandmother as JMC, the trial court impliedly found that appointing Father as SMC would significantly impair the Child's physical health or emotional development. Further, the facts supported that finding. Father had been diagnosed with bipolar disorder and had been hospitalized for mental health reasons five times in five years. A parent's mental impairment alone does not establish that a child's physical health or emotional development will be significantly impaired by parental custody; however, a trial court is in the best interest to observe the witness's demeanor in making this determination. Additionally, one of Father's hospitalizations stemmed from the use of methamphetamine, and another stemmed from the assault of his older brother. While this suit was pending, Father was arrested for assaulting the Child's maternal aunt. Father claimed that his illness was under control, yet he also testified that he was not under the care of any mental health professional and took lithium pills "at [his] leisure" to control his mood swings. In addition, Maternal Grandmother testified that the Child had become attached to her during his infancy and would become upset when separated from her. Early childhood development is a factor a trial court can consider when assessing harm.

STATUTE ALLOWS TRIAL COURT TO APPOINT GRANDMOTHER JOINT MANAGING CONSERVATOR WITH THE EXCLUSIVE RIGHT TO DETERMINE CHILDREN'S RESIDENCE ALONG WITH MOTHER AND FATHER AS NON-PRIMARY JOINT MANAGING CONSERVATORS.

Compton v. Pfannenstiel, 428 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (2/13/14).

Facts: Grandmother sought conservatorship of Child 1 and Child 2. Grandmother testified that Mother used and sold drugs, placed children in dangerous situations, neglected children, failed to adequately feed or care for children, and did not meet children's medical needs. Grandmother further testified that Mother had been arrested four times during the six months prior to trial, and this allegation was corroborated at trial by a police officer. Father testified that Mother was not a fit parent and that she did not adequately feed the children. Father and Mother shared a drug problem, and Father was incarcerated for burglary for four years. Father testified that he believed Grandmother's conservatorship was necessary. Two school counselors also testified that they had concerns that Mother was not meeting the children's nutritional needs and that the children had an excessive number of absences. Mother's father and sister testified on her behalf, denying that she had a drug problem or neglected the children. Mother's father and sister did, however, acknowledge that Mother did not have employment or housing. The trial court awarded joint conservatorship of the children to Grandmother, Mother, and Father. The trial court granted Grandmother the exclusive right to determine the children's primary residence. Mother appealed.

Holding: Affirmed.

Opinion: Mother challenged the trial court's appointment of Grandmother as a joint managing conservator of Mother's children since parents are presumptively the managing conservators of their children. A trial court must appoint a child's parents to be joint managing conservators, or one parent as the sole managing conservator, unless it concludes that appointment of the parent or parents would not be in the best interest of the child, because the appointment would significantly impair the child's physical health or emotion development. The statue applies to the appointment of a non-parent in addition to both parents. The COA found that the evidence in this case satisfied the statutory threshold, including evidence of Mother's drug use, recent criminal arrests, and extreme neglect of her children. The trial court reasonably could find that the record demonstrated significant impairment of the children's health and emotional development. Father acceded to

the necessity of the grandparent conservatorship in the children's interest. Therefore, the COA held that the trial court was within its discretion in naming Grandmother as a joint managing conservator to protect the children's physical health and emotional development.

TRIAL COURT HAD SUFFICIENT EVIDENCE TO FIND THAT IT WAS IN THE CHILDREN'S BEST INTEREST TO SPLIT CUSTODY.

In re K.B.K., No. 11-12-00155-CV, 2014 WL 1285784 (Tex. App.—Eastland, 2014, no. pet.) (mem. op.) (03/27/2014).

Facts: In 2010, the trial court signed a decree of divorce appointing Mother and Father as JMCs of the parties 3 children (2 older daughters and a younger son) and ordered that Mother would decide the children's primary residence. Mother and the children initially remained in Texas, but moved to Colorado after Mother developed a relationship with and eventually married another man. Father filed a petition to modify the custody arrangement to have the Children returned to Texas. Following a trial, the trial court ordered that the 2 older daughters would reside with Father in Texas, but that the younger son would continue to reside with Mother in Colorado. Father appealed, arguing that the trial court erred because there was no evidence supporting split custody.

Holding: Affirmed.

Opinion: Texas's policy favoring keeping children together during periods of possession is simply a factor the trial court considers in deciding what is in the child's best interest. Here, during the proceeding, the trial court interviewed the two older daughters in chambers, and the daughters expressed their desire to live with Father in Texas in order to maintain strong ties with family and friends in Texas. The trial court also heard evidence that, among other things, the younger son had adjusted well to his new home and school in Colorado, had bonded with his step father, and was very attached to his new puppy. Accordingly, the trial court had sufficient evidence to find that in was in the Children's best interest to split custody.

SAPCR
POSSESSION AND ACCESS

RESTRICTION THAT MOTHER BE "OFF WORK" AND "PRESENT" DURING HER PERIODS OF EXTENDED SUMMER VISITATION WAS UNDULY BURDENSOME AND UNNECESSARILY RESTRICTIVE.

¶14-5-13. ***In re H.D.C.,*** ___ S.W.3d ___, 2014 WL 6464331, 14-13-00976-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (11-18-14).

Facts: At the time of their divorce, Mother and Father had one teenage Daughter and one grade-school-aged Son. Mother and Father signed an agreed order that appointed both parents as JMC, with Mother having the exclusive right to designate the primary residence of the Children. Father had a standard possession order and was ordered to pay child support.

After the divorce, the Daughter began engaging in self-destructive behavior. About a year after the divorce, Father observed hygiene issues. A few months later, Father discovered that the Daughter had posted inappropriate photos of herself online. About a year after that, Father learned that the Daughter had begun cutting herself. Father discussed the problems with Mother, who did not think they needed to be addressed

until after CPS recommended therapy. Both of the Children were struggling in school, and Mother's solution was to do the Children's homework for them. Mother was issued an arrest warrant as a result of the Children's truancy while in her care. Mother denied many of the problematic behaviors, including a claim that the Daughter had taken 12 Benadryl pills at once while in Mother's care.

Father filed a SAPCR. The trial court issued temporary orders giving Father the exclusive right to designate the Children's primary residence and ordering Mother to pay child support. A trial was held several months later, at which the Children's therapist testified about the Children's behavioral changes since residing primarily with Father. In its final order, the trial court granted Father the primary right to designate the Children's primary residence, ordered Mother to pay Child support, and imposed a restriction that Mother be "off work" and "present" during her extended summer possession of the Children. Mother appealed arguing that that restriction was ambiguous and broader than necessary to serve the Children's best interests.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: A possession order must be stated in clear and unambiguous language and must be specific enough to permit the court to enforce the judgment by contempt. Here, the requirement that Mother be "off work" and "present" during her extended period of possession was clear and unambiguous. Thus, the order was not vague. However, a restriction on possession should not exceed that which is required to protect the best interest of the child. Here, the trial court found that the Children had been left unsupervised many times while Mother was at work and that the Daughter engaged in self-destructive behavior while unsupervised. The evidence supported an order that the Children be supervised while in Mother's possession. In addition, Mother's brother had a marijuana conviction and abused prescription drugs. Mother's mother lost her daycare license because of Mother's brother's activities, indicating Mother's mother permitted those activities at the daycare while children were present. Therefore, evidence supported not allowing Mother's mother or brother to supervise the Children. However, requiring Mother to be "off work" and "present" during her month of extended summer visitation was unduly burdensome and unnecessarily restrictive. A restriction that Mother arrange for a suitable adult to supervise the Children in her absence would have been sufficient to protect the best interests of the Children.

SAPCR
CHILD SUPPORT

BOYFRIEND'S PAYMENT OF MOTHER'S MONTHLY EXPENSES DID NOT OPEN UP BOYFRIEND'S FINANCIAL INFORMATION FOR DISCOVERY IN MODIFICATION PROCEEDING

¶14-5-14. *In re Jones*, No. 03-14-00223-CV, 2014 WL 3562764 (Tex. App.—Austin 2014, orig. proceeding) (mem. op.) (09-24-14).

Facts: Mother and Father divorced after having one Child. Subsequently, Father filed a SAPCR. Father served a request for disclosure and interrogatories on Mother. Mother responded and listed Boyfriend as a person with knowledge of relevant facts, identified Boyfriend as her boyfriend, and stated that Boyfriend paid her monthly expenses, which amounted to $4000 per month. Father then served a notice of intention to take Boyfriend's oral deposition and included a request for the production of documents. Father requested that Boyfriend produce (1) any business records for any business entity owned by Boyfriend, including financial information and tax returns, (2) all personal banking and financial records, (3) wage and earnings records, and (4) all personal income tax returns since Mother's and Father's divorce. Boyfriend filed a motion to quash and a motion for protection. After a hearing on Boyfriend's motions, the trial court announced that Boyfriend was required to appear for deposition and to produce all the requested documents, except for tax and bank records. Boyfriend filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Return to Table of Contents

Opinion: The scope of discovery is within a trial court's discretion; however, the trial court must make an effort to impose reasonable discovery limits. While Texas Family Code Section 154.062 provides that the court should include all of Mother's income, including gifts, Texas Family Code section 154.069 provides that when calculating Mother's net resources, the court cannot include the net resources of her Boyfriend. Therefore, the financial information requested by Father of Mother's Boyfriend was not relevant to the proceedings.

Editor's Comment: *The requested discovery does seem superfluous when Mother submitted an interrogatory answer that Boyfriend paid all her expenses in the amount of $4,000 per month. J.V.*

Editor's Comment: *I know the law on this one is solidly rooted, but this one still rubs me the wrong way. Mother opens the door to her boyfriend's contributions to her by answering certain discovery responses, and then balks when Father wants the details on boyfriend's finances. This is a SAPCR modification by Father, so couldn't you make an argument that boyfriend's finances are relevant when he is helping to support the child? Is he a flake? Does he run a shady business? Has he declared bankruptcy 10 times? I think that should all be on the table, especially after Mother made it part of her discovery responses. R.T.*

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. M.M.O.*

MOTHER FAILED TO CARRY HER BURDEN TO SHOW THAT FATHER "CONSCIOUSLY CHOSE" TO REMAIN UNDEREMPLOYED

¶14-5-15. ***In re Reddick,*** ___ S.W.3d ___, 2014 WL 5388162, 01-12-00576-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (10-23-14).

Facts: Mother and Father were divorced, and Father was ordered to pay $2000 a month child support for the couple's three Children. Father was also awarded ownership of a business he owned with his brother that sold and serviced measurement equipment for the surveying and construction industry. Father paid child support for three years before he began missing payments or paying reduced amounts. Shortly after Father began falling behind on his payments, he sought to have the OAG review his child support obligation. The OAG recommended that his obligation be reduced to $300 per month. Mother contested the confirmation of the review order, and Father hired an attorney to amend his petition and request temporary orders reducing his support. The trial court denied the request for temporary orders and proceeded to a bench trial.

At trial, Father testified that his business was closely tied to the construction industry and the housing market, and that after Hurricane Ike, "business started tapering off slowly but surely." Father was having difficulty making payroll and paying vendors, and the landlord locked the business out of its premises for failure to pay rent. Father stopped doing business and negotiated a sale of most of his assets to a competitor. At least one vendor had filed a collection suit. In 2009, Father's net income was $18,949, and in 2010, it was $10,219. Father attempted to get a job with the company who purchased his business, but that company did not have an opening suitable for Father's skills. Father continued to look for a job in his industry, but was unsuccessful. He began working for his wife's landscaping company for minimum wage and had plans to go to truck-driving school.

Mother testified that it was her opinion that Father could make "upwards of $75,000 to $100,000 a year at least" because that is what he made during marriage. On cross-examination, Mother admitted that she had not worked for Father's company since about 2006, three years before the "business started tapering off" per Father's testimony. Mother testified that she knew what Father was "capable of" but offered no further explanation of how Father could improve his financial situation. Mother produced no evidence of Father's education or work experience. Ultimately, the trial court found Father was intentionally underemployed and signed

Return to Table of Contents

an order lowering the child support to $1875 per month. Father appealed, arguing that the trial court erred in finding him to be intentionally underemployed and that even if Mother established he was intentionally underemployed, Father presented sufficient rebuttal evidence to preclude the trial court from using his potential income, rather than his actual income in calculating child support.

Holding: Reversed and Remanded

Opinion: A court may apply the child support guidelines to an obligor's earning potential, rather than actual earnings, if it established the obligor *consciously chose* to be un- or underemployed. When an obligor offers proof of his or current wages, the obligee then bears the burden of showing the obligor is intentionally un- or underemployed. Then, the burden shifts to the obligor to offer evidence in rebuttal. The court must also consider reasons for an obligor's un- or underemployment, such as an active but unfruitful pursuit of employment, economic conditions, or intentional un- or underemployment to gain further education.

Here, Father introduced evidence that he sold his business only after it was deeply in debt, was pursued legally by creditors, and was locked out of its premises for failure to pay its lease. Mother produced no evidence of Father's educational background or work experience. Father's resume, which he introduced into evidence, showed he had a high school education and several years in sales experience before starting his business, which ultimately failed. Father tried to get a job with the company that bought his business and with at least a dozen other companies. He finally began working for his wife's landscaping business making minimum wage. In addition, Father had plans to go to truck driving school and was planning to start a job as a truck driver three months after the trial. Mother's testimony that Father was capable of "more than mowing yards" was insufficient to carry her burden to show that Father consciously chose to be underemployed.

REGISTRATION OF ISRAELI CHILD-SUPPORT ORDER VACATED BECAUSE FATHER ESTABLISHED THAT HE HAD NOT BEEN PROPERLY SERVED WITH PROCESS AND THAT THE ISRAELI COURT LACKED PERSONAL JURISDICTION OVER HIM.

¶14-5-16. ***In re E.H.,*** ___ S.W.3d ___, 2014 WL 5380088, 14-13-00622-CV (Tex. App.—Galveston 2014, no pet. h.) (10-23-14).

Facts: Mother and Father married in Israel and had three Children, who were all born in Israel. Father left Mother and the Children and moved to South Carolina and, later, to Galveston, Texas. About a year after Father left, Mother obtained a judgment for child support in Israel after serving him by registered mail to South Carolina. A few years later, Father obtained a rabbinical divorce in Galveston through proceedings initiated by Mother. Father was eventually granted conservatorship of one of their Children.

The National Insurance Institute of Israel paid Mother a portion of the child support payments through a program with the Israeli government allowing spouses to obtain a portion of unpaid support from the government and to file suit against the non-paying spouse for the difference. Mother obtained permission from the Israeli courts to seek arrearages from Father for around $150,000 in unpaid support. The OAG filed in Galveston a notice of registration of the Israeli order and a motion to confirm the arrearages. Father contested the registration, arguing that he had never been served with process for any child support action. After a hearing, the trial court denied registration of the Israeli order, finding that Father was denied due process, was never served with process, and had no notice of the suit. The OAG appealed, arguing that the trial court was required to register the judgment under the full faith and credit clause of the U.S. Constitution and the principle of comity. In addition, the OAG argued that the trial court should have deferred to the Israeli court's personal-jurisdiction determination, and that Father's bald assertion that he was not served was insufficient to support that claim.

Holding: Affirmed

Majority Opinion: (J. Wise and J. Jamison) The Uniform Interstate Foreign Support Act ("UIFSA") is codified in Texas Family Code Chapter 159 and provides that a party may register a child support or income-withholding order of another state or a foreign country. While the U.S. Constitution requires Texas to give

full faith and credit to judgments of other states, no clear language in the statute implies that this clause extends to foreign countries.

Comity is a principle under which Texas gives effect to the laws and judicial decisions of another state or jurisdiction. However, the U.S. Supreme Court has held that "due process requires that no other jurisdiction shall give effect, *even as a matter of comity*, to a judgment elsewhere acquired without due process." Here, the OAG failed to present sufficient evidence that Father received proper service as required under Israeli court rules or that he received sufficient notice to comport with due process.

Additionally, Texas Family Code Section 159.607(a) allows an obligor to challenge the registration or enforcement of another state's child support or income-withholding order. The COA noted that none of the permitted defenses included a best-interest analysis. Under TFC 159.607(a)(1), a court may vacate the judgment if "the issuing tribunal lacked personal jurisdiction over the contesting party." Under Israeli rules of civil procedure, personal jurisdiction can be established by proof of delivery by registered mail that is recorded in the court's file. Here, the Israeli court authorized service by mail. At the final hearing, Mother's attorney stated that summons was sent, and Mother testified that Father told her by telephone that he had received the documents. In addition, Mother confirmed that she recognized Father's signature on the confirmation of delivery. However, no confirmation of delivery was attached to the court's file. The certificate of service was directed to a similar but incorrect name and was sent to an address of which Father was aware but at which he did not reside. The certificate of service did not clearly identify what documents were delivered. Further, Father denied that the signature on the confirmation of delivery was his.

Concurring Opinion: (C.J. Frost) The UIFSA provides eight exclusive defenses to contest the validity or enforcement of a registered judgment. If a party fails to establish one of these eight defenses, the court must issue an order confirming the judgment. The exclusive list does not include a defense on the grounds that the issuing tribunal lacked subject-matter jurisdiction or that the contesting party did not receive notice. However, a court may vacate the judgment if "the issuing tribunal lacked personal jurisdiction over the contesting party," TFC 159.607(a)(1), or "there is a defense under the law of this state to the remedy sought," TFC 159.607(a)(5).

Under Israeli law, similar to Texas law, for the Israeli court to have had personal jurisdiction over Father, he would have had to have received proper service, waived service, or appeared in the Israeli lawsuit. In addition, federal due process requires that a defending party receive "Reasonable Notice," which is notice that is reasonably calculated to apprise the defendant of the pendency of the action and afford the defendant an opportunity to be heard. Thus, Father would have been able to raise a defense under both TFC 159.607(a)(1) and 159.607(a)(5). However, because there was sufficient evidence to establish that Father did not receive Reasonable Notice—providing him a defense under TFC 159.607(a)(5)—there was no need to address whether he received proper service of process under Israeli law.

TRIAL COURT'S PLENARY POWER IN PARENTS' DIVORCE PROCEEDING DID NOT DETERMINE THE TRIAL COURT'S JURISDICTION TO ADDRESS THE PARENTS' ALLEGEDLY DISABLED ADULT CHILD'S SUIT FOR CHILD SUPPORT.

¶14-5-17. *In re Sisk*, No. 14-13-00785-CV, 2014 WL 5492804 (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (mem. op.) (10-30-14).

Facts: The Parents divorced when their Child was 25 years old. The agreed final divorce decree stated that there was no child of the marriage entitled to support. Four years later, the Child filed a petition for child support, alleging that he was disabled and unable to support himself. The Parents each filed a separate answer, asserting that the Child lacked standing and asserting the affirmative defenses of statute of limitations, laches, and estoppel. Subsequently, the Parents filed a joint motion to dismiss, which was one sentence long and asked the trial court to dismiss the suit based on the pleadings. The trial court held a hearing and determined that it lacked jurisdiction because its plenary power to alter the divorce decree had expired and because the

decree included a finding that there was no child entitled to support. The trial court issued findings of fact and conclusions of law and signed an order dismissing the Child's suit. The Child appealed.

Holding: Reversed and Remanded

Opinion: A SAPCR is a suit affecting conservatorship, access to, support of, or the establishment or termination of a parent-child relationship and must be styled "In the interest of ____, a child." A final order in a SAPCR must include the social security numbers and driver's license numbers of the parties and the child. A petition for divorce must include a SAPCR if the parties are the parents of a child; however, the SAPCR and divorce are actually two separate lawsuits. A trial court obtains continuing exclusive jurisdiction over a child in connection with a SAPCR after rendering a final order.

Here, nothing in the divorce decree indicated that it included a SAPCR or that the trial court considered whether the Child was a "child entitled to support." The proceedings was not styled "In the interest of [the Child], a child." The divorce decree did not include the social security numbers or driver's license numbers of the Parents or the Child. The divorce decree was "agreed" and signed by the Parents but not by the Child. Thus, the divorce proceeding did not include a SAPCR, and the trial court did not consider during the divorce proceeding whether the Child was entitled to support. Further, the trial court did not obtain continuing, exclusive jurisdiction over the Child. Therefore, the Child properly filed a freestanding lawsuit under TFC 154.305, which allows him to do so because there was no court with continuing exclusive jurisdiction.

Additionally, the only grounds for a defendant's motion to dismiss are want of prosecution or lack of jurisdiction. Affirmative defenses should be raised through a motion for summary judgment, not a motion to dismiss or plea to the jurisdiction. A trial court should not issue findings of fact and conclusions of law in a summary judgment proceeding. Here, the Parents did not attach any exhibits or affidavits to their joint motion to dismiss, and the trial court issued findings of fact and conclusions of law. Thus, the motion was not a misnamed motion for summary judgment. As stated above, the trial court had subject matter jurisdiction over the suit. The Parents had no basis under TRCP or the TFC to file a motion to dismiss.

MOTHER FAILED TO ESTABLISH WITH ANY SPECIFICITY WHAT PORTION OF THE TRIAL COURT'S DISPROPORTIONATE DIVISION OF THE COMMUNITY ESTATE CONSTITUTED A LUMP PAYMENT OF CHILD SUPPORT OR THAT SHE WAS ENTITLED TO RECOVER FOR OVERPAYMENT WHEN THE CHILDREN LATER BEGAN RESIDING WITH HER.

¶14-5-18. ***In re Moschopoulos,*** ___ S.W.3d ___, 2014 WL 5798278, 08-13-00026-CV (Tex. App.—El Paso 2014, no pet. h.) (10-31-14).

Facts: At the time of Mother and Father's divorce, they had two Children. One child was 17, and the older child was 19. The older child was disabled, requiring full supervision and assistance, and was the subject of this suit. Mother and Father's divorce was tried to the bench in piecemeal fashion over six days. After the hearings were completed, the trial court issued a letter ruling to the parties appointing them as JMCs, with Father being granted the exclusive right to designate the primary residence of the Children. The letter ruling also divided the community estate, taking into consideration child support, house payments, and future child support all owed by Mother to Father. In addition, the trial court divided the community estate based on Father's retirement age, the disparity of the parties' separate estates, the disabled Child, and the fact that Father was the primary caregiver of the Children. Further, the trial court listed the assets and liabilities awarded to each spouse. No values were listed, but two exhibits identifying household furniture and furnishings of the parties were attached. The trial court confirmed separate property of the parties but did not value it. The divorce decree divided the property in conformity with the letter ruling and included a provision that Mother's child support obligation was fully satisfied. Sixteen months after the divorce, both Children moved into Mother's home. Mother filed suit seeking to recover excess child support. Mother contended that the division of the community estate was disproportionate in lieu of her being ordered to pay child support and that what was envisioned as a life-time support obligation ended up lasting only 16 months. Mother calculated that Father received about $87,000 more than half of the community estate, and that under the child support guidelines, she would have been obligated to pay roughly $13,000 in child support. Thus, she sought a money

judgment for around $76,000. Father argued that Mother paid no child support payment at all and that her estimation of the community estate was inaccurate. The trial court denied Mother's motion, and she appealed.

Holding: Affirmed

Opinion: A party who has overpaid child support may seek reimbursement; however, the obligor must prove the amount of support ordered and the amount overpaid. To prove a trial court abused its discretion in making a just and right division of the community estate, a party must establish the size of the community and what portion of the community was awarded to each party. Here, Mother did not introduce values during the divorce proceedings, yet introduced valuation evidence during these child support repayment proceedings. Additionally, in her calculations, Mother failed to take into account the mortgage on the community homestead because she did not believe it should be considered. The trial court's letter ruling included exhibits listing assets awarded to each party but no valuations. The final decree included no values except for certain debts assessed against Mother. The trial court's letter ruling indicated that child support was one of several factors it took into consideration in dividing the community estate. Even if the court were to accept Mother's values presented during the child support repayment proceedings, neither the trial court nor the COA would be able to determine the size of the community estate or how disproportionate the division was. Mother failed to prove the amount of the child support award or by what amount she overpaid it.

Editor's Comment: *It is critical to property appeals that the record includes community property values. Further, when there is a dispute as to value, the trial court should be asked to make findings. As the court observes, "an appellant cannot demonstrate that a trial court abused its discretion in making a just and right division of the community estate without being able to quantify the size of the community pie or just how large a slice each spouse was served." J.V.*

SAPCR
ADOPTION

TFC 153.434 SPECIFICALLY PROHIBITED PATERNAL GRANDPARENTS FROM REQUESTING ACCESS TO THE CHILD PENDING MATERNAL GRANDPARENTS' PENDING ADOPTION PROCEEDING; TRIAL COURT'S DENIAL OF MATERNAL GRANDPARENTS' ADOPTION PETITION DID NOT RETROACTIVELY CONFER STANDING ON PATERNAL GRANDPARENTS.

¶14-5-19. *In re Gonzalez*, No. 04-14-00485-CV, 2014 WL 4922933 (Tex. App.—San Antonio 2014, orig. proceeding) (mem. op.) (10-01-14).

Facts: Mother and Father died in a car accident, and Maternal Grandmother was appointed the permanent guardian of the Child. A few years later, Maternal Grandparents filed a petition for adoption of the Child. Paternal Grandparents, who did not live together, each filed a separate general denial in response to the petition. One week before the adoption was scheduled for final hearing, Paternal Grandmother, for the first time, filed an intervention requesting possession of and access to the Child. Three days later, Paternal Grandfather filed a motion for grandparent access. The trial court postponed the final hearing and issued temporary orders granting Paternal Grandparents some access to the Child. The trial court signed an "Amended Order Denying Adoption," although it was unclear what prior order was being amended. In the Amended Order, the trial court denied Maternal Grandparents' petition for adoption and stated that all relief not expressly granted was denied and included a handwritten notation, "This order is appealable." Nevertheless, the trial court retained on its docket a final hearing scheduled for about a month later. Maternal Grandparents filed their appeal before the final hearing and notified the trial court via letter that the final hearing was not needed because "all

Return to Table of Contents

relief not expressly granted was denied." The trial court convened for the final hearing. Counsel for Paternal Grandparents appeared, but counsel for Maternal Grandparents did not. Paternal Grandparents re-urged request for access and asserted that their intervention and motion for grandparent access were still "live pleadings" and requested rulings because the trial court had "already denied the adoption." Without hearing any evidence, the trial court signed an order granting the Paternal Grandparents shared standard possession. Maternal Grandparents filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Texas Family Code Section 153.434 provides that a grandparent ***may not request*** possession of or access to a child if each of the biological parents has died and the grandchild is the subject of a pending suit for adoption by a person other than the child's stepparent. Here, it was undisputed that the Child's parents were dead and an adoption proceeding was pending. Additionally, the adoption proceeding would not be considered final until the conclusion of the pending appeal or until dismissed by the trial court. TFC 153.434 clearly denied Paternal Grandparent's standing to file a request for possession or access. The trial court's order denying Maternal Grandparent's petition for adoption could not retroactively confer standing on Paternal Grandparents.

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflectiing a shift in the frequency of mandamus proceedings. M.M.O.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

TDFPS FAILED TO MEET ITS BURDEN TO SHOW THAT TERMINATION WAS IN THE CHILD'S BEST INTEREST, IN PART BECAUSE IT MERELY STATED THAT THE CHILD'S AUNT WAS WILLING TO ADOPT THE CHILD, WITHOUT PRESENTING ANY EVIDENCE ABOUT THE AUNT'S ABILITY TO CARE FOR THE CHILD

¶14-5-20. ***In re R.S.D.,*** ___ S.W.3d ___, 2014 WL 4335354, 04-13-00665-CV (Tex. App.—San Antonio 2014, no pet. h.) (09-03-14).

Facts: Mother was arrested for possession of a controlled substance, and TDFPS took control of her Child. While in county jail, Mother attempted to see the Child through the "MATCH" program, but was unable. However, Mother was involved in the "Supporting Books" program, which allowed her to record herself reading a book and send the recording to her son. Mother did not know whether the Child received the recordings. Mother had not received a response from her caseworker in months.

TDFPS sought to terminate Mother's and Father's parental rights. Father signed an affidavit relinquishing his rights, and he stated that he believed that placing the Child with a paternal aunt in California would be in the Child's best interest. At the time of trial, Mother had not completed all of her service plan, but it was unclear which uncompleted services were available to Mother while incarcerated. Mother's projected release date was set for about 2-3 years after the termination proceedings, but she was scheduled for a parole review in two months. Mother admitted to using cocaine at the beginning of the case but also admitted that she was wrong to use it and could change in the future. TDFPS sought termination because Mother had not completed her service plan, Mother was going to be incarcerated for another two or more years, and the Child's paternal aunt in California was willing to adopt the Child.

The trial court terminated both Parents' parental rights. Father did not challenge the judgment. Mother appealed, arguing that the evidence was legally and factually insufficient to support the trial court's finding that termination was in the Child's best interest.

Holding: Affirmed in Part; Reversed in Part and Rendered

Return to Table of Contents

Opinion: A parent's parental rights may only be terminated after a finding by clear and convincing evidence of a ground enumerated by TFC 161.001(1) and a finding that termination is in the child's best interest. When determining whether a termination is in a child's best interest a court should apply the *Holley* factors.

Here, the Child was too young to express a desire, but the evidence established that the Child was developing slowly, had ADHD, and needed a lot of guidance and attention. No evidence was presented that the Child was at risk for emotional or physical danger.

Mother's admission to having done cocaine in the past was the only evidence of an act or omission of the parent indicating a potentially improper parent-child relationship. Mother admitted that she was wrong to use cocaine. Further, although Mother was convicted for drug possession, she had no other criminal history, except for a prostitution charge that had been dismissed.

While incarcerated, Mother had completed her parenting class and domestic violence class, attended narcotics anonymous classes, and underwent counseling. Mother had nearly completed her GED. Some of the services that Mother had not completed were not available to her, but TDFPS failed to elaborate on which services were and were not available to Mother.

Father and the TDFPS caseworker both indicated that placing the Child with his paternal aunt in California was in his best interest; however, no evidence was presented about the aunt's parenting abilities, programs available to assist her, plans the aunt had for the Child's future, or the stability of the aunt's home. A conclusory statement, even if uncontroverted, is insufficient to support a best interest finding.

FATHER'S DRUG USE AND FAILURE TO PARTICIPATE IN REHABILITATION PROGRAMS SUPPORTED FINDING THAT TERMINATION WAS IN CHILDREN'S BEST INTEREST; TRIAL COURT'S DETERMINATION NOT TO TERMINATE MOTHER'S PARENTAL RIGHTS DID NOT IMPACT DECISION TO TERMINATE FATHER'S PARENTAL RIGHTS

¶14-5-21. ***B.B. v. TDFPS,*** ___ S.W.3d ___, 2014 WL 4737541, 08-14-00178-CV (Tex. App.—El Paso 2014, no pet. h.) (09-23-14).

Facts: Mother and Father were married with three children. Father had another son from a prior relationship. Father began dealing cocaine at age 17. When Mother and Father met, Father smoked an average of seven grams (four blunts) of marijuana a day. Father's usage of marijuana increased after his first son's mother abandoned that child. Father admitted to working under the influence at a restaurant. Father had been convicted of driving without a license several times and was once sentenced to 17 days in jail for driving with a suspended license. He was placed on probation for felony possession of cocaine and was later sentenced to 49 days in jail for marijuana possession. Father was caught smoking marijuana in violation of his probation and elected to serve a staggered two-year prison sentence. While in prison, he did not see his oldest child, who lived several hundred miles away from the prison.

After his release from prison, he and Mother moved to a trailer that was initially in good condition. However, as time passed, three holes opened up in the floor that Father repaired with plywood. Father began using powder cocaine and selling both powder and crack cocaine. Mother and Father used cocaine and marijuana together and took care of the Children while under the influence.

TDFPS received a tip that the Children were being neglected. Upon investigation, TDFPS found the home unsafe, dirty, and lacking food and diapers. One Child had an untreated rash, and another Child had marks around his eye. Mother and Father both tested positive for drugs. TDFPS formulated a treatment plan for Father, which included a drug rehabilitation facility, in-patient treatment, drug court, outpatient classes, parenting classes, and individual and group therapy. However, Father did not fully participate in any portion of the plan and repeatedly tested positive for drugs.

Father's and Mother's car was stolen, and Father injured his ankle, so he was unable to work. They could not pay rent on their apartment, were evicted, and became homeless. Father continued to use cocaine while

homeless. Father later found a part-time, temporary job working for a travelling carnival, making $600 a week. If he were offered a formal contract, he would be required to travel with the carnival.

The Children were placed with a foster mother, who they referred to as "grandma." One Child was in speech therapy, and another was in physical therapy. Both Children improved while in therapy. While the Children were in TDFPS custody, Father missed 39 scheduled visits with the Children. After a final hearing, the trial court terminated Father's parental rights, and named TDFPS as MC and Mother as PC. Father appealed and challenged the finding that termination was in the Children's best interest.

Holding: Affirmed

Opinion: In its best interest review, the COA addressed five *Holley* factors jointly: the emotional and physical needs of the child now and in the future; the emotional and physical danger to the child now and in the future; the parenting abilities of the parties seeking custody; the plans for the child by the parties seeking custody; and the stability of the home or proposed placement. Two of the Children had special needs. Father was homeless and had nowhere to house the Children. Father worked part time, but the work was sporadic. Even if Father's work continued, it would require frequent relocations, causing a hardship for the Children. Father cared for the Children and took some parenting classes; however, he also admitted caring for the Children while on drugs. Additionally, Father failed to consistently attend therapy or participate fully in drug rehabilitation programs. When the Children were taken into custody by TDFPS, one had an untreated rash, and another had marks around the eye. The COA determined that when considering these factors in the aggregate, a trial court could reasonably believe that Father could not provide for the Children's emotional and physical needs; his presence would place the Children in emotional or physical danger; he lacked the ability to parent well; his future plans were too ill-defined; and he would expose the Children to drugs.

Father testified that the fact that his car was stolen was the reason for many missed meetings with the Children. Also, his homelessness was caused by an injury that rendered him unable to work. Father additionally argued that termination would not be in the Children's best interest because then they would receive no child support from him in the future; however, Father never paid child support in the past. Taken as a whole, the evidence supported a finding that termination was in the best interest of the Children.

Finally, the fact that Mother's parental rights were not terminated did not impact the finding that termination of Father's parental rights was in the Children's best interest. The court must look only to the conduct of Father when determining whether termination of Father's rights is in the best interests of the Children.

MOTHER'S RIGHTS TERMINATED BECAUSE DEPLORABLE LIVING CONDITIONS AND FREQUENT INCARCERATIONS ENDANGERED THE CHILD'S PHYSICAL AND EMOTIONAL WELL-BEING.

¶14-5-22. ***JDS v. TDFPS,*** ___ S.W.3d ___, 2014 WL 4745794, 08-14-00191-CV (Tex. App.—El Paso 2014, no pet. h.) (09-24-14).

Facts: The Child was five years old at the time of trial. TDFPS had received reports of neglect and launched an investigation that revealed Mother and the Child were living in a home with broken windows, no electricity, no hot water, mice, roaches, and moldy food. Mother and the Child lived with Mother's boyfriend and his father. Before the investigation was completed, Mother was incarcerated, and the Child was placed with her maternal grandmother. However, the maternal grandmother later tested positive for marijuana, so the Child was removed and placed with a foster family. The Child's foster mother testified that in her care the Child was doing "phenomenally well" and was "flourishing." The trial court also heard testimony from Mother, the TDFPS caseworker, the CASA supervisor. The TDFPS caseworker reported that the Child's therapist recommended that the Child have no contact with Mother, who was still incarcerated at the time of trial. Ultimately, the trial court terminated Mother's parental rights and appointed TDFPS as SMC. Mother appealed, challenging the legal and factual sufficient of the evidence to support termination.

Holding: Affirmed

Return to Table of Contents

Opinion: TFC 161.001 allows termination of a parent's parental rights after clear and convincing evidence establishes a violation of one of the grounds enumerated in TFC 161.001(1) and that termination is in the child's best interest.

TFC 161.001(1)(D) and (E) are similar in that each require proof of endangerment. TFC 161.001(1)(D) focuses on the child's surroundings and environment, and TFC 161.001(1)(E) focuses on parental misconduct. While a parent's imprisonment alone does not constitute an endangering course of conduct, routinely subjecting a child to the probability that she will be left alone because the parent is imprisoned does endanger the child's physical and emotional well-being.

The child's home with Mother was "deplorable." Mother claimed that at the time of TDFPS's investigation, the home was "100 times better" than when she and the Child first moved in. The home was infested with roaches and mice. To kill the mice, Mother spread poison throughout the house, which was also a danger to the Child. Food in the refrigerator was moldy because it was broken, and Mother did not explain why there was no other food in the house. When asked why there was no hot water in the house, Mother explained that she manually turned on the hot water heater only when necessary for baths and dishes because of an issue with the electricity and a leak in a water pump. The Child's teeth hurt every day due to a serious infection from untreated cavities. After being placed in foster care, one tooth was pulled, and four teeth were capped. Mother had been allowing the Child to have chocolate milk and fruit juice despite being advised that sugary drinks would worsen the Child's dental problems. Mother had twice pleaded guilty in the past for child endangerment. She had admitted to using synthetic marijuana and tested positive for marijuana when she was arrested most recently. The Child had stated that she did not want to go back to Mother's home. The Child talked of family violence. The Child began having nightmares about a "Chucky Doll" she saw in a movie and did not want to sleep alone. Mother's solution to the Child's fear of sleeping alone was to allow the Child to sleep between Mother and Mother's boyfriend in their bed. Mother allowed destructive people to live in the home. Based on this evidence, the COA found that the trial court could have reasonable formed a belief or conviction that Mother had violated TFC 161.001(1)(D) and (E).

When determining the best interest of a child, a court will consider the *Holley* factors. Here, the Child desired not to return to the prior situation. She had bonded with her foster family to the point that she called them "mom and dad" and referred to Mother by name. A simple birthday card from Mother increased the recurrence of nightmares and bedwetting, which led the Child's therapist to recommend no contact with Mother and to screen all further communications from Mother.

The Child needed stability, security, and continuity. Future conduct may be predicted by past conduct. Mother had provided the Child with deplorable living conditions, exposed her to poison, vermin, alcohol, and marijuana. The Child was afraid to sleep alone and required five night lights. Mother allowed the Child to sleep between Mother and Mother's boyfriend. Mother delayed dental treatment for the Child.

Mother's judgment was questionable, which indicated a lack of parenting abilities. Mother had taken some classes to improve her skills while in prison. However, she also had a pattern of repeating past mistakes. She twice pleaded guilty for child endangerment, but she also offered excuses and blamed others.

TDFPS sought to be named PMC of the Child and to continue the Child's placement with her foster parents, who wanted to adopt the Child. The Child was reading, writing stories, and doing math. Mother wanted the Child back because she loved the Child; however, she did not provide any specific plan for improving her lifestyle. Mother stated that she intended to find a home, job, and car within 90 days of her release from prison but provided no additional details on how she planned to reach those goals. The Child's therapist did not believe the Child should be returned to Mother.

Mother excused the condition of the home as being "100 times better" than it had been previously. She claimed that other people "trashed" it but also allowed those people to stay with her and the Child in the home. Mother explained that mice and roaches were common in older homes. Mother dismissed the mice carcasses around the home with an explanation that she had put out poison. Mother blamed her boyfriend's father for putting dirty dishes in the drawers. Mother stated that when the Child reported that the house had no electricity, the Child was just confused about seeing a light bulb blow out. Mother explained hot water was available when necessary. Mother downplayed a conviction for theft of a PlayStation because it was in her home when she stole it. She did not appear to fully understand the endangerment charges against her. Based

Return to Table of Contents

on the evidence, a reasonable fact finder could have formed a firm belief or conviction that termination of Mother's parental rights was in the Child's best interest.

COA GRANTED WITHDRAWAL OF APPOINTED COUNSEL BASED ON *ANDERS* BRIEF OPINING THAT, AFTER A CONSCIENTIOUS REVIEW OF THE RECORD, NO GROUNDS EXISTED FOR AN APPEAL OF THE TERMINATION OF MOTHER'S PARENTAL RIGHTS.

¶14-5-23. ***In re X.H.,*** ___ S.W.3d ___, 2014 WL 4958234, 10-14-00193-CV (Tex. App.—Waco 2014, no pet. h.) (10-02-14).

Facts: The trial court terminated the parent-child relationship between Mother and her two Children after finding by clear and convincing evidence that termination was supported by Texas Family Code Sections 161.001(1)(D), (E), and (O) and that termination was in the best interest of the Children. Subsequently, Mother was found to be indigent, and appellate counsel was appointed to represent her.

Holding: Granted and Affirmed

Opinion: An *Anders* brief can be applicable in an appeal of an order terminating parental rights. Here, the appointed counsel filed an *Anders* brief certifying that that he had conducted a conscientious examination of the record, and in his opinion, the record reflected no potentially plausible basis to support an appeal. He certified that he diligently researched the law, and in his opinion, an appeal would have been frivolous. Mother's rights were terminated based on three separate grounds under TFC 161.001(1), and after acknowledging that only one enumerated act or omission is needed to support a finding in favor of termination, the appointed counsel opined that the evidence clearly supported termination under Texas Family Code Section 161.001(1)(O), failure to comply with a court-ordered service plan. In addition, the appointed counsel believed that the evidence supported a finding that termination was in the best interest of the Children.

After an independent review of the record, the COA agreed with the appointed counsel's analysis, granted the appointed counsel's motion to withdraw, and affirmed the termination. The COA ordered the appointed counsel to provide Mother with a copy of the COA's opinion within 5 days to advise her of her right to pursue a petition for review with the Texas Supreme Court. In addition, although Mother was found to be indigent, she was ordered to be responsible for the court costs of the appeal.

TRIAL COURT ERRED IN FAILING TO RETURN CHILD TO FATHER WHEN NO EVIDENCE SUPPORTED THE CHILD'S REMOVAL.

¶14-5-24. ***In re Hughes,*** ___ S.W.3d ___, 2014 WL 4932959, 06-14-00076-CV (Tex. App.—Texarkana 2014, orig. proceeding) (10-03-14).

Facts: TDFPS filed a petition for protection of the Child, for conservatorship, and for termination. On the same day, the trial court entered an order for protection of the Child, named TDFPS temporary managing conservator, and set a hearing. At the adversary hearing, Father moved to dismiss the petition because it lacked an affidavit as required by TFC 262.101. The trial court stated that it had reviewed affidavits of the Child's parents in another case and believed that drug abuse was involved. During the hearing, the trial court entered no exhibits and heard no testimony. At the conclusion of the hearing, the trial court denied Father's motions and issued a temporary order mandating that the Child would remain in TDFPS's care. Father filed a petition for writ of mandamus.

Holding: Petition for Writ of Mandamus Conditionally Granted

Opinion: After an adversary hearing, a trial court shall order the return of a child to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian entitled to possession unless the court

finds sufficient evidence as set forth in TFC 262.201(b), including evidence that for the child to remain in the home would be contrary to the welfare of the child.

Here, the temporary orders stated that the Child would remain in the care of TDFPS was based upon the "sworn affidavit accompanying the petition and based upon the facts contained therein and the evidence presented to [the] [c]ourt at the hearing." However, it was undisputed that the petition had no accompanying affidavit and that TDFPS presented no evidence or testimony at the hearing. Therefore, the trial court was required to return the Child to Father at the conclusion of the hearing.

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. M.M.O.*

FATHER'S RIGHTS TERMINATED BECAUSE HE LEFT THE CHILD WITH MOTHER, DESPITE KNOWING OF MOTHER'S DRUG HABITS AND MENTAL ISSUES.

¶14-5-25. ***M.V. v. TDFPS,*** ___ S.W.3d ___, 2014 WL 5033255, 08-14-00156-CV (Tex. App.—El Paso 2014, no pet. h.) (10-08-14).

These termination proceedings involved one mother, two fathers, and three children. The trial court terminated all three parent's parental rights. Mother has not appealed. The other father appealed in BC. v. TDFPS, and the COA released both opinions on the same day.

Facts: Mother and Father were married and had one Child. Mother had two older Children with another man. Mother and the second father left the Children alone while they went to a bar. The second father pleaded guilty to two counts of child abandonment and was placed on four years' deferred adjudication. The Children were removed and placed with their maternal grandmother. Subsequently, the Children were removed from the grandmother's care after Mother was detained from entering the U.S. from Mexico with 33.5 pounds of marijuana. TDFPS filed a suit to terminate the parental rights of all three parents.

At the time of trial, the Child was 6 years old, and Mother and Father were married but not cohabitating. Father was aware that Mother had been arrested for drugs, had used drugs when they lived together, and suffered from bipolar disorder. However, Father left the Child with Mother "because she was the mother." Although there was a police report detailing an incident in which Mother scratched Father's back, chest, and arm in the Child's presence, Father claimed he did not make those assertions to the police and explained that the incident had occurred when Mother had just experience a sudden change of character.

During the termination proceedings, Father participated in a court-ordered service plan, which included a drug treatment program. However, Father twice tested positive for cocaine. Father alleged that the second time he tested positive was because he had recently kissed someone who had done cocaine. At trial, Father explained that he expected to be able to obtain a trailer near his work, where he and the Child could live. However, he had not mentioned this trailer to the TDFPS caseworker before trial and, thus, the caseworker had no opportunity to inspect the trailer. Father also suggested that he and the Child could live with his family in Mexico, but he also admitted that he hadn't been there in years. Father identified two people who would be able to assist him in caring for the Child; however, he had not informed the caseworker of one of those people, and the other person refused to allow a home study. Father knew the first name of the Child's pediatrician but could not remember the doctor's last name. Father had never been to any of the Child's checkups in the last year. Two caseworkers testified, and each recommended termination of Father's parental rights.

Ultimately, the trial court terminated the parent-child relationship between Father and the Child, on the based upon Texas Family Code Sections 161.001(D),(E), (F) and (P), as well as a finding that termination was in the Child's best interest. Father appealed, challenging the legal and factual sufficiency of the evidence to support the trial court's findings.

Holding: Affirmed

Return to Table of Contents

Opinion: A parent's parental rights may be terminated after a finding by clear and convincing evidence that the parent committed an enumerated act or omission of Texas Family Code sections 161.001(1) and that termination is in the child's best interest. TFC 161.001(1)(E) supports termination if the parent engages in conduct or knowingly placed the child with persons who engaged in conduct that endangered the child's physical or emotional well-being. The *Holley* factors guide a court's best interest analysis.

Here, the Child did not testify as to her desires; however, the three Children were bonded and wanted to remain together. Father routinely left the Child with Mother, while knowing of Mother's mental health issues. Father testified that he had friends who would help him raise the Child, but he did not provide full information regarding them to TDFPS, and one of the friends rejected a home study. Father did not show much focus on obtaining and providing a suitable home for the Child and failed to inform TDFPS of his plans regarding a trailer home. Further, the Child was thriving in a stable placement with her siblings.

FATHER'S GUILTY PLEA TO CRIMINAL OFFENSE OF CHILD ABANDONMENT WAS SUFFICIENT TO ESTABLISH GROUNDS FOR TERMINATION UNDER TFC 161.001(1)(D); TRIAL RECORD DID NOT SUPPORT FATHER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL

¶14-5-26. ***B.C. v. TDFPS,*** ___ S.W.3d ___, 2014 WL 5033252, 08-14-00150-CV (Tex. App.—El Paso 2014, no pet. h.) (10-08-14).

These termination proceedings involved one mother, two fathers, and three children. The trial court terminated all three parent's parental rights. Mother has not appealed. The other father appealed in M.V. v. TDFPS, and the COA released both opinions on the same day.

Facts: Mother and Father had two Children together. Mother had a younger child with another man, to whom she was married but with whom she did not cohabitate. Mother and Father left the Children home alone while they went to a bar to by cocaine. After Mother and Father were arrested, Mother asked to check on her Children because a friend was watching them. The police conducted a welfare check and found the Children home alone with the door unlocked. Mother and Father were arrested for possession and child abandonment. Termination proceedings commenced, and ultimately, both Mother's and Father's parental rights were terminated. Mother did not appeal. Father appealed and challenged the legal and factual sufficiency of the evidence to support termination.

Holding: Affirmed

Opinion: A parent's parental rights may only be terminated after finding that clear and convincing evidence established that the parent committed one of the enumerated acts or omissions of Texas Family Code Section 161.001(1) and that termination is in the child's best interest.

Here, Father pled guilty to child abandonment. The indictment alleged that he "did then and there having custody, care and control of the [two Children, who were] younger than 15 years, did then and there intentionally, with the intent to return, abandon [the Children] in a place, to-wit: a residence, without providing reasonable and necessary care for the child, under circumstances which no reasonable, similarly situated adult would leave a child of that age and under the circumstances that exposed [the Children] to unreasonable risk of harm[.]" Father's guilty plea to this charge alone was sufficient to support a finding that grounds for termination existed under TFC 161.001(1)(D).

Further, evidence was presented of additional convictions, including conspiracy to import a controlled substance, possession of a controlled substance, driving under the influence, and resisting arrest. Father was also arrested for domestic violence against Mother. Father agreed that he put the Children at risk by exposing them to an unsafe environment in which Mother used drugs. During the year-and-a-half that the Children were in foster care, Father continued drinking and using drugs. Three months prior to the final hearing, he was arrested a second time for driving while intoxicated, and four months prior to the final hearing, he had used cocaine. Father failed to comply with the service plan as ordered because he knew of outstanding warrants for

is arrest and did not want to turn himself in. Father did not provide a valid address, did not visit the Children, and rarely called them. Father had been ordered to pay $25 per month in child support, but he never did. A subsequent motion for enforcement alleged that he owed more than $8000 in child support and more than $900 in medical support. Father had not been able to suggest a placement for the Children that would keep all three Children together; although the Children had expressed a desire to remain in foster care "for the rest of their lives as long as they [would not be] separated." Moreover, the Children were thriving in foster care and were very bonded to each other. The case worker believed it would be in the Children's best interest to remain together.

GROUNDS FOR TERMINATION EXISTED BECAUSE MOTHER LEFT THE CHILDREN WITH FATHER, DESPITE KNOWING OF HIS MENTAL HEALTH ISSUES AND SUICIDAL TENDENCIES.

¶14-5-27. ***J.S. v. TDFPS***, ___ S.W.3d ___, 2014 WL 5798244, 08-13-00354-CV (Tex. App.—El Paso 2014, no pet. h.) (10-29-14).

Facts: TDFPS filed a petition seeking termination of Mother's parental rights of her two older Children. When the two Children were removed, Mother was pregnant with a third child. That child was later adopted by Mother's aunt after Mother voluntarily relinquished her parental rights.

Mother and Father lived together. Over the course of about 2 years, Father attempted suicide by cutting his wrists at least four times, and at least one of those times was in front of the Children. Mother was aware of each of these attempts, but claimed to be unaware of any mental health issues prior to the first attempt. One month after the first attempt, Mother and Father were "living in the streets," and Father referred himself to MHMRS and was assigned a psychiatrist. Subsequently, the family was kicked out of the Salvation Army shelter because coke bottles with urine in them were found in the family's room. Father began banging his head on the wall and punching shelves. He then grabbed a switchblade and cut his wrist in front of the Children. A few months later, Father was in the kitchen and deeply cut his wrist. Mother called the police, who took Father to the hospital. Not long after that suicide attempt, TDFPS received a report of neglectful supervision. Mother admitted to leaving the Children in Father's care despite being aware of his mental issues. Mother asserted that his behavior was never directed towards the children. Mother signed a safety plan, agreeing not to leave the Children alone with Father.

A few weeks later, TDFPS received a second intake report. An intervention specialist went to the home and noticed bruises on the younger Child face. Mother claimed that the bruises occurred when the Child climbed into the playpen and fell. However, the Child was not walking yet, and the intervention specialist did not believe the Child was strong enough to climb into the playpen. During the interview, the Child started crying, and Mother grabbed the Child's face and angrily told the Child to calm down. The way Mother grabbed the Child's face matched the Child's bruises. The Child was taken to the hospital and after a final diagnosis of failure to thrive, an ear infection, diarrhea, and child abuse, both Children were removed from Mother's care. An emergency room doctor later testified that due to the different stages of the Child's multiple bruises, her injuries had to have been continuous. Father claimed he was not home when the Child received the bruises. A few days later, Father called TDFPS to report that Mother had caused the Child's physical injuries. Mother called a few days after that to explain that Father had been drinking when he made his call. Ultimately, Mother was arrested for injury to a child, to which she pleaded guilty and received four years' deferred adjudication.

Soon after the removal of the Children, Mother's third child was born. TDFPS received a third intake report alleging Father had punched Mother in the head while she was holding the infant. Father was arrested, and Mother moved in with her aunt and uncle. Mother promised not to allow Father to return to the residence. TDFPS later learned that Mother bailed Father out of jail, and he returned home.

A few months after Father's arrest, TDFPS received a fourth intake report. Father and Mother were arguing. Father claimed Mother began pushing him while holding the Child. He waited until Mother put the infant

down and then hit and choked Mother. Father was arrested for family violence assault. A month later, he was arrested again for violating a protective order by going to Mother's residence. Father pleaded guilty to third degree felony assault.

Mother began a new relationship with a boyfriend who had been living on the streets off and on for about 5 years. The boyfriend had been asked to take parenting classes, but failed to do so. The boyfriend denied any problems with drugs or alcohol but had been arrested for possession and convicted for DWI. Mother was aware that the boyfriend smoked marijuana in her apartment. Mother signed a safety plan agreeing not to allow any unapproved individuals access to the Children. When TDFPS found the boyfriend in the apartment during an unannounced inspection, Mother signed another safety plan agreeing not to allow the boyfriend to stay in her home until TDFPS approved him. Despite her agreement, Mother continued to allow the boyfriend to stay with her because TDFPS cannot dictate who can stay in her home.

As part of the transition plan to reunify Mother and the Children, Mother was allowed an overnight, unsupervised visit with the Children. The older child reported that during the visit Mother had hit the younger child on the back of the head for defecating on the carpet. Mother denied hitting the Child, saying that she "would never spank [her] kids."

At trial, Mother testified that she only pled guilty to the injury to a child charge because she would have lost at trial. She claimed that Father had been the one to cause the Child's injuries. She further stated that she allowed Father to stay because she thought he would change.

A TDFPS caseworker testified that Mother lacked patience for the Children and was very mean to them. The caseworker stated that Mother didn't interact much with the Children and was not loving or nurturing to them. The caseworker also expressed concerns that Mother had not bonded with the younger Child. TDFPS planned to have the Children adopted by their foster parents. The ad litem attorney testified that termination was in the best interest of the Children.

After the hearing, the trial court terminated Mother's parental rights. Mother appealed, arguing that the trial court erred in allowing the testimony of her evaluating psychologist and that the evidence was insufficient to support termination.

Holding: Affirmed

Opinion: Termination of a parent's parental rights is permitted only after clear and convincing evidence establishes that the parent committed one of the enumerated acts or omissions of TFC 161.001(1) and that termination is in the child's best interest.

In determining whether termination is in the child's best interest, the court should consider the *Holley* factors:

The desires of the child. Although the Children were too young to articulate their desires, the COA noted that the older Child did not call Mother "mommy" and described her as "mean."

The present and future physical and emotional needs of the child. Mother had not formed a bond with the younger Child and failed to notice that the younger Child suffered from a failure to thrive. Mother was not nurturing to either Child.

The present and future emotional danger to the child. Mother consistently failed to follow TDFPS requests and showed poor judgment regarding the safety of her Children. She chose to expose her Children to Father and her boyfriend despite promises to TDFPS not to do so.

The parental abilities of the persons seeking custody in promoting the best interest of the child. Mother completed her parenting classes, never tested positive for drugs, and was enrolled in school. However, she also missed "a lot" of visitations with her Children, even after they were modified to accommodate her. Mother had no support from friends or family. She had not formed a bond with the younger Child, and despite 16 months of intervention and TDFPS services, Mother hit the younger Child.

Available assistance programs. In foster care, the older Child would be receiving speech therapy and the younger was attending play therapy.

The plans for the child by the individuals or agency seeking custody. TDFPS planned for the Children to be adopted by their foster parents.

The stability of the home or proposed placement. The Children had been in foster care for about a year with no need for psychotropic medications.

Return to Table of Contents

Acts or omissions of the parent which may indicate the existing parent-child relationship is not appropriate. Mother failed to recognize the danger of leaving the Children with Father. Mother was observed grabbing the younger Child in such a way that would cause the bruises on the Child's face. Mother insisted that her boyfriend continue living with her despite TDFPS's concerns. During her first overnight, unsupervised visit, Mother hit the younger Child.

Any excuse for the parent's acts or omissions. Mother claimed that she was not completely aware of Father's mental health issues, but police records contradicted that assertion. Mother claimed missed visits with the Children were due to her high risk pregnancy, but she gave birth one month after the Children were removed. Mother did not start visiting the Children regularly until a year after they were removed.

APPOINTMENT OF COUNSEL TO REPRESENT FATHER AFTER ADVERSARY HEARING NOT REVERSIBLE ERROR BECAUSE FATHER DID NOT FILE AN AFFIDAVIT OF INDIGENCE AND DID NOT ESTABLISH THAT THE DELAY CAUSED HARM.

¶14-5-28. ***In re S.R.,*** ___ S.W.3d ___, 2014 WL 5898453, 14-14-00393-CV, 14-14-00416-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (11-13-14).

Facts: Mother and Father were married with three Children. The parents were separated but not divorced. While Mother was pregnant with the third Child, TDFPS received several referrals alleging drug use, unsanitary living conditions, physical abuse, sexual abuse, and neglect. The subsequent investigation ruled out physical and sexual abuse. However, TDFPS was concerned about the parents' untreated mental illnesses and domestic violence in front of the Children. The parents were offered family-based safety services and signed several safety plans. Initially, the Children were voluntarily placed with a friend of the family. Later, the friend told TDFPS that Mother had taken the Children. TDFPS filed a petition for protection of the Children, seeking custody and termination of the parents' parental rights. Mother returned the Children to TDFPS custody after having been missing for two days. The Children were then placed in foster care. After a number of hearings, the case was tried to the court. The trial court terminated both parent's parental rights based on findings that termination was in the Children's best interest and that the parents had committed acts set out in TFC 161.001(D), (E), and (O). Mother and Father each appealed, challenging the sufficiency of the evidence to support the trial court's findings supporting the statutory grounds for termination. In addition, Father challenged the sufficiency of the evidence supporting the trial court's best interest finding. Father also alleged that the trial court erred in failing to appoint an attorney to represent him until after the adversary hearing had been completed.

Holding: Affirmed

Opinion: Texas Family Code Section 107.013 requires that a parent who claims indigence must file an affidavit of indigence before the court can conduct a hearing to determine the parent's indigence. Here, Father signed a written request for appointment of counsel, but it was not sworn or notarized. Thus, it was not an affidavit. Further, it was unclear from the record whether Father's request was made before or after the adversary hearing. The trial court appointed counsel for Father the same day his request was made. The final trial occurred almost 18 months after the appointment. The record did not reflect that any error in the timing of appointment probably led to the rendition of an improper judgment.

Return to Table of Contents

MOTHER WAS NOT REQUIRED TO SHOW A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES SINCE ENTRY OF DIVORCE DECREE IN HER PETITION TO TERMINATE FATHER'S PARENTAL RIGHTS BECAUSE TFC 156.101 DID NOT APPLY AND THE TRIAL COURT HAD NOT PREVIOUSLY DENIED TO TERMINATE FATHER'S PARENTAL RIGHTS.

¶14-5-29. ***In re A.M.,*** ___ S.W.3d ___, 2014 WL 6433061, 05-14-00915-CV (Tex. App.—Dallas 2014, no pet. h.) (11-17-14).

Facts: Mother and Father were married with one Child. The parents separated and shared possession by agreement. Subsequently, Father shot Mother 5 or 10 times, which put Mother in a coma for three weeks. It took Mother almost a year to feel well enough to move around. A few months after being shot, Mother filed a petition for divorce. Mother asked the court to name her the SMC of the Child but did not ask the court to terminate Father's parental rights. During the divorce proceedings, Father was sentenced to 45 years' imprisonment and to pay a $10,000 fine. In the final decree of divorce, Mother was named SMC, and the trial court neither terminated nor denied to terminate Father's parental rights. Less than a year after the divorce was finalized, Mother filed a petition to terminate Father's parental rights. The trial court found that grounds for termination existed because Father engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangered the physical or emotional well-being of the child, that Father knowingly engaged in criminal conduct that resulted in his conviction and imprisonment and inability to care for the child for not less than two years, and that termination was in the Child's best interest. Father appealed, alleging that Mother's petition to terminate should have been denied because she failed to show a material and substantial change since the divorce.

Holding: Affirmed

Opinion: Texas Family Code 156.101 allows a trial court to modify a conservatorship order only after a showing that circumstances have materially and substantially changed. Texas Family Code 161.004 provides that if a trial court has previously denied to terminate a parent-child relationship, the court may only subsequently terminate that parent-child relationship if there has been a material and substantial change since the denial was rendered.

A modification proceeding and a termination proceeding are distinct statutory schemes with different issues, standards of review, and burdens of proof. Therefore, Texas Family Code 156.101's requirement of a material and substantial change does not apply to a suit for termination of parental rights. Further, in the final divorce decree, the trial court did not deny to terminate Father's parental rights, so Texas Family Code 161.004 did not apply.

DESPITE COMPLETION OF ALL COURT-ORDERED SERVICES AND HER 16-MONTH'S SOBRIETY, MOTHER'S PARENTAL RIGHTS TERMINATED BASED ON HISTORY OF DRUG USE, INCARCERATION, AND CHILD ENDANGERMENT.

¶14-5-30. ***In re D.M.,*** ___ S.W.3d ___, 2014 WL 6676966, 04-14-00399-CV (Tex. App.—San Antonio 2014, no pet. h.) (11-24-14).

Facts: TDFPS became involved with the Child when police were dispatched to an assault in progress. When the police arrived at the apartment, the Child was on the second floor screaming out a broken window, and the door frame of the apartment had been kicked in. The police later learned that Mother and Father had been evicted, and no one was supposed to be in the apartment. When the police entered the apartment, Mother and Father were not there. A friend of the family was with the Child, but he had been sleeping when the police arrived. The police suspected the friend had been using drugs. The Child was wearing a t-shirt and shorts, but no shoes, underwear, or a diaper. The Child was playing with broken glass, had cuts on his hand and feet, flea bites on his legs, and appeared to be hungry. There were syringes and pieces of broken glass on the floor. There was no food in the apartment. The police called CPS. Mother arrived and explained that she had gone to a shelter after being assaulted by Father. Mother was arrested for endangerment and the Child was taken to

a shelter. Mother had two older Children who did not live with her, and she had experiences with protective services involving all three children. Mother claimed that she had not used drugs in five years, but she tested positive for methamphetamines and amphetamines.

Over the next year and a half, the Child flourished in foster care, and Mother successfully completed all her court-ordered services. Mother exercised all of her visitation and remained sober for the 16 months leading up to the trial. At trial, the friend found with the Child when the police arrived testified that Mother had endangered the Child's health and safety. A CPS caseworker testified that termination was in the Child's best interest. Mother's drug counselor testified that he was confident that Mother would be able to sustain her successful recovery from addiction. Three witnesses on behalf of the foster family testified that it would not be in the Child's best interest to remove him from his foster family. Mother testified and acknowledged that she had left the Child in conditions that were bad for him. She admitted to several instances of family violence, drug use prior to the Child's removal, and arrests for drug use and shoplifting. She was aware that the friend who had been watching the Child had a criminal history. She stated that Father's assaults had become more frequent, and he had hit the Child once. However, she and Father both testified—Father testified telephonically—that upon his release from prison, Father would not return to Mother's home. Mother had been using drugs most of her life and had been incarcerated 31 times in Texas and California. She had made three prior attempts at drug rehabilitation but had relapsed each time. Mother testified that she had turned her life around, was older and more mature, had lost the desire to use drugs, and was confident that she would maintain her sobriety.

At the close of testimony, the attorney ad litem, the foster parents' attorney, and TDFPS's attorney each recommended termination. The trial court entered an order terminating Mother's and Father's parental rights. Mother appealed, arguing that the evidence was legally and factually insufficient to support termination pursuant to TFC 161.001(1)(D) or (E) or that termination was in the Child's best interest.

Holding: Affirmed

Majority Opinion: (J. Angelini, J. Alvarez) A court may terminate a parent's parental rights after clear and convincing evidence establishes that the parent engaged in an enumerated act or omission of TFC 161.001(1) and that termination is in the child's best interest. TFC 161.001(D) and (E) both involve endangerment of the child's physical or emotional well-being.

Here, Mother admitted to leaving the Child in conditions that were bad for him, including syringes, broken glass, and feces in the apartment. Mother admitted to knowing that the man with whom she left the Child had a criminal history. When the police and TDFPS found the Child, he was playing with broken glass, had cuts on his hands and feet, appeared to be hungry, and had flea bites. The Child was not wearing shoes or a diaper. In addition, there was a history of family violence, and Father had once assaulted Mother in front of the Child. This evidence was sufficient to support an endangerment finding.

When determining whether termination is in the best interest of the child, the court will review the *Holley* factors. While there is a presumption that the child's best interest is served by preserving the parent-child relationship, the court's focus in on the child's best interest, not the parent's. Further, a factfinder may infer that a parent's past conduct endangering the well-being of a child may recur in the future if the child is returned to that parent.

Desires of the Child: The Child was too young to express his desires.

Physical and Emotional Needs: When the Child was removed from Mother's care, he was malnourished, quiet, shy, and would not stop eating. After a year and a half with his foster family, the Child was healthy, happy, and well-adjusted. Mother testified that she believed that she could meet the Child's future needs and that she planned to take the Child to therapy to adjust to leaving his foster family. However, the trial court could have reasonably inferred from Mother's past inability to meet the Child's physical and emotional needs that she would be unable to do so in the future.

Emotional and Physical Danger: There was no risk of danger to the Child while in the care of his foster family. However, Mother acknowledged that a relapse into drug abuse was possible. Mother had been an addict for most of her life, had been incarcerated 31 times, had been in—and relapsed from—drug rehab three

Return to Table of Contents

times, and was currently serving a 5-year probationary sentence. When the Child was removed, Mother tested positive for amphetamines and methamphetamines.

Parental Abilities: The Child had a mutual love and strong bond with his foster family. While Mother had completed everything TDFPS and the drug court required of her, she had a history of not adequately caring for the Child.

Plans for the Child: The foster family intended to adopt the Child. Mother testified that she had turned her life around and that Father would not return to her home when he was released from prison. However, as factfinder, the trial court was free to accept or disregard Mother's testimony.

Stability of the Home: Mother's stability was contingent on her ability to remain sober, which her drug counselor acknowledged could not be guaranteed. The Child's foster family, on the other hand, was currently providing and could continue to provide the Child with a stable permanent home.

Parental Acts or Omissions/Excuses: For the first half of the Child's life, Mother chose drugs over the Child. Mother had been incarcerated 31 times and was presently serving a 5-year probationary sentence. Mother was involved with an abusive relationship with Father, and she exercised extremely poor judgment by leaving the Child in dangerous and deplorable conditions.

Mother argued that the trial court erred in terminating her parental rights when TDFPS had not put forth evidence for each *Holley* factor to establish that termination was in the Child's best interest. However, it is not necessary to establish each *Holley* factor, and in some cases, one *Holley* factor may be sufficient.

Mother further argued that TDFPS's argument was improper and merely argued that the foster family was "essentially a better family." However, the facts also showed that Mother had exposed the Child to illegal drug use, criminal activity and incarceration, domestic violence, and emotional and physical endangerment.

Finally, Mother argued that termination was premature because she had completed every task asked of her and was on a successful recovery track. However, the Texas Legislature requires all termination suits to be completed within a year, due to the State's interest in protecting the best interest of the child and protecting children from being in foster homes indefinitely while their existing parents attempt to improve themselves.

In response to the dissenting opinion, the COA noted that there is no legal basis for requiring evidence to contradict a parent's claim of rehabilitation prior to finding that termination is in a child's best interest.

Dissenting Opinion: (J. Martinez) A decision to terminate a parent's parental rights should be strictly scrutinized and deference should be given to the parent's constitutional rights. Prior to termination, TDFPS must establish both bases for termination with clear and convincing evidence, and proof of one element does not alleviate the burden of proving the other.

Physical and Emotional Needs: No evidence was presented regarding any future danger Mother posed to the Child. Rather, the court merely speculated that Mother "may" have difficulty maintaining her sobriety. There was no evidence of any recent misconduct. The court's speculation could not rise to the level of "clear and convincing."

Parental Abilities: The TDFPS caseworker testified that Mother had not been able to show that she could meet the Child's needs. However, this bare assertion was not elaborated upon. Mother's counselor, on the other hand, testified that Mother was in recovery, was capable of living a life of recovery, and could care for her family.

Stability of the Home and Plans for the Child: TDFPS presented no evidence of any unsuitability of Mother's home or her plans for the Child. TDFPS asserted that Mother presented no evidence that her home was appropriate for a Child. However, it is TDFPS's burden to show that termination is warranted, not Mother's burden to show it is not. In addition, Mother's counselor testified that Mother had maintained a residence and employment, and TDFPS did not refute this testimony. The best interest standard does not permit termination merely because a child might be better off living elsewhere.

Parental Acts or Omissions/Excuses: While Mother's past conduct was harmful, Mother acknowledged that those acts were detrimental to the Child. Further, Mother completed all her court-ordered services and had been clean and sober for 16 months leading up to the trial.

Nothing in the record contradicted Mother's claim of rehabilitation, and other than Mother's past conduct, no additional evidence was presented supporting termination. There was no evidence of any continuing misconduct supporting an inference that Mother would be unable to meet the Child's future needs.

Return to Table of Contents

MISCELLANEOUS

TRIAL COURT LACKED PLENARY POWER TO RENDER JUDGMENT IN NEW TRIAL BECAUSE NO WRITTEN ORDER GRANTING THE NEW TRIAL HAD BEEN SIGNED.

¶14-5-31. *In re Torres-Medina*, No. 05-14-01046-CV, 2014 WL 4403830 (Tex. App.—Dallas 2014, orig. proceeding) (mem. op.) (09-08-14).

Facts: The trial court rendered judgment in the Parties' divorce and signed a final decree of divorce that did not order either party to pay child support. Mother filed a motion for new trial, and the trial court held a hearing on Mother's motion. The trial court orally granted a new trial, requested that Father draft the order granting the new trial, and directed the Parties to obtain a setting for a new trial. At the beginning of the new trial, the judge noted that he could not find an order granting new trial in the file, but he believed he had signed such an order. Father's attorney did not comment, and the new trial proceeded. At the conclusion of the new trial, the trial court rendered judgment and signed a second decree that ordered Father to pay child support. Father filed a petition for writ of mandamus, contending that the trial court lacked the power to render the second decree because its plenary power had expired.

Holding: Writ of Mandamus Conditionally Granted

Opinion: An order granting a new trial must be written, in the form of an order, and must be express and specific. An oral order is ineffective, even when accompanied by a docket entry and scheduling order. Without a valid order granting a new trial, the trial court's plenary power is not extended and will expire after 30 days. Here, there was no written order, so the subsequent retrial was a nullity, and the trial court lacked the power to sign the second divorce decree.

Editor's Comment: *The minute you, as a trial practitioner with little or no appellate experience, get into the post-trial and post-judgment arena, PLEASE CALL AN APPELLATE LAWYER WHO SPECIALIZES IN FAMILY LAW. There are twists and tweaks and technicalities that can and will trip you up. Orders on motions for new trial have to be extremely specific, and extremely WRITTEN AS AN ORDER. Nothing else will suffice. R.T.*

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. M.M.O.*

MOTHER'S JURY DEMAND WITHOUT PAYMENT OF JURY FEE EFFECTIVE BECAUSE TRIAL COURT APPROVED HER AFFIDAVIT OF INDIGENCY; SUBSEQUENT CHANGE IN FINANCIAL CIRCUMSTANCES DID NOT RENDER JURY DEMAND INEFFECTIVE.

¶14-5-32. *In re Vaughn*, No. 12-14-00006-CV, 2014 WL 4922640 (Tex. App.—Tyler 2014, orig. proceeding) (mem. op.) (09-17-14).

Facts: Mother and Father had four Children. TDFPS filed a petition for protection, conservatorship, and termination. Mother filed an affidavit of indigence, and the trial court signed an order finding that Mother's affidavit had been properly filed and appointed counsel to represent her. Subsequently, Mother's appointed counsel filed a jury demand and noted that Mother's Affidavit of Indigency had been approved by the trial court, so Mother did not include the customary $30 jury fee. Afterwards, the trial court signed an order setting the

case for pre-trial and trial. One month after that, the trial court approved Mother's motion to substitute counsel, and Mother discharged her court-appointed attorney. At a hearing, the trial court noted that a jury demand had been filed, but the jury fee had not been paid. Further, the trial court stated that because Mother did not rectify the failure to pay and because a jury trial would delay the proceedings, the case was set for bench trial that month. Mother and Father each objected stating that the jury fee was waived by the finding of indigency. The trial court denied the requests to proceed with a jury trial. Mother and Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Upon timely request, a party is entitled to a jury trial in a termination proceeding. Pursuant to TRCP 216, a party must submit a written request for a jury and pay the jury fee at least 30 days prior to the trial date. However, pursuant to TRCP 217, if a party has filed an effective affidavit of indigency prior to that deadline, the court "shall" enter the suit on the jury docket without requiring the jury fee.

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. M.M.O.*

ORDER OF CONSTRUCTIVE CONTEMPT VOID BECAUSE ALLEGED CONTEMNOR WAS NEVER SERVED WITH SHOW CAUSE ORDER

¶14-5-33. *In re Miller*, No. 05-14-01023-CV, 2014 WL 4700682 (Tex. App.—Dallas 2014, orig. proceeding) (mem. op.) (09-23-14).

Facts: The trial court held a hearing on a motion to compel the production of documents, at which the movants appeared, but Relator did not. The trial court ordered Relator to produce documents within about one week from the hearing, but the order was not signed until two weeks after the hearing. That order also set a temporary injunction hearing. Subsequently, because Relator had not produced documents, the movants filed a motion for an order to show cause, requesting the trial court to order Relator to appear and show cause as to why he should not be sanctioned. No show cause order appeared on the trial court's docket sheet. When the parties appeared at the previously scheduled temporary injunction hearing, the trial court found Relator in constructive contempt and ordered Relator committed to county jail. Relator filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: A petition for writ of habeas corpus asks a COA to determine whether the order of contempt was void. A judgment of constructive contempt must be preceded by personal service on the alleged contemnor of an appropriate show cause order or legally equivalent method of notice, which states when, how, and by what means the defendant is allegedly in contempt. Here, the trial court did not issue any order to Relator to show cause why he should not be held in contempt. Therefore, the subsequent order of contempt was void.

Editor's Comment: *Personal service is mandatory to support contempt/jail time. M.M.O.*

MANDAMUS RELIEF AVAILABLE FROM TEMPORARY ORDERS ISSUED BY AN ASSOCIATE JUDGE. PARTIES' SEPARATION AGREEMENT SATISFIED REQUIREMENTS OF PARTITION OR EXCHANGE AGREEMENT DESPITE LACK OF USE OF THE WORD "PARTITION"; TRIAL COURT ERRED IN ORDERING SPOUSAL SUPPORT PAYMENTS WHEN THERE WAS A PRESUMPTIVELY VALID PARTITION OR EXCHANGE AGREEMENT.

¶14-5-34. *In re Eaton*, No. 02-14-00239-CV, 2014 WL 4771608 (Tex. App.—Fort Worth 2014, orig. proceeding) (mem. op.) (09-25-14).

Return to Table of Contents

Facts: Husband and Wife separated but did not file for divorce. Instead, they signed a separation agreement that would be "a full, final, fair, and equitable division of their community estate effective as of [the date of their separation]." The agreement provided that all future earnings would be the separate property of the respective party, and each would waive any claim to the separate property of the other. Further, Husband agreed to continue to provide medical coverage for Wife through his employer and to pay Wife a lump sum followed by periodic payments for the next two years. In exchange for the payments, Wife agreed any claim she might have against Husband or the community estate would be fully satisfied by the agreement.

Three years after the final periodic payment from Husband, Wife filed a petition for divorce asking for a disproportionate share of the community estate. Husband answered and asserted that the separation agreement should be enforced. After a temporary orders hearing before an associate judge without a court reporter, the associate judge entered a report for temporary orders requiring Husband to pay $6,000 per month in temporary spousal support and $5,000 in interim attorney's fees. Husband filed a motion to reconsider, but the associate judge denied Husband's motion and entered temporary orders consistent with her report. Husband filed a petition for writ of mandamus. Wife argued that Husband was not entitled to mandamus relief because there was no reporter's record and because Husband failed to seek de novo review.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Whether the trial court's temporary orders violated the terms of the Parties' separation agreement was a question of law, meaning that the hearing testimony bore no legal effect. Additionally, the Parties did not dispute the facts adduced at the hearing. Thus, no reporter's record was required. In addition, per Texas Family Code Section 201.016(a), Husband's failure to seek de novo review did not deprive him the right to appeal to or request other relief from the COA. Although signed by the associate judge, the temporary orders constituted an order of the referring court. *See* Tex. Fam. Code Ann. § 201.007(c) (providing associate judge's temporary orders are construed to be orders of referring court).

To be a valid partition or exchange agreement, the agreement must (1) be in writing, (2) be signed by both parties, and (3) either contain a reference to partition or show an intent to convert community property into separate property. The agreement need not contain the word "partition" if it is clear that the parties intended a partition.

Here, there was no dispute that the agreement was in writing and signed by the parties. Further, although it did not contain the word "partition," the agreement clearly established the Parties' intent to divide their community estate and recharacterize it as their respective separate property.

A partition or exchange agreement is presumptively enforceable, and the party that seeks to show it to be unenforceable bears the burden to show it was involuntarily executed or unconscionable. Wife did not assert either of these bases for unenforceability, and she did not ask the court to rule on the agreement's validity. Thus, the agreement was presumptively enforceable and needed no judicial approval to be effective.

The purpose of temporary spousal maintenance is to protect the welfare of a "financially dependent" spouse during the pendency of a divorce. Here, the Parties' agreement clearly partitioned the community estate, waived all future claims, and obligated Husband to make payments to Wife for a set period of time. The last payment due to Wife was paid three years before Wife filed for divorce. At the time of the hearing, there was no community estate, and Wife received no monetary support from Husband. The trial court clearly abused its discretion by ordering temporary spousal support and interim attorney's fees when there was a presumptively valid partition or exchange agreement.

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. We have all been taught that Texas does not have separation agreements as with many other states. This case seems to approve the idea that a partition and exchange agreement can act as a separation agreement if the agreement meets with the requirements of a partition agreement under the statute—in writing, signed, and state the intent to recharacterize community property. Because a marital agreement is presumed valid, the trial court cannot contravene such agreement in temporary orders unless the presumption of validity is rebutted. M.M.O.*

Return to Table of Contents

MOTHER'S ASSERTION OF A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES IN HER PETITION TO MODIFY POSSESSION AND ACCESS WAS NOT A JUDICIAL ADMISSION OF A MATERIAL AND SUBSTANTIAL CHANGE TO SUPPORT A MODIFICATION OF SPOUSAL MAINTENANCE.

¶14-5-35. *Rother v. Rother*, No. 04-13-00899-CV, 2014 WL 4922898 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (10-01-14).

Facts: Mother and Father divorced. The divorce decree appointed them JMCs of their only Child and provided Father with a standard possession order. In addition, the decree ordered Father to pay monthly spousal maintenance. Subsequently, Father filed a petition to modify the decree with respect to the standard possession order and the order for spousal maintenance. Father alleged that the circumstances had materially and substantially changed to support both requests. Mother filed a counter-petition also asserting a material and substantial change in circumstances but only seeking a modification of Father's possession and access to the Child. Mother then filed a no-evidence MSJ asserting there was no evidence of a material and substantial change in circumstances supporting a request to modify spousal maintenance. Further, Mother stated that neither Party's employment nor income had changed since the divorce decree. Father filed a response to the MSJ arguing Mother judicially admitted in her counter-petition to a material and substantial change in circumstances. The trial court granted Mother's MSJ. Father appealed.
Holding: Affirmed

Opinion: Before a trial court can modify spousal maintenance, the party moving for modification must establish a material and substantial change in circumstances. If both parties are seeking to modify the same provision of an order, such as conservatorship, a counter-petition alleging the existence of a material and substantial change in circumstances is a judicial admission. Here, however, Father sought to modify spousal maintenance, and Mother's counter-petition sought to modify Father's possession and access to the Child. Further, Mother specifically asserted that neither party's employment nor income had changed and that no other factor relevant to determining spousal maintenance had changed since the prior order. Thus, in Mother's counter-petition, her assertion that there had been a material and substantial change in circumstances applied only to her request to modify Father's possession schedule. Father presented no evidence of a material and substantial change to support his request to modify spousal maintenance.

Editor's Comment: *This case confirms what I have long argued—the standard for changed circumstancess on possession/access is not the same as changed circumstances for modification of other issues. The standard for the change circumstances must be viewed independently issue by issue. This probably comes up more often when one party moves to modify possession and the other party moves to modify child support. M.M.O.*

★★★TEXAS SUPREME COURT ★★★

MOTHER WAS ENTITLED TO RESTRICTED APPEAL BECAUSE THE RECORD ESTABLISHED THAT SHE DID NOT PARTICIPATE IN UNDERLYING PROCEEDING; FINAL DECREE CONTAINED TWO CONFLICTING RECITATIONS INDICATING THE DATE OF FINAL HEARING, BUT THE COURT'S DOCKET SUPPORTED ONLY ONE OF THE RECITATIONS

¶14-5-36. ***Pike-Grant v. Grant,*** ___ S.W.3d ___, 2014 WL 4933010, 13-0277 (Tex. 2014) (10-03-14).

Facts: Mother and Father began divorce proceedings approximately one year after their only Child was born. The trial court issued temporary orders naming the Parents JMCs. Over a year later, Father successfully moved to modify the temporary orders to appoint him SMC. A few months later, the court coordinator notified the attorneys of record of a September trial date. Mother's attorney filed a motion to withdraw that day

and stated that he had not had contact with Mother in over a year. However, Mother's attorney indicated that he would attempt to notify Mother of the setting. Additionally, Mother's attorney stated that he could not attend the September hearing due to a trial date in another matter. The trial court granted a motion by Father to appear telephonically.

At the September hearing, Father appeared telephonically, his attorney appeared in person, but neither Mother nor her attorney appeared. The trial court called Mother's attorney to determine whether Mother had received notice of the hearing, but the attorney did not answer. At the conclusion of the hearing, the trial court informed Father that it would not be able to enter a judgment until after a response from Mother regarding whether she intended to participate. Two months later, in November, the trial court signed a final decree that included two conflicting recitations. On the first page, a hand-written notation indicated that the trial court heard the case in November, and type-written text indicated that Mother and her attorney appeared and announced ready for trial. However, the final decree also recited that "the final Hearing for Divorce" occurred in September.

Subsequently, Mother field a restricted appeal. The COA dismissed the restricted appeal, relying on the recitation on the first page indicating that Mother had participated in the underlying hearing.

Holding: Reversed

Opinion: A party is eligible for restricted appeal if (1) the party filed notice of the restricted appeal within six months of the judgment, (2) the party was a party to the underlying suit, (3) the party did not participate in the hearing that resulted in the judgment and did not file any prejudgment motions, and (3) error is apparent on the face of the record. Whether a party seeking restricted appeal participated in the underlying suit should be construed liberally in favor of the right to appeal.

Here, although the final decree indicated that a hearing occurred in November and that Mother appeared at the hearing, nothing in the court's record supported that recitation. There was a reporter's record for the September hearing but not for a November hearing. The reporter's record clearly showed that neither Mother nor her attorney appeared at the September hearing. The docket reflected that the court coordinator notified the parties of the September trial setting, but there was no record of notice being given for a November setting. The trial court granted Father's motion to appear telephonically at the September hearing. The docket showed that Mother's attorney filed a motion to withdraw on the same day the coordinator notified him of the September trial setting. Temporary orders issued by the trial court pending appeal indicated that the final decree was signed in November and that the orders where rendered in September. Therefore, it was clear from the record that Mother did not participate in the underlying suit, and the COA erred in concluding it had no jurisdiction over Mother's restricted appeal.

Editor's Comment: *Had there not been conflicting recitals, would the Court have looked beyond the decree? J.V.*

PURSUANT TO TRCP 680, MOTHER NOT ENTITLED TO SECOND EXTENSION OF TRO AGAINST FATHER BECAUSE FATHER DID NOT CONSENT TO AN EXTENSION.

¶14-5-37. *In re Hauck*, No. 03-14-00640-CV, 2014 WL 5315370 (Tex. App.—Austin 2014, orig. proceeding) (mem. op.) (10-13-14).

Facts: During their divorce proceeding, Mother obtained a TRO that restrained Father from having any contact with their Child. About 10 days later, Mother obtained an extension of the TRO. About two weeks after that, Mother obtained a second extension, over Father's objection. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Return to Table of Contents

Opinion: TRCP 680 provides that a TRO may be extended only once for an additional 14 days, unless the party against whom the order is directed consents to a longer extension. This provision is a safeguard against harm caused by a restraint on one who has not yet had an opportunity to a truly adversarial proceeding. Here, the TRO had already been extended once, and Father objected to a second extension. In fact, the trial court noted in its ruling that the extension "was opposed by Respondent."

Editor's Comment: *Another mandamus case—the burden to request mandamus has eased, reflecting a shift in the frequency of mandamus proceedings. Beware of getting too many extensions on non-standard TROs. The civil rules apply which restrict the extensions! M.M.O.*

FATHER'S FAILURE TO FILE A STATEMENT OF POINTS OR ISSUES WITH HIS APPEAL BASED ONLY ON A PARTIAL REPORTER'S RECORD DID NOT PREJUDICE MOTHER BECAUSE HIS ISSUES WERE INCLUDED IN HIS NOTICE OF APPEAL; NO EVIDENCE SUPPORTED TRIAL COURT'S ORDER FOR FATHER TO REIMBURSE MOTHER FOR MILEAGE DURING EXCHANGES OF THEIR CHILDREN.

¶14-5-38. *In re B.P.R.*, No. 09-12-00575-CV, 2014 WL 5306530 (Tex. App.—Beaumont 2014, no pet. h.) (mem. op.) (10-16-14).

Facts: Mother filed a SAPCR to modify a prior order that controlled the parent-child relationship between Mother and Father. Father filed a counterpetition, which agreed that the circumstances had changed but requested different relief. After trial, the trial court rendered a modified order that designated Mother as the conservator with the exclusive right to designate the primary residence of the Children and allowed her and the Children to live anywhere in Texas. The location for exchanges of the Children was designated as the midpoint between Mother's and Father's current residences. Father was ordered that if he chose to exchange the Children at that designated location, rather than Mother's residence, Father was to reimburse Mother for her mileage. Father only requested a partial reporter's record and appealed only the portion of the order related to the mileage reimbursement, arguing that Mother was not entitled to that relief because she had not pleaded for it and that the decision was arbitrary because it was not fair and equitable. Mother argued that the COA was required to affirm the trial court's ruling because Father failed to file a statement of points or issues to be presented on appeal.

Holding: Affirmed as Modified

Opinion: TRAP 34.6 allows a party to pursue an appeal from a partial appellate record, which serves as "the entire record for purposes of reviewing the stated points or issues." The Texas Supreme Court has held that the statement of points or issues need not be included in the request for the reporter's record unless the appellee has been prejudiced by the appellant's tardiness.

Father filed a notice of appeal indicating that the only issues he intended to appeal was the order for him to "reimburse [Mother's] mileage … for pickup and delivery of the children[]" and "the option to pick up and return the children at the residence of [Mother] to avoid paying mileage." These were the same issues raised by Father six months later in his brief. Mother was given timely notice of the limited appeal and the fact that Father had filed a partial record. Mother had the opportunity to designate any additional records she believed to be relevant, but she opted not to do so. In fact, Mother indicated that "no additional record was necessary," and she did not argue that she was prejudiced by any ambiguity interjected by Father. Thus, Father's failure to file a statement of points or issues did not constitute a reason for the COA to affirm the trial court's ruling.

Father was not required to object at trial to the trial court's decision regarding the mileage reimbursement before raising a sufficiency argument on appeal. However, his failure to object did waive his complaint that Mother failed to plead her claim to be reimbursed for mileage.

Based on the partial record, the evidence did not provide any reason for Mother's decision to move, while Father maintained his residence. Further, no evidence was presented regarding the financial circumstances of either Mother or Father. Texas Family Code Section 156.103(b) creates a rebuttable presumption

Return to Table of Contents

that the child's best interest is served by imposing increased expenses on the party who moved. No evidence was presented to rebut that presumption.

Editor's Comment: *A statement of the issues to be raised on appeal is supposed to be included in the request for a partial reporter's record, but including those issues in the notice of appeal will do if the failure to include them in the request for a partial reporter's record does not prejudice the other side. J.V.*

WIFE'S MOTION FOR REHEARING DENIED BECAUSE SHE RAISED NEW ISSUES FOR THE FIRST TIME IN HER MOTION FOR REHEARING

¶14-5-39. ***Kastelman v. Kastleman,*** ___ S.W.3d ___, 2014 WL 5420411, 03-13-00133-CV (Tex. App.—Austin 2014, no pet. h.) (10-23-14) (supplemental opinion on denial of rehearing).

Facts: Wife filed a motion for rehearing raising new alternative arguments after the COA dismissed her appeal as moot on the ground that she was estopped from appealing based on the acceptance of benefits doctrine. (*Kastelman v. Kastleman*, No. 03-13-00133-CV, 2014 WL 2014 WL 3809759 (Tex. App.—Austin 2014, no pet. h.) (07-30-14) (mem op.)).

Holding: Rehearing Denied

Opinion: A motion for rehearing provides a court with an opportunity to correct errors, not to test alternative arguments after an unsuccessful appeal. A new issue can only be raised in a motion for rehearing if the error is fundamental. Here, Wife attempted to raise multiple new arguments in her motion for rehearing, none of which constituted fundamental errors. Thus, her new arguments were waived.

HUSBAND WAS ESTOPPED FROM CHALLENGING PROPERTY DIVISION BECAUSE HE ACCEPTED THE BENEFITS OF THE JUDGMENT BY TRANSFERRING PROPERTY TO HIS NEW WIFE

¶14-5-40. *Domit v. Domit*, No. 13-14-00001-CV, 2014 WL 5500475 (Tex. App.—Corpus Christi 2014, no pet. h.) (mem. op.) (10-30-14).

Facts: In Husband's and Wife's divorce decree, Husband was awarded a 100% interest in the Property, in which the community estate had a 61.49% interest. Husband was also ordered to pay $1875 in monthly child support. Husband appealed, arguing that the trial court erred in failing to provide detailed findings of fact and conclusions of law on the valuations of specific properties and that the division of the estate was unfair and unjust. In addition, Husband also argued that the trial court erred in ordering him to pay child support without entering any findings or conclusions.

After perfecting his appeal, Husband transferred his entire interest in the Property to his new wife, who listed the Property for sale with Husband as real estate agent. Wife filed a motion to dismiss the appeal, asserting that the appeal was moot because Husband accepted the benefits of the judgment.

Holding: Dismissed in Part; Affirmed in Part

Opinion: Generally, a party who accepts the benefits of a judgment is estopped from challenging it. The initial burden is on an appellee to show that the appellant is estopped. Once the appellee has established the doctrine applies, the burden shifts to the appellant to establish one of two narrow exceptions: (1) the acceptance was due to financial duress or other economic circumstances; or (2) the appellant only accepted "that which

appellee concedes, or is bound to concede, to be due him under the judgment." This exception "does not tolerate chance or uncertainty."

Here, Husband argued that he only accepted benefits that Wife was bound to concede were due to him. However, he also asked the court to declare the judgment of divorce "null and void," require the trial court to issue detailed findings of facts and conclusions of law valuing all community and separate property, and remand the estate to the trial court for a new just and right division. The Company was 61.49% community property and Husband was awarded a 100% interest in the Company. Husband did not explain why he would unquestionably be entitled to a 100% award of the Company if the trial court were to perform a new just and right division. Because of this "chance or uncertainty," Husband was estopped from challenging the property division on appeal.

However, Husband's challenge to child support was severable from the property division and could be challenged despite an acceptance of benefits of the division of property.

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 bes 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).

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.

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

In this fraud suit by Byrd against the law firm that represented his ex-wife in a divorce, the issues are (1) whether attorney immunity protects lawyers who allegedly forged a bill of sale for property awarded to the ex-wife in the decree (with tax consequences to the ex-husband) and (2) whether the burden to show the attorney-immunity doctrine's fraud exception should be borne by the ex-husband as plaintiff. Byrd's suit against Cantey Hanger alleged that the firm prepared paperwork to transfer ownership of an airplane his ex-wife got in the divorce but arranged for its sale from Byrd's leasing company to a third party, falsely listing the ex-wife as the leasing company's manager. As a result,

the leasing company incurred tax liability that the divorce decree specified the ex-wife would bear. The trial court granted summary judgment to the law firm on the immunity question. The appeals court affirmed.

Wayne Ventling v. Patricia M. Johnson, 14-0095
from Nueces County and the Corpus Christi/Edinburg Court of Appeals
Oral argument set January 13, 2015

Two principal issues in this contest over interest from a final divorce decree's enforcement are:

(1) whether the appeals court's decision that relief should have been granted instead of the trial court's denial of it by interlocutory order triggers interest from the date of the interlocutory order and

(2) whether a judgment ostensibly disposing all claims is final if a claim for attorney fees remains pending.

Return to Table of Contents