SECTION REPORT
FAMILY LAW
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IN THIS MONTH'S REPORT

MESSAGE FROM THE CHAIR 2
TABLE OF CASES 3
IN THE LAW REVIEWS AND LEGAL PUBLICATIONS 4
ASK THE EDITOR 6
IN BRIEF: *Family Law From Around the Nation*, Jimmy L. Verner, Jr. 7

COLUMNS
OBITER DICTA
Charles N. Geilich 9
PSYCHOLOGICAL ISSUES: *Magic Words or Reliable Testimony?*
John A. Zervopoulos, Ph.D., J.D., ABBP 10
FINANCIAL PLANNING ISSUES: *Is the 4% Rule Still a Good Idea?*
Christy Adamcik Gammill, CDFA 11

ARTICLES
The Effect of Adultery and Cruel Treatment on Divorce and SAPCR: Is there much of an effect at all?
Rania Mohsen 12
Conflicts Arising from Texas and International Divorce Judgments
Paul Huang 23

CASE DIGESTS
DIVORCE
Collaborative Law 35
Alternative Dispute Resolution 36
Division of Property 38
Enforcement of Property Division 41
Spousal Maintenance/Alimony 42
SAPCR
Standing and Procedure 44
Paternity 45
Conservatorship 47
Child Support 50
Enforcement of Child Support 52
Modification 53
Termination of Parental Rights 54
MISCELLANEOUS 58
SUPREME COURT WATCH 72

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MESSAGE FROM THE CHAIR

Football season here we come! I've got my team flags ready to fly by the front door, and I know that many of you do as well. Let the Facebook college team posting battles begin! With football comes the holiday season, so for those of you not so into football, it's also time to start shopping. Whatever you choose to do, enjoy!

ADVANCED FAMILY LAW—The Advanced Family Law Course in San Antonio had record setting attendance. Co-Directors, Judge Judy Warne and Kristal Thomson, as well as the planning committee and the wonderful team of State Bar staff put together an absolutely fantastic program. Although I haven't verified this with Guinness, I'm told it was the largest gathering of attorneys anywhere in the world.

HONORS AND AWARDS—The Advanced Family Law Course was also an opportunity for the Section to honor family lawyers who have made a significant contribution to the practice of family law. Ken Fuller was posthumously honored by the former and current Presidents of the State Bar of Texas with the Presidential Citation. Former Section Chair and one of the Family Law Council's most valued leaders and advisors, Brian Webb, was inducted into the Hall of Legends. Dawn Fowler received the Ken Fuller Pro Bono Award; and Chris Nickelson received the Joseph McKnight Best CLE Article for his article "Recovering Attorney's Fees." Linda Solomon received the Gay G. Cox Collaborative Law Award, and the Hon. Dean Rucker received the Texas Academy of Family Law Specialists Sam Emison Award. Congrats and well deserved to all!

UPCOMING CLE—Our upcoming CLE seminars include:

- Masters of Family Law – September 25-27, 2015, Horseshoe Bay, Course Director: Gary Nickelson.
- New Frontiers in Marital Property Law – October 15-16, 2015, Denver, Course Directors: Cindy Tisdale and Chris Nickelson.
- Advanced Family Law Drafting – December 10-11, 2014, Dallas, Course Director: Hon. Scott Beauchamp.
- Texas Academy of Family Law Specialists Trial Institute – January 15-16, 2016, Charleston, SC, Course Directors: Kristal Thomson and Sherri Evans.
- Marriage Dissolution – April 7-8, 2016, Galveston
  Course Director: Charla Bradshaw; 101 Course Director: Leigh de la Reza

UPCOMING COLLABORATIVE CLE—The upcoming Collaborative CLE seminars presented by the Collaborative Law Institute of Texas:

- ☐ September 24-25, 2015 – Basic Interdisciplinary Training in Austin.
- ☐ November 5-6, 2015 – Advanced Interdisciplinary Training in Dallas.
- ☐ February 25-26, 2016 – 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 Dallas.

LEGISLATIVE WORK, A COMBINED EFFORT—Although the 2015 Legislative Session has concluded and the Family Law Section's Legislative Committee's efforts, as well as the efforts of the Texas Family Law Foundation were a resounding success, there is no time to rest. The Legislative Committee had its first meeting this August and will continue to work throughout the year developing proposed legislation for presentation by the Foundation, an entity separate from the Section, at the next legislative session.

If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. The work of the Foundation would not be possible without all of you who donated your time, who donated items to and purchased items at the silent auction, and who attended the fashion show in San Antonio.

See you at New Frontiers in Denver!

Heather L. King
Chair, Family Law Section

TABLE OF CASES

A.B.B., In re, ___ S.W.3d ___, 2015 WL 4985353 (Tex. App.—El Paso 2015, no pet. h.) ¶15-5-33
A.L.F.L., In re, 2015 WL 4561231 (Tex. App.—San Antonio 2015, no pet. h.) ¶15-5-44
A.L.H., In re, ___ S.W.3d ___, 2015 WL 3759162 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) ¶15-5-29
Allen v. Allen, ___ S.W.3d ___, 2015 WL 5025844 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) ¶15-5-18
Auz v. Cisneros, ___ S.W.3d ___, 2015 WL 6156878 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) ¶15-5-53
Baker v. Baker, ___ S.W.3d ___, 2015 WL 3917922 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) ¶15-5-15
B.C.S., In re, ___ S.W.3d ___, 2015 WL 4134582 (Tex. App.—El Paso 2015, no pet. h.) ¶15-5-31
Bergenholtz v. Eskenazi, 2015 WL 4481664 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-42
Bhardwaj v. Pathak, 2015 WL 4882522 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-09
Boyd, In re Marriage of, 2015 WL 3941614 (Tex. App.—Amarillo 2015, no pet. h.) ¶15-5-10
B.T.G., In re, 2015 WL 4911856 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-50

★ ***C***

antley Hanger v. Byrd, ___ S.W.3d ___, 2015 WL 3976267 (Tex. 2015) ¶15-5-36
Carter v. Carter, 2015 WL 4571315 (Tex. App.—Beaumont 2015, no pet. h.) ¶15-5-22
Clements v. Clements, 2015 WL 3523028 (Tex. App.—Corpus Christi 2015, no pet. h.) ¶15-5-02
De Leon v. Abott, ___ F.3d ___, 2015 WL 4032161 (5th Cir. 2015) ¶15-5-38
D.V., In re, ___ S.W.3d ___, 2015 WL 4035050 (Tex. App.—El Paso 2015, no pet. h.) ¶15-5-28
E.W., In re, ___ S.W.3d ___, 2015 WL 3918292 (Tex. App.—Texarkana 2015, no pet. h.) ¶15-5-30
In re E.W.N., ___ S.W.3d ___, 2015 WL 5047612 (Tex. App.—El Paso 2015, no pet. h.) ¶15-5-51
I.C.G., In re, 2015 WL 3454278 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-27
J.A., In re, ___ S.W.3d ___, 2015 WL 4985914 (Tex. App.—El Paso 2015, no pet. h.) ¶15-5-26
J.M.W., In re, ___ S.W.3d ___, 2015 WL 10123434 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) ¶15-5-20
J.R., III, In re, 2015 WL 4639625 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-47
Kaftousian v. Rezaeipanah, ___ S.W.3d ___, 2015 WL 4389581 (Tex. App.—El Paso 2015, no pet. h.) ¶15-5-07
K.A.K., In re, 2015 WL 4736566 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-17
Kimbell v. Kimbell, 2015 WL 4663396 (Tex. App.—Fort Worth 2015, no pet. h.) ¶15-5-16
K.R.Z., In re, 2015 WL 4478123 (Tex. App.—San Antonio 2015, no pet. h.) ¶15-5-40
K.T. v. M.T., 2015 WL 4910097 (Tex. App.—Fort Worth 2015, no pet. h.) ¶15-5-11
Lauriette, In re, 2015 WL 4967233 (Tex. App.—Dallas 2015, orig. proceeding) ¶15-5-04
L.E.S., In re, ___ S.W.3d ___, 2015 WL 4914743 (Tex. App.—Texarkana 2015, no pet. h.) ¶15-5-32
Loya v. Loya, ___ S.W.3d ___, 2015 WL 4546398 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) ¶15-5-03
McCoy, In re, 2015 WL 5168111 (Tex. App.—Fort Worth 2015, orig. proceeding) ¶15-5-54
M.G.N., In re, ___ S.W.3d ___, 2015 WL 4554525 (Tex. App.—San Antonio 2015, no pet. h.) ¶15-5-43
M.I.M., In re, 2015 WL 4472741 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-21

★ ***O***

bergefell v. Hodges, 576 U.S. ___, 2015 WL 2473451 (2015) ¶15-5-35
O'Donnell v. Vargo, 2015 WL 4722459 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-48
Perez v. Williams, __ S.W.3d __, 2015 WL 5076294 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) ¶15-5-52
R.A., In re, 2015 WL 3646528 (Tex. App.—Waco 2015, no pet. h.) ¶15-5-12
Rawls v. Rawls, No. 2015 WL 5076283 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) ¶15-5-01

★ ***R***

oyston, Razor, Vickery, & Williams, LLP v. Lopez, ___ S.W.3d ___, 2015 WL 3976101 (Tex. 2015) ¶15-5-37
Rubio v. Klein, 2015 WL 4720792 (Tex. App.—Eastland 2015, no pet. h.) ¶15-5-46
Sandoval, In re, ___ S.W.3d ___, 2015 WL 4759972 (Tex. App.—San Antonio 2015, orig. proceeding) ¶15-5-14
Schamp v. Mitchell, 2015 WL 4478150 (Tex. App.—San Antonio 2015, no pet. h.) ¶15-5-41
Simcoe v. Christopher, 2015 WL 4554335 (Tex. App.—San Antonio 2015, no pet. h.) ¶15-5-45
S.M.B., In re , 2015 WL 3988034 (Tex. App.—Dallas 2015, no pet. h.) ¶15-5-39
S.T., In re, ___ S.W.3d ___, 2015 WL 3646990 (Tex. App.—Fort Worth 2015, no pet. h.) ¶15-5-13

★ ***S***

tate v. Naylor, ___ S.W.3d ___, 2015 WL 3852284 (Tex. 2015) ¶15-5-34
Stearns v. Martens, __ S.W.3d __, 2015 WL 5092497 ¶15-5-08
(Tex. App.—Houston [14th Dist.] 2015, no pet. h.).
S.W., In re, 2015 WL 5103634 (Tex. App.—Fort Worth 2015, orig. proceeding) ¶15-5-24
Todd, In re, 2015 WL 4249799 (Tex. App.—Fort Worth 2015, orig. proceeding) ¶15-5-25

T.S.P., In re, 2015 WL 5037123 (Tex. App.—San Antonio 2015, no pet. h.) ¶15-5-23
West v. West, 2015 WL 4251159 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) ¶15-5-06, 19
Wiese, In re, 2015 WL 4907030 (Tex. App.—Austin 2015, orig. proceeding) ¶15-5-49
Zarnesky v. Zarnesky, 2015 WL 3918513 (Tex. App.—Austin 2015, no pet. h.) ¶15-5-05

In the Law Reviews and Legal Publications

LEAD ARTICLES

What Every Business Attorney Needs to Know about Family Law, Charla **Bradshaw**, Heather L. **King**, & Emily **Miskel**, TSXB06 ALI-CLE 161 (August 11, 2015).

Redesigning the Family Law System to Promote Healthy Families, William J. **Howe, III** & Elizabeth Potter **Scully**, 53 Fam. Ct. Rev. 361 (July 2015).

Do Not Make Their Trauma Your Trama: Coping with Burnout as a Family Law Attorney, Lisa **Morgillo**, 53 Fam. Ct. Rev. 456 (July 2015).

Families in Circle Process: Restorative Justice in Family Law, Susan Swaim **Daicoff**, 53 Fam. Ct. Rev. 427 (July 2015).

Peacemaking for Divorcing Families: Editor's Introduction, Forrest S. **Mosten**, 53 Fam. Ct. Rev. 357 (July 2015).

The Place for Custody Evaluations in Family Peacemaking, Mary Elizabeth **Lund**, 53 Fam. Ct. Rev. 407 (July 2015).

Unbundled Services to Enhance Peacemaking for Divorcing Families, Forrest S. **Mosten**, 53 Fam. Ct. Rev. 439 (July 2015).

The Parenting Coordinator as Peacemaker and Peacebuilder, Christine A. **Coates**, 53 Fam. Ct. Rev. 398 (July 2015).

Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys, Susan L. **Crockin** & Gary A. **Debele**, 27 J. Am. Acad. Matrim. Law. 289 (2015).

Hidden Landmines for the Family Law Practitioner: Attorney Liability Under State and Federal Wiretap Statutes, Allison B. **Adams**, 27 J. Am. Acad. Matrim. Law. 263 (2015).

Preparing Clients for Custody Evaluations: A Call for Critical Examination, Jonathan W. **Gould** & James J. **Nolletti**, 27 J. Am. Acad. Matrim. Law. 359 (2015).

The Use of Trusts to Structure Divorce Settlements, Carlyn S. **McCaffrey**, 27 J. Am. Acad. Matrim. Law. 29 (2015).

Still Part of the Family? How Divorce Affects a Child's Relationship with Grandparents, Uncles, Aunts, and Cousins, Richard S. **Victor**, 38-SUM Fam. Advoc. 22 (Summer 2015).

Think Global, Act Local, Stephen **Page** & Brian **Esser**, 38-SUM Fam. Advoc. ii. (Summer 2015).

Creative Postdivorce Problem-Solving, Joan H. **McWilliams**, 38-SUM Fam. Advoc. 37 (Summer 2015).

Religious Law, Family Law and Arbitration: Shari'a and Halakha in America, Mohammad H. **Fadel**, 90 Chi.-Kent L. Rev. 163 (2015).

Family Support and Supporting Families, Courtney G. **Joslin**, 68 Vand. L. Rev. En Banc 153 (2015).

Protecting the Parent-Child Relationship, Kristy **Horvath** & Margaret **Ryznar**, 47 Geo. Wash. Int'l L. Rev. 303 (2015).

Symposium, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Re-unification Services for Parents with Mental Disabilities*, Charisa **Smith**, 26 Stan. L. & Pol'y Rev. 307 (2015).

Should Civil Marriage Be Opened Up to Multiple Parties?, Martha **Bailey** & Amy **Kaufman**, 64 Emory L.J. 1747 (2015).

Why Two in One Flesh? The Western Case for Monogamy Over Polygamy, John **Witte, Jr.**, 64 Emory L.J. 1675 (2015).

The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage, Stu **Marvel**, 64 Emory L.J. 2047 (2015).

Marriage as Black Citizenship?, R.A. **Lenhardt**, 66 Hastings L.J. 1317 (June 2015).

Domestic Applications of Sharia and the Exercise of Ordered Liberty, James A. **Sonne**, 45 Seton Hall L. Rev. 717 (2015).

"Mama's Baby, Papa's Maybe": Disestablishment of Paternity, Vanessa S. **Browne-Barbour**, 48 Akron L. Rev. 263 (2015).
A Prospective Analysis of Family Fragmentation: Baby Mama Drama Meets Jane Austen, Lynne Marie **Kohm**, 29 BYU J. Pub. L. 327 (2015).
Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time, Stacy **Brustin** & Lisa Vollendorf **Martin**, 48 Ind. L. Rev. 803 (2015).
Why the State Cannot "Abolish Marriage": A partial Defense of Legal Marriage, Gregg **Strauss**, 90 Ind. L.J. 1261 (Summer 2015).
The Future of Justice Scalia's Predictions of Family Law Doom, Robert E. **Rains**, 29 BYU J. Pub. L. 353 (2015).
Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges, Charisa **Smith**, 39 Law & Psycol. Rev. 2015 (2014–2015).
Abandoned Babies: The Backlash of South Korea's Special Adoption Act, Sook K. **Kim**, 24 Wash. Int'l L.J. 709 (June 2015).
Marrying "Well": Debating Consanguinity, Matrimonial Law, and Brazilian Legal Medicine, 1890–1930, Okezi **Otovo**, 33 Law & Hist. Rev. 703 (August 2015).
"A Sordid Case": Stump v. Sparkman, Judicial Immunity, and the Other Side of Reproductive Rights, Laura T. **Kessler**, 74 Md. L. Rev. 833 (2015)
Eliminating Financiers from the Equation: A Call for Court Mandated Fee Shifting in Divorces, Bibeane Metsch **Garcia**, 113 Mich. L. Rev. 1271 (May 2015).
Openness in International Adoption, Malinda L. **Seymore**, 46 Columb. Hum. Rts. L. Rev. 163 (Spring 2015).
"Alimony for Your Eggs": Fertility Compensation in Divorce Proceedings, Katelin **Eastman**, 42 Pepp. L. Rev. 293 (Feb. 2015).
Whose Fault is it Anyway?: Analyzing the Role "Fault" Plays in the Division of Premarital Property If Marriage Does Not Ensue, Arielle L. **Murphy**, 64 Cath. U.L. Rev. 463 (Winter 2015).
Parentage Prenups and Midnups, Jeffrey A. **Parness**, 31 Ga. St. U.L. Rev. 343 (Winter 2015).
Special Issue: Marriage Equality and Reproductive Rights: Lessons Learned and the Road Ahead, 29 Colum. J. Gender & L. 1 (2015).

ASK THE EDITOR

***Dear Editor*:** I have a case in which I represent the wife and where the trial court sent both sides a written ruling in a divorce case several months ago. In a couple of places in the ruling, such as rights and duties and standard periods of possession, it referred us to the Family Law Practice Manual. In a couple of places, the trial used the word "ordered" but not throughout. The ruling was filed and put in the minutes of the court, and it did reference the style of the case, it was also signed and dated, but it did not contain a statement of finality such as, "This judgment finally disposes of all claims and all parties and is appealable." It took about three months, but the other lawyer and I were finally able to get a final decree entered, which included all of the rights and duties, specifics of possession, and a statement of finality. The husband has now hired a new lawyer who is claiming that the "ruling" was really a final order and the trial court lost plenary power to enter the final decree. He is threatening to file a mandamus. Do I have anything to worry about? *Confused in Conroe*

Dear Confused in Conroe: From what you have told me, I do not think you need to worry. It sounds like this is merely a ruling, not a final order especially since it refers you the Family Law Practice Manual, has no statement of finality, and the trial court later signed a final decree of divorce that contains all of the necessary terms and contains a statement of finality.

The purpose of a ruling is to announce the court's decision on a matter pending for resolution. A judgment is the documentation of the court's ruling that resolves the lawsuit. *See Lindley v. Flores*, 672 S.W.2d 612, 614 (Tex. App.–Corpus Christi 1984, no writ). The judgment must be sufficiently definite and certain so as to define and protect the rights of the litigants. *Stewart v. USA Custom Paint & Body Shop*, 870 S.W.2d 18, 20 (Tex. 1994). A judgment routinely goes through three stages: rendition, reduction to writing, and entry. *Oak Creek Homes, Inc. v. Jones*, 758 S.W.2d 288, 290 (Tex. App.—Waco 1988, no writ). Rendition of judgment occurs when the trial judge officially announces a decision on the law as to the matters at issue, either orally in open court or ***by signed memorandum*** filed with the clerk. *Garza v. Tex. Alcoholic Beverage Comm'n,* 89 S.W.3d 1, 6 (Tex. 2002); *Reese v. Piperi*, 534 S.W.2d 329, 330 (Tex. 1976); *Formby's KOA v. BHP Water Supply Corp.*, 730 S.W.2d 428, 429-30 (Tex. App.—Dallas 1987, no writ). The writing out of the judgment in the form of a judgment is a clear, distinct action from the rendition of that judgment. *See Knox v. Long*, 257 S.W.2d 289, 292 (Tex. 1953).

A letter from the trial court announcing the ruling is not the equivalent of a signed order or judgment. *See Goff v. Tuchscherer*, 627 S.W.2d 397, 398-99 (Tex. 1982); *McCormack*, 597 S.W.2d at 346; *Perdue v. Patten Corp.*, 142 S.W.3d 596, 603 (Tex. App.–Austin 2004, no pet.); *Atkinson v. Culver*, 589 S.W.2d 164, 165 (Tex. App.–El Paso 1979, no writ). Although a letter may, under certain circumstances, be treated as an order, it must contain precise, specific language and be clear and unambiguous. *See Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988) (orig. proceeding) (letter stated, "Therefore the Court orders a mistrial"); *Schaeffer Homes, Inc. v. Esterak*, 792 S.W.2d 567, 568 (Tex. App.–El Paso 1990, no writ) (letter stated, "new trial is granted"). The reason for the requirement of a clear and unequivocal written order is that, of necessity, a court must speak through its written orders, and an appellate court cannot presume an intent on the part of the trial court in the absence of plain speech. *Poston Feed Mill Co. v. Leyva*, 438 S.W.2d 366, 368 (Tex. App. – Houston [14th Dist.] 1969, writ dism'd w.o.j.). Another indication of an order is the inclusion of command language. *See Gregory v. Foster*, 35 S.W.3d 255, 257 (Tex. App.–Texarkana 2000, no pet.); *Shubert v. J.C. Penney Co.*, 956 S.W.2d 634, 635 n.4 (Tex. App.–Texarkana 1997, pet. denied). A final judgment should contain a statement of finality such as, "This judgment finally disposes of all claims and all parties and is appealable." *Lehmann v. Har-Con Corp.* 39 S.W.3d 191, 206 (Tex. 2001).

IN BRIEF

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

Grandparents: The Alaska Supreme Court reversed a trial court ruling allowing visitation to the paternal grandfather, observing that the visitation would take place during the father's time with the child "so there was no reason to formally award him visitation." *Sarah D. v. John D.,* 352 P.3d 419 (Alaska June 12, 2015). Acknowledging the "regrettable consequences" of its decision, the Indiana Supreme Court reversed a grandmother's adoption of her grandchildren because Indiana law prohibits persons with certain felony convictions from adopting, reasoning that the statute was "rationally related to a legitimate legislative purpose" and did not "discriminate against a suspect class." *In re Adoption of I.B.,* 32 N.E.3d 1164 (Ind. June 11, 2015). A California Court of Appeals upheld felony convictions for child custody deprivation when the children's parents fled to Mexico with the children rather than take the children to see their grandparents, even though the grandparents were neither parties to the parents' underlying custody case nor given any rights over the children, but the trial court had ordered a visit with the grandparents. *People v. DeJongh,* 237 Cal.App.4th 1124 (Cal. App. June 18, 2015).

Jurisdiction: A man who was born and raised in Vermont and lived there for much of his life did not meet Vermont's six-month residency requirement for divorce after returning to Vermont from Germany because he testified that although he intended to return to the United States someday, he intended to reside in Germany indefinitely, such that he was a resident of Germany. *Gosbee v. Gosbee,* ___ A.3d ___, 2015 WL 3634561 (Vt. June 12, 2015). The Oklahoma Supreme Court held that although the issue is not directly addressed by statute, an Oklahoma trial court may not bifurcate a divorce by granting the divorce and later dividing property, such that a divorce granted on the day prior to a spouse's death but reserving property division to a later time must be dismissed. *In re Marriage of Thatcher,* 864 NW.2d 533 (Iowa June 5, 2015).

Procedure: A Kentucky trial court did not abuse its discretion when it limited trial time in a custody modification suit to a total of six hours, split evenly between the parties, because the trial court notified the parties of this limitation well in advance of trial, the trial court was familiar with the case from pretrial proceedings, and trial courts have a great deal of discretion in conducting the trial of cases. *Addison v. Addison,* 463 S.W.3d 755 (Ky. June 11, 2015) (citing *Ingram v. Ingram,* 125 P.2d. 694 (Ok. App. 2005) (setting forth list of factors to consider when determining limits on trial time)). In *Bailey v. Bertram,* ___ S.W.3d ___, 2015 WL 2266350 (Ky. May 14, 2015), the Kentucky Supreme Court noted its "discomfort" when medical malpractice plaintiffs intervened in a physician's divorce case to attempt to unseal certain files that could show that the physician's personal lifestyle and marital discord might have contributed to his alleged malpractice, stating that "the right to intervene in a court action is not a discovery tool." The Nevada Supreme Court reversed a trial court's decision to divide the parties' property in the face of a third-party claim that some of the property belonged to that third party, holding that the trial court should have conducted an evidentiary hearing on the third-party claims before deciding to proceed with property division. *Anderson v. Sanchez,* ___ P3d ___, 2015 WL 4542421 (Nev. July 23, 2015).

Property: The Connecticut Supreme Court refused to recognize "a cause of action against a party to a dissolution action for failing to take affirmative steps to recover marital assets from a third party" in a case in which the husband's family had created a trust for him but then transferred the trust's assets to another trust that, unlike the first trust, made disbursements of principal discretionary with the trustees. *Ferri v. Powell-Ferri,* 116 A.3d 297 (Conn. June 16, 2015). Although in California property acquired while "living separate and apart" from the other spouse is not community property, for this rule to apply the spouses must have separate residences rather than live separately in the same home. *In re Marriage*

of Davis, 352 P.3d 401 (Cal. July 20, 2015). Also in California, a person who owns a separate property partnership interest but after marriage adds his spouse as a partner to obtain a partnership loan does not thereby transmute the property into community property unless, per statute, the spouse executes "an express declaration transmuting the character of the property interest." *In re Marriage of Lafkas,* 237 Cal.App.4th 921 (Cal. App. June 16, 2015).

Retirement: The West Virginia Supreme Court reversed a trial court that granted a widow retirement benefits as against an ex-wife, even though the divorce decree awarded the ex-wife a proportionate interest in those benefits, for lack of a Qualified Domestic Relations Order ("QDRO") by invoking its equitable powers to permit posthumous entry of a QDRO. *Jones v. West Virginia Pub. Empl. Ret. Sys.,* ___ S.E.2d ___, 2015 WL 3684065 (W. Va. June 10, 2015). The Illinois Supreme Court approved a divorce court's decision not to decrease the value of a husband's municipal police pension by the value of hypothetical Social Security benefits that he would not receive because he did not participate in Social Security, reasoning that placing a present value on fictional benefits "is rank speculation" and holding "that Congress intended to keep Social Security benefits out of divorce cases." *In re Marriage of Mueller,* 34 N.E.3d 538 (Ill. June 18, 2015). The Nebraska Supreme Court held that interest accrued on the premarital portion of a husband's retirement account was not property "earned or accumulated during the marriage" because the increase was not due to the efforts or contributions of either spouse. *Coufal v. Coufal,* 866 N.W.2d 74 (Neb. 2015).

Zillow? Noting that it is a "basic principle of jurisprudence" that a court "may not introduce its own evidence into a proceeding," the New Hampshire Supreme Court reversed a trial court's division of the marital estate and alimony award when, in the absence of a formal appraisal of the marital home, the trial court used Zillow to locate what it considered to be comparable sales and used them to establish the marital home's value. *In the Matter of Rokowski & Rokowski,* ___ A.3d ___, 2015 WL 4480890 (N.H. July 23, 2015).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

As I write this on an airplane, I'm wondering what the practice of law would be like if it were more like traveling. If you think litigating bugs you now, consider this.

As you enter the courtroom with your trial case loaded for bear, and you begin to remove your notebooks, binders and documents, a bailiff approaches you.

"Sir," she asks, "did you prepare your own questions for cross-examination? Have they been out of your possession at any time? Did anyone give you any questions to ask for them?" And, finally, "You'll have to leave your briefcase out in the hall, counsel, it doesn't fit."

Then a voice rings out over the PA system: "Anyone sitting on the back bench, nearest the seats to the hallway, you are in an exit row. In the event of an emergency, you must be prepared to block the lawyers from fleeing first, allowing the litigants and witnesses to form an orderly line and exit before the attorneys. If you are unable or unwilling to perform this task, there is a line of court clerks who will perform it for you. Also, please keep in mind that opinions and positions may shift unexpectedly during testimony, so please be careful when questioning witnesses."

At that point, the judge emerges from a door in the front, just after the bailiff advises everyone in the courtroom to please not congregate near the bench. The judge takes her seat.

"Hello, everyone, this is ... ahhh.....Judge Smith from up here on the bench, and ...uhhhh... I will be assisted today by my Associate Judge, Skippy. We expect a ... uhhhh.... mostly smooth hearing, but conflict can occur at any time. For that reason, we ask that you [crackle, static, unintelligible] refrain from any unnecessary side bar comments or antagonistic behavior, and let's see if we can bring this hearing in on time. Things might get a little ... uhhhh.... bumpy when the movant's mother takes the stand, so please pay attention to my admonitions. Folks, we know you had no choice when you filed your case, but we ... uhhhh .... thank you for litigating in this court."

Just as you begin to ask your first question, the judge interrupts you.

"Uh.... folks, this is Judge Smith again. Here on the bench. At the front of the room. If you'll ... uhhhh ... look to your left, you can get a good view of the clock. Those of you on the right side of the courtroom may enjoy seeing the American flag. Okay ... ahhhh ... counsel, ask your first question."

"Thank you, Judge. Mr. Jones, do you see any connection between your wife's affair and the destruction of your marriage?"

The bailiff interrupts.

"Oh, wait, I have connection information here. Because we started late, all connections have been missed."

"Sorry about that folks," says the judge. "We had a ... uhhhh ... equipment problem with my robe back in chambers, and we had to have a new robe brought in from another courthouse. And by the way, the courtroom looks a bit full. If we could ... uhhh ... get someone to give up their right to object to opposing counsel's questions, we're offering a voucher good for one ex parte conversation with the judge of your choice next week. Anybody?"

The bailiff then chimes in: "If you plan to sleep during this hearing, or otherwise not pay attention, please make sure we can see your legal pad and pen, otherwise we may need to wake you. All family codes, research material, and your innate ability to ask an effective, relevant and non-leading question should be stowed away now and remain unavailable to you during the entire hearing. Thank you, and enjoy your day in court."

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[1] 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

MAGIC WORDS OR RELIABLE TESTIMONY?

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

In response to Ms. Smith's deposition question, psychologist Dr. Jones reassured her by stating, "All my opinions are made to a reasonable degree of professional certainty." Opposing counsel smiled.

"Reasonable degree of professional certainty" is a variant of the familiar "reasonable degree of medical certainty." When used by medical experts, the latter phrase has long been controversial in tort law and legal literature. Jurisdictions differ as to the phrase's definition and whether experts must use the phrase in their testimony. Nevertheless, the American Law Institute's *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* rejects the need for an expert to state an opinion to a reasonable degree of medical [or scientific] certainty or probability as a condition for admissibility, noting that the phrase "provides no assurance of the quality of the expert's qualifications, expertise, investigation, methodology, or reasoning." (Section 28 cmt. e (2010)). Similarly, many legal commentators reject the words as empty formalism.

Texas caselaw echoes these sources:

> An expert need not use the magic words 'reasonable medical probability' if the evidence establishes that this is the substance of his opinion . . . [T]his Court stated that reasonable probability must be determined by considering the substance of the expert's testimony and does not turn on semantics or on the use by the witness of any particular term or phrase. *Schaefer v. Texas Employment Ins. Assn.*, 612 S.W.2d 199, 202 (Tex. 1980); *see also*, *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 711–12 (Tex. 1997)).

The phrase, "reasonable medical certainty," then, begs a key question for mental health experts who resort to the "psychological" or "professional" variant to bolster their testimony: What degree of reasonable certainty must the testimony reach to be deemed reliable? Press the expert to answer the question by unwrapping the phrase. For example:

- Why did you choose the standard "reasonable degree of professional [psychological] certainty?"
- From where did you adopt this statement? Caselaw? A lawyer? Psychological literature?
- Please explain how you apply this standard to your opinion?
- Please, word-by-word, define "reasonable degree of professional [psychological] certainty."
- What about these words makes your testimony relevant and reliable?

Texas caselaw emphasizes that "the same is true of *Robinson* and the Texas Rules of Evidence: [I]t is not so simply because an expert says it is so." *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 726 (Tex. 1998).

Don't settle for magic words from an expert, and you'll stress that the court shouldn't either.

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IS THE 4% RULE STILL A GOOD IDEA?
By Christy Adamcik Gammill, CDFA[1]

Back in the early 1990s, a California financial planner named William Bengen developed a retirement income strategy known as "the 4 percent rule." Basically, it says that as long as you withdraw no more than 4 percent of your initial portfolio, adjusted for inflation, each year during retirement, you shouldn't run out of money.

For years, financial professional used this "rule" to determine how much clients should withdraw from their retirement assets each year. But today, many are not so sure it's a good idea. Here's why.

The 4 percent rule was developed in a different economic time.

- In the 1990s, it seemed like you couldn't lose in the stock market. Today, investors are more likely to experience volatility, making it nearly impossible to count on a consistent return.
- Back then, the yield on a three-month Treasury bill was 6 percent. Today, it's close to zero. Even in 2002, the five-year U.S. Treasury yield was still 4.5 percent. Today, it's less than 2 percent. Without an interest rate at or above 4 percent, investors can't be sure that they'll replace the assets they take from their portfolio each year.

Some now use 4 percent as a starting point.
Some financial professionals believe in using the "4 percent rule" as a starting point for retirement income planning, rather than using it as a hard and fast rule. That way, they can incorporate flexibility into the strategy, giving clients a greater chance of having income throughout for as long as they live.

Here are a few suggestions for your retirement income strategy:

Adjust your spending based on market performance
If the market performs well, take a little more. If it performs poorly, take a little less. That way, you're consistently pulling out a similar percentage of your current assets – not your initial balance.

Don't take it if you don't need it
There may come a time when you'll need a larger percentage of your assets for health reasons, so if you don't need it now, don't take it.

Consider adding guaranteed income to the mix
By investing a portion of your assets in an annuity, you may be able to receive enough guaranteed income each year to cover some everyday expenses in retirement. Some variable annuities offer income benefits that provide withdrawals of 4 percent each year. Adding guaranteed income to the mix can give you more flexibility with your other assets, as well as more confidence that your assets will last as long as you do.

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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.

ARTICLES

The Effect of Adultery and Cruel Treatment on Divorce and SAPCR: Is there much of an effect at all?

By Rania Mohsen[1]

I. INTRODUCTION

In a world where the "common understanding" in the United States is that 50% of marriages end in divorce, it is imperative to understand what consequences may result from a parties' action both during the marriage and after separation, but prior to divorce. There appears to be a widespread belief that adultery, cruelty, and other such faulty behavior during the course of a marriage will certainly provide the innocent party with a significant advantage during the divorce in things such as property division and child custody. When the author began researching this article, she held the beliefs described above. In fact, the common views are a collection of myths. Fault in a marriage is increasingly less fundamental on the outcomes of divorce proceedings and suits affecting the parent-child relationship (SAPCR's). Is this a good thing? Perhaps a penalty for faulty behavior is exactly what is needed to help maintain healthy behaviors in marriages.

First, this article outlines the grounds for fault and no fault divorce in Texas. It then proceeds to give a general history of how no-fault divorce came to be in the United States and how it works in Texas. Then, examples of several cases are given in which adultery and cruel treatment were found to exist, but were either rejected as a ground for divorce in favor of insupportability or accepted as the ground for divorce, yet carried little weight in the outcome of the proceeding.

As fair warning, the article goes on to express displeasure with the current judicial ambivalence towards fault in Texas divorce proceedings. Further, it suggests that in the division of property, the Texas courts should be tougher on the party at fault in a marriage.

But finally, the article concludes that pleading fault in a Texas divorce often provides the innocent party with little to no relief.

II. GROUNDS FOR DIVORCE

The Texas Family Code provides seven grounds for divorce: insupportability, cruelty, adultery, conviction of felony, abandonment, living apart, and confinement in a mental hospital.[2] The three that grounds are most relevant to this paper are insupportability, cruelty and adultery.

A. Traditional Fault Grounds

1. Cruelty, a.k.a. Cruel Treatment

A court may grant a divorce on the ground of cruelty in favor of one spouse if the other spouse is guilty of cruel treatment toward the complaining spouse of a nature that renders further living together insupportable.[3] [4] "Insupportable," for purposes of cruel treatment, means "incapable of being borne, unendurable, insufferable, intolerable."[5] Mere trivial matters or disagreements do not justify the granting of divorce for cruel treatment.[6]

2. Adultery

A court may grant a divorce on the ground of adultery in favor of one spouse if the other spouse has committed adultery.[7] Adultery means the voluntary sexual intercourse of a married person with one not the spouse of the offender.[8] Adultery is not limited to acts committed before the separation of the parties.[9] However, incidents of adultery committed after the divorce complaint is filed cannot be the sole basis for granting a divorce on the ground of adultery.[10] Adultery can be shown by direct or circumstantial evidence, but clear and positive proof is necessary.[11] Mere suggestion and innuendo are insufficient.[12]

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[1] [1] Ms. Mohsen received her J.D. from the University of Texas in 2015 and may be reached at ram0589@hotmail.com.
[2] Tex. Family Code Ann. 6.001-.007 (West 2014).
[3] Id. at 64.
[4] The fault ground of cruelty is defined by using the term, insupportability, the no-fault ground. Using the term insupportable in a fault ground while using the term insupportable in a separate no fault ground may cause confusion to the reader. Cruelty and insupportability are two separate grounds for divorce that should not be confused with each other.
[5] *Ayala v. Ayala*, No. 01-09-00785-CV, 387 S.W.3d 721, 733 (Aug. 26, 2011).
[6] Id. at 733.
[7] Tex. Family Code Ann. 6.001-.007 (West 2014).
[8] Kelly McClure, Chris Meuse, *Adultery and Its Impact on Divorce*, Dallas Bar Association, (Sept. 2011), http://www.dallasbar.org/sites/default/files/headnotes_09_final-web.pdf.
[9] Id.
[10] Susan L. Thomas, *Proof of Adultery as Grounds for Dissolution of Marriage*, 49 Am. Jur. Proof of Facts 3d 277, §5 (Last updated Dec. 2014).
[11] McClure, Meuse, *supra* note 7.
[12] Id.

3. Miscellaneous Fault Grounds

A court may grant a divorce "in favor of one spouse if during the marriage the other spouse:" (1) has been convicted of a felony; (2) has been imprisoned for at least one year in the Texas Department of Criminal Justice, a federal penitentiary, or the penitentiary of another state; and (3) has not been pardoned. The court may not grant a divorce under this section against a spouse who was convicted on the testimony of the other spouse. A court may grant a divorce on the ground of abandonment in favor of one spouse if the other spouse: (1) left the complaining spouse with the intention of abandonment; and (2) remained away for at least one year.[13]

B. No Fault Grounds

1. Insupportability

A court may grant a divorce on the ground of insupportability without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.[14]

2. Living Apart

A court may grant a divorce on the ground of living apart in favor of either spouse if the spouses have lived apart without cohabitation for at least three years.[15]

3. Mental Illness

A court may grant a divorce in favor of one spouse if at the time the suit is filed:(1) the other spouse has been confined in a state mental hospital or private mental hospital, as defined in Section 571.003, Health and Safety Code, in this state or another state for at least three years; and (2) it appears that the hospitalized spouse's mental disorder is of such a degree and nature that adjustment is unlikely or that, if adjustment occurs, a relapse is probable.[16]

The ground of living apart is not considered a fault ground because it is presumed that the couple has decided to separate and live apart, so the divorce can be granted in support of either spouse.[17] In other words, for the divorce ground of living apart, it is presumed that neither party acted poorly and whichever party asks for the divorce on this ground will be granted it, so it indicates no fault is involved.[18]

A divorce on the ground of confinement in a mental hospital is granted to one spouse against the other, but the confined spouse cannot be blamed for their mental illness.[19] Therefore, even though confinement in a mental hospital yields a divorce in favor of one spouse, while neither living apart nor insupportibility have a winner-loser aspect, all three are considered no-fault grounds for divorce.[20]

III. NO-FAULT DIVORCE IN GENERAL

Prior to the advent of no-fault divorce, at least theoretically a spouse seeking divorce was required to prove that the other spouse was at fault for the marriage break down.[21] Unhappy couples often resorted to collusion by fabricating evidence of marital misconduct in order to establish one of the grounds upon which a divorce could be granted.[22]In 1969, California became the first jurisdiction to adopt a modern, purely "no-fault" divorce law when Governor Ronald Reagan signed the Family Law Act of 1969, which became effective in 1970.[23] [24] [25] The 1969 act eliminated all fault grounds for divorce and provided that, apart from "incurable insanity," marriage could be terminated only upon the "irreconcilable differences which have caused the irremediable breakdown of the marriage."[26] Evidence of marital misconduct was de-

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[13] Tex. Family Code Ann. 6.001-.007 (West 2014).
[14] Tex. Family Code Ann. 6.001-.007 (West 2014).
[15] Id.
[16] Id.
[17] Professor John J. Sampson, Family Law Seminar Professor at The University of Texas School of Law, during a discussion on Texas fault grounds, (Nov. 2014).
[18] Id.
[19] Id.
[20] Id.
[21] Josh D. Simon, *No Fault* Divorce, The Harris Law Firm P.C., (Sept. 24, 2009), http://www.harrisfamilylaw.com/the-history-of-no-fault-divorce.
[22] Michelle L. Evans, *Wrongs Committed During a Marriage: The Child That No Area of the Law Wants To Adopt*, 66 Wash. & Lee L.Rev. 465, 473 (2009), *available at* Westlaw.
[23] Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. Rev. 79, 83 (1991), *available at* Westlaw.
[24] Prior to his life-long marriage to Nancy Davis Reagan, the president and former movie-star was married and divorced by another star, Jane Wyman.
[25] Texas Family Code Title 1, Husband and Wife, (1969) was most notable for containing the first strictly no-fault ground for divorce enacted in the United States (Acts 1969, 61st Leg. Ch. 888). However, California received virtually all of the national publicity when it enacted its own no-fault provision shortly thereafter.[25] The Texas version enacted one ground endorsing the no-fault principle by explicitly stating "a divorce may be granted without regard to fault." But, the new code conservatively also retained several fault grounds. On the other hand, the California legislature bit the bullet and announced that one no-fault ground was sufficient to settle all of the issues.
John J. Sampson, *Symposium on Ethical Issues and Trends in Family Law*, *Choking on Statutes Revisited: A History of Legislative Preemption of Common Law Regarding Child Custody*, 45 Fam. L.Q. 95 (Spring 2011).
[26] Wardle, *supra* note 22, at 83.

clared to be "improper" and "inadmissible."[27] By the mid-1980's, all fifty states had at least some form of no-fault provision as part of their divorce law as either the sole basis for dissolution or as an alternative to the traditional fault-based systems.[28]

From the national perspective, there were four main general arguments for the adoption of no-fault grounds.[29]

First, no-fault grounds were considered a mechanism to reduce hostility and distress of the parties involved in the divorce. Requiring proof of marital fault in all cases was widely criticized for breeding costly, bitter, counterproductive litigation that impeded reconciliation.[30] Not only were the adults victims of divorce hostility, but the children of the parties suffered as well because of the animosities expressed in the divorce process. An observer noted that "the divorce system seemed designed to promote and exacerbate conflict, rather than to provide a way to find compromises and to get the divorce in as painless a fashion as possible."[31]

Second, it was argued that no-fault was necessary to protect the integrity of the legal system. There was discontent over "the trail of perjury and subterfuge that traditional fault-based divorce grounds had brought into the courts."[32] Divorce lawyers across the country were under considerable pressure to put an acceptable gloss to domestic discord and manipulate evidence to fit the provisions of existing divorce law. In most states, the easiest way to do that was to base the divorce action on the mental cruelty provisions of the divorce law, which led attorneys to suggest to clients that they testify that their spouse had been disparaging and that they suffered many sleepless nights as a consequence; alternatively, a fictitious slap to the face or blow to the upper arm evidenced physical cruelty.[33] These practices were no secret. Judges in every state quietly accommodated divorce lawyers by not probing into the truthfulness of the evidence offered.[34]

The third major argument was that the law could not enforce its policy beyond the realm of formalities. It could not force an unhappy spouse to live with his partner.[35] Abandonment-sometimes known as the "poor man's divorce" had long been practiced. The law hadn't been able to prevent a married person from taking another partner and beginning an illegitimate family.[36] It was estimated that nearly 20,000 children were born out of wedlock every year because access to divorce was so restrictive that the parents simply cohabited as lovers without obtaining a divorce from their legal spouse.[37]

Fourth and finally, it was argued that basic notions of marriage and divorce had changed over time and that no-fault divorce more accurately reflected modern conceptions of terminating marital relations. The general public widely rejected the notion that the breakdown of a marriage was entirely the fault of one spouse and that divorce was a remedy awarded to the innocent spouse while a judgment was imposed against the spouse at fault.[38] People had come to view divorce as a private matter that the state had no legitimate interest to restrict when the parties to the marriage had agreed to terminate the marriage. It was argued that requiring disclosure of "the most intimate and often embarrassing details of marital life" is "abhorrent to the community," violated the spirit of family privacy, and worked only to "demean the marriage relationship, humiliate the parties, and damage the residual family relationships."[39]

IV. NO-FAULT DIVORCE IN TEXAS

The concept of no-fault divorce became effective in Texas on January 1, 1970, with the introduction of insupportability as a ground for divorce.[40] In Texas, this quickly became the basis for granting nearly all divorces.[41] In the legislature, after this "reform" no fault divorce eventually elicited a steady drumbeat of criticism from some social conservatives who have advocated for its repeal when there are children of the marriage.[42] Legislation to this effect has been introduced in every session since 1997, but has yet to be enacted.[43]

When deciding a divorce on the ground of insupportability or irreconcilable differences, the court only has to find that irreconcilable differences exist; it does not need to inquire into the fault of the parties.[44] Texas is a community property state, so the court starts with a presumption that all the property earned or acquired by either spouse during the marriage

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[27] Id. at 83.
[28] Evans, *supra* note 21, at 474.
[29] Wardle, *supra* note 22, at 91.
[30] Id. at 92.
[31] Id. at 92.
[32] Id. at 93.
[33] Id. at 93.
[34] Id. at 93.
[35] Id. at 94.
[36] Id. at 94.
[37] Id. at 95.
[38] Id. at 95.
[39] Id. at 96.
[40] Tex. Fam. Code Ann. 6.001-.007 (West 2014).
[41] Id. at 63-64.
[42] Id. at 64.
[43] Id. at 64.
[44] Blum et. al, *No-fault divorce-Evidence of fault*, 24 Am. Jur. 2d Divorce and Separation § 314, (Nov. 2014), *available at* Westlaw.

is community property, owned equally by the spouses.[45] If a spouse claims separate property, it must be proven by tracing it with "clear and convincing evidence."[46]

The court divides community property between spouses in a "just and right manner," having due regard for any children of the marriage.[47] This differs from the division of community property when a spouse passes away, which yields in a 50-50 split.[48] The just and right division in a divorce proceeding varies widely from a 50-50 split to a quite disproportionate award to one spouse.[49] The trial court is afforded broad discretion in dividing the community estate, and every reasonable presumption is given in favor of the trial court's proper exercise of its discretion.[50] However, if one spouse is at fault for the breakup of the marriage, the court may take that into consideration in determining what is an equitable division of the couple's property.[51] Attorneys will often allege more than one ground for divorce in a petition, including a no-fault ground.[52] In this way the divorce may still be granted if the court finds the burden for proving fault was not met. It is not necessary to prove both grounds in order to obtain a divorce.[53] Proving any one of the grounds is sufficient. [54]

In Dzierwa v. Cerda, the appellate court reversed the entire decree of divorce because the trial court had dissolved the marriage solely on the ground of adultery although the wife had pleaded both adultery and insupportability.[55] On appeal, Dzierwa argued that the trial court abused its discretion in granting the divorce on the ground of adultery because the evidence was insufficient in showing that he had committed adultery.[56] At trial, Cerda briefly testified about why she sought a divorce on the ground of adultery. She testified that she "knew that he was seeing another woman" and that she "believed he was having an affair with that woman." She testified that she had proof of Dzierwa's adultery in some of his emails, but no emails were introduced into evidence and Cerda did not testify about the contents of those emails. The trial court found that the evidence did not rise above the level of mere suggestion or innuendo that Dzierwa committed adultery. The court stated that neither Cerda's testimony that Dzierwa was "seeing" another woman nor her "belief" that he was "having an affair" constituted substantive or probative evidence of adultery. The appellate court stated that because divorces can be granted only on statutory grounds, and the trial court had granted the divorce only on the ground of adultery, which Cerda failed to prove, the case had to be remanded for a new trial.[57]

V. PLEADING FAULT AND NO FAULT

The Texas appellate courts have consistently stated that fault in marriage is a factor that can affect property division, which may have led to the misconception that fault is a significant factor. In the vast majority of cases, no fault is the ground the case will be decided on, and there will be no trial of the issue of fault, rather, an agreement will be reached between the parties for settlement. However, the failure to plead and include fault grounds for divorce may prevent the court from considering fault in a just and right division of the community estate.[58] Allegations such as cruelty or adultery are often included in the petition as a strategic move, often with the objective of requesting a greater award of property or to assist in a custody dispute, as opposed to a ground for divorce.[59] Still, even where fault is properly pleaded by a party, an unequal division of the property may not be awarded just to punish the party.[60]

Since 1997, when the Texas Family Code was last recodified, a keyword search for codes 6.001, 6.002, 6.003, 6.004, 6.005, 6.006, and 6.007 on Westlaw yields a result of 39 appellate cases that discussed the divorce grounds of insupportability, 26 that have discussed cruel treatment, 13 that have discussed adultery, 2 that have discussed conviction of a felony, 1 that discussed abandonment, 2 that discussed living apart, and 4 that discussed confinement in a mental hospital as ground for divorce. When searching the word "fault divorce" or just "fault" as opposed to the code for a specific fault ground, 293 cases are listed. The insignificance of these numbers is astonishing when considering that between 1997 and 2010, Texas recorded roughly 75,000-87,000 divorces per year.[61] This could lead to the conclusion that the appellate courts are not requested or required to consider adultery or cruel treatment as an important factor. Insofar as pleading fault in an attempt to gain an advantage over the other spouse, it appears that such a pleading accomplishes little or nothing

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[45] Rich Stim, *Texas Divorce: Frequently Asked Questions*, DivorceNet, http://www.divorcenet.com/states/texas/txfaq01.
[46] Id.
[47] Id.
[48] Professor John J. Sampson, Family Law Seminar Professor at The University of Texas School of Law, during a discussion on a community property split, (Nov. 2014).
[49] Id.
[50] *In re marriage of C.A.S. and D.P.S.*, No. 05-11-01338-CV, 405 S.W.3d 373 (June 26, 2013).
[51] Stim, *supra* note 53.
[52] 33 Tex. Prac., Handbook Of Texas Family Law § 6:14 (Westlaw updated Nov. 2014).
[53] Id.
[54] Id.
[55] *Dzierwa v. Cerda*, No. 04-13-00407-CV, 2014 WL 3843950, at 1, 4 (45th Jud. Dist. Ct. Aug. 6, 2014).
[56] Id. at 3.
[57] Id. at 4.
[58] Phillips v. Phillips, 75 S.W.3d 564 (Tex. App.—Beaumont 2002).
[59] § 3:130.Fault or no-fault grounds—Reasons for pleading fault grounds, 1 Tex. Prac. Guide Family Law § 3:130 (Westlaw updated Dec. 2014).
[60] Id.
[61] *Marriage and Divorce*, Texas Department of State Health Services, http://www.dshs.state.tx.us/chs/vstat/vs10/nnuptil.shtm ((ast updated July 01, 2014).

other than seeking revenge. The only factors the statute requires a Texas court to consider in dividing the marital estate upon divorce are the "rights of the parties" and "any children of the marriage."[62] However, Texas case law provides many examples of the factors that may influence the court's discretion in a property division that is deemed equitable to the divorcing parties.[63] As noted above, one factor the trial court may consider in making a just and right division of the estate of the parties is fault in the breakup of the marriage.[64]

VI. ADULTERY

A. Adultery and Property Division

Aside from securing a decree in favor of one spouse on the fault ground of adultery, pleading and/or arguing adultery as the reason for the breakup of a marriage can be used to obtain a disproportionate share of the marital estate.[65] In a divorce granted on a fault basis, the trial court may consider the fault of one spouse in breaking up the marriage when making a property division.[66] This rule is still applicable when a divorce is based on no-fault and fault grounds.[67] However, the rule does not mean that fault must be considered; only that it may be considered.[68]

In the Texas Supreme Court's seminal case Murff v. Murff, the Court held that if the divorce is granted on fault grounds or a on a combination of fault and no-fault grounds, the court may take a spouse's fault into account when dividing the parties' property.[69]

In re Marriage of C.A.S. and D.P.S., Daniel, the husband, appealed the divorce decree dissolving the marriage between he and his wife Cynthia due to his contention that, among other things, the trial court erred in dividing the marital property and by granting the divorce on fault grounds.[70] Cynthia's divorce petition alleged irreconcilable differences, which she then amended to add adultery and sought a disproportionate share of the community estate.[71] The divorce was granted on fault grounds, and Cynthia was awarded 81% of the assets.[72] The trial court found that Daniel had committed adultery and had taken his paramour on several trips and bought her several expensive gifts.[73]

In response to Daniel's contention that his adultery did not support a disproportionate division of property, the appellate court explained that in a fault-based divorce, the trial court may consider the conduct of the errant spouse in making a disproportionate distribution of the marital estate. Further, in his case, the trial court's finding of adultery did support the disproportionate division of the community property.[74]

However, the appellate court went on to state that the record established a number of circumstances that justified awarding a disproportionate share of the community estate to Cynthia. In addition to the adultery, the court first noted the disparity in their financial conditions and earning capacities.[75] The court also took into account Daniel's wrongful dissipation of the community assets.[76] Daniel expended community assets on trips to see his paramour in Milwaukee, on trips to the Bahamas and Europe, and on expensive gifts. Further, the court noted Daniel's misconduct during the divorce proceedings by selling community assets in violation of the trial court's standing order, and cancelling both depositions that Cynthia had scheduled claiming that he was too ill to attend when really he had been spending the weekend with his paramour. Finally, the court considered payments to the parties' respective attorneys made from the community estate. While both parties paid the fees from community assets, Cynthia received permission from the trial court to liquidate community assets while Daniel did not, and Cynthia incurred additional fees due to Daniel's conduct during the divorce proceedings, including his failure to appear at scheduled depositions and failure to respond fully to discovery requests.[77]

Based on this record, the appellate court concluded that the trial court did not abuse its discretion by making a disproportionate award of the marital property.[78] While this case shows that adultery may be considered in the award of marital property, it also shows that the unequal distribution may not be used as a punishment against the offending spouse, and that while the distribution does not have to be equal, it must be equitable. However, the fact of the matter is if the court intended to punish the offending spouse for his faulty behavior, the punishment would go undetected unless the court specifically specified the faulty behavior as the reason for their unequal distribution.

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[62] 39 Tex. Prac., Marital Property And Homesteads § 20.14, (Westlaw updated Aug. 2014).
[63] Id.
[64] Id.
[65] McClure, Meuse, *supra* note 7.
[66] *Murff v. Murff*, 615 S.W.2d 696, 696 (Tex.1981).
[67] Id. at 698.
[68] Id. at 698.
[69] 39 Tex. Prac., Marital Property And Homesteads § 20.14, (Westlaw updated Aug. 2014).
[70] *In re marriage of C.A.S.*, 405 S.W.3d 373 at 379.
[71] Id. at 379.
[72] Id. at 379.
[73] Id. at 383.
[74] Id. at 392.
[75] Id. at 392.
[76] Id. at 393.
[77] Id. at 394.
[78] Id. at 395.

In Applewhite v. Applewhite, the wife, Dana, argued that the trial court abused its discretion by not finding adultery as a fault ground for divorce and by not awarding her a disproportionate share of the community property even though her husband's attorney stipulated at trial that he had engaged in two affairs during the marriage.[79] The court responded by noting that Texas Family Code 6.001 says the court *may* grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation. In this case, the trial court decided to grant the divorce only on the ground of insupportability. Dana pleaded both insupportability and adultery as a ground for divorce. Because the Family Code assigns the divorce-ground determination to the discretion of the trial court, the appellate court determined that the court below did not abuse its discretion by not finding adultery, or by not additionally finding, adultery as a ground for divorce.[80] In essence, the court was asked to grant a divorce and they made the choice to grant it on insupportability rather than to deal with the fault ground. The outcome here is another example that shows the court's disregard towards the fault of a party in a divorce.

In response to the wife's issue regarding the division of property, the court repeated the rule that the trial court shall order a division of the parties' estate in a manner that the court deems just and right, having due regard for the rights of each party.[81] Again, the property division need not be equal, but it must be equitable.[82] The record demonstrated that the trial court divided the community assets equally between Dana and William, but it ordered William to pay a significant portion of the community debt. The court went on to say that based on the evidence, it appeared that William's greater share of debt was likely to account for the disparity in income between the two, in addition to the fact that Dana was the primary conservator for seven of their children. The appellate court determined that the trial court did not abuse its discretion by not awarding the wife/mother an even greater share of the community estate.[83] This case again demonstrates the slender importance that Texas courts accord to pleading and proving adultery in the division of marital property. It appears that adultery, without more, such as spending community funds on the offender's paramour, is generally not enough to have an effect on the division of marital property.

In Lisk v. Lisk, after Nancy discovered her husband's affair they unsuccessfully sought counseling.[84] When Richard filed for divorce, in her counter petition, Nancy requested that the divorce be granted on fault grounds, and that she be granted a disproportionate share of the community estate.[85] The trial court granted the divorce on the grounds of insupportability.[86]

On appeal Nancy argued that the trial court abused its discretion by not granting the divorce based on adultery because of the uncontested evidence of her husband's affair and by not awarding her a more disproportionate share of the marital estate.[87] The court responded by citing to the text of Texas Family Code Section 6.001. The court went on to say that both parties pleaded insupportability as a ground for divorce and the record contained sufficient evidence of intense conflict between the couple to support the trial court's finding of insupportability.[88]

However, Nancy argued that because Richard admitted to having an affair, the trial court abused its discretion by failing to grant her a divorce on the grounds of adultery. The appellate court countered that just because her husband admitted to an affair does not mean the trial court was required to grant the divorce on the grounds of adultery, although it would have been within its discretion to do so. For those reasons, the appellate court held that the trial court did not abuse its discretion.[89]

Nancy also argued that she should have been granted a more disproportionate share of the community estate due to the time she had invested in her husband's business and because her husband had engaged in an affair. The court responded by noting that the record appears to show that the trial court gave consideration to the affair and the disparity in income and earning power between the two parties, but that the trial court was not obligated to award her a more disproportionate share of the estate on account of her husband having an affair and a larger income. It is not an abuse of discretion for a trial court to make an equal division of property, even where the equalities balance in favor of the wife. Fault and disparity in the parties' incomes are "only two of the many factors a trial court should consider when dividing a marital estate."[90]

Here, the court looked beyond those two factors and also considered her earning capacity from her advanced degrees, her good health, the income she would receive from their business partnership, the age and health of her children and her husband's assumption of the community's tax liability when making what it considered to be a just and right division of

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[79] *Applewhite v. Applewhite*, No. 02-12-00445-CV, 2014 WL 787828 (Feb. 27, 2014).
[80] Id. at 2.
[81] Id. at 2.
[82] Id. at 2.
[83] Id. at 3.
[84] *Lisk v. Lisk*, No. 01-04-00105-CV, 2005 WL 1704768, (July 21, 2005).
[85] Id. at 1.
[86] Id. at 2.
[87] Id. at 4.
[88] Id. at 5.
[89] Id. at 5.
[90] Id. at 6.

the marital estate.[91] The broad amount of discretion afforded the trial court in this area and the sufficient evidence in the record to support their division of the marital estate justified the trial court decision.[92]

On the other hand, in White v. White, the husband Jack appealed from a final decree of divorce arguing that the trial court abused its discretion by granting the divorce solely on the ground of adultery.[93] The appellate court responded by noting that his wife Gail pleaded adultery as a ground, and that Jack admitted on the stand that he had committed adultery.[94] The appellate court could not conclude that the trial court abused its discretion by granting the divorce based on a statutory ground that was pleaded and proven.[95] Despite awarding the divorce on the grounds of adultery, Gail received more than 50% but less than 55% of the net asset value of the community estate.[96] The court noted the wide disparity in each party's respective income and the fact that Jack had not contributed any money toward the household bills or payments during the twelve months prior to the trial.[97] Although Jack engaged in adulterous behavior, with his wife's sister-in-law no less, the court appeared to give such behavior very little weight.

B. Adultery and Spousal Maintenance

In some states, such as North Carolina, South Carolina, Georgia, and West Virginia, adultery is a complete bar to alimony.[98] In other states it is just one of several considerations on which the support decision is based.[99] The Texas Family Code does not look at fault when determining an award of alimony.[100] Therefore, receiving alimony, or spousal support, is not automatic in Texas and proving adultery is not likely to have an impact on the court's decision.[101]

In Texas, a court that determines that a spouse is eligible for maintenance shall determine the nature, amount, duration, and manner of periodic payments by considering all relevant factors, including: (1) the spouses' abilities to meet their needs independently; (2) the education and job skills of each spouse; (3) length of the marriage; (4) age, employment history, earning potential, and health of the spouses (5) child support each spouse has to pay; (6) whether a spouse wasted or hid money during the marriage; (7) contributions by one spouse to the other's education or earning potential; (8) property each spouse brought into the marriage; (9) contributions by a spouse to the marriage as a homemaker; (10) misconduct during the marriage by each spouse, including adultery and cruel treatment, and (11) any domestic violence during the marriage.[102]

In Applewhite v. Applewhite, discussed above, the wife, Dana, argued that the court abused its discretion by not awarding her spousal maintenance.[103] She argued that she was married for over 25 years and only began working recently, that she is in her late forties and lacks work experience, and that she didn't have enough money to buy groceries for the children and couldn't meet her reasonable needs.[104] Upon reviewing this issue, Dana acknowledged at trial that William paid her spousal support eighteen months during the pendency of the divorce suit.[105] The evidence also showed that Dana was employed, that she rented a house, that she had a car, that she paid for utilities and food, and that the value of the possessions and property in her house is four times greater than the value of the possessions and property in William's house. Further, as explained, the trial court disproportionately divided the community estate in Dana's favor.[106]

Dana testified that she needs more money to fully cover the monthly expenses that we detailed above, but there was no evidence that those general expenses represent her minimum reasonable needs, and she did not identify what amount of income she would need to satisfy her minimum reasonable needs.[107] Notably, the court did not consider her husband's adultery in its refusal to award spousal maintenance.

In Ayala v. Ayala, Juan appealed from a default divorce decree granted on the grounds of cruelty, adultery, and insupportability, contesting the grounds the divorce was granted on, the imposition of spousal maintenance, and the grant of sole managing conservatorship in favor of his now ex-wife, Blanca.[108] [109]

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[91] Id. at 6.
[92] Id. at 6.
[93] *White v. White*, No. 2-07-159-CV, 2008 WL 2639989, (July 3, 2008).
[94] Id. at 1.
[95] Id. at 1.
[96] Id. at 2.
[97] Id. at 2.
[98] Thomas, *supra* note 9.
[99] Id.
[100] Elizabeth Rayne, Demand Media, *What Can You Ask for in a Divorce in Texas if Adultery Has Been Committed?*, Legalzoom, http://info.legalzoom.com/can-ask-divorce-texas-adultery-committed-24604.html.
[101] Id.
[102] Tex. Fam. Code Ann. §8.052 (West 2014).
[103] *Applewhite*, 2014 WL 787828 at 3.
[104] Id. at 3.
[105] Id. at 4.
[106] Id. at 4.
[107] Id. at 4.
[108] The paradigm case for fault can be found in Ayala v. Ayala where the court focused on a wide variety of factors of fault and the consequences thereof.
[109] Ayala, 387 S.W.3d 721, at 725.

Blanca and Juan separated in 1998, and for the next ten years he lived with another woman while Blanca remained in their home, paying all the bills and raising the children with no financial help from Juan. Blanca, who is diabetic and blind, had to look to her children for help with the home expenses because she was unable to work. At the time of divorce, only one minor child was left in the home, i.e., F.A., age fourteen.[110] Juan claimed the evidence was insufficient to support the imposition of spousal maintenance.[111] The trial court noted that the marriage lasted longer than ten years and that Blanca is diabetic and blind and has had to look to her children for help with home expenses because she was unable to work. During that time, Blanca raised the children and was still raising their daughter F.A. The court further noted that while Blanca is disabled and unemployed, Juan had been continuously employed with the same employer for thirty years. The court noted that the evidence spoke to Blanca's financial resources, her ability to seek employment, the duration of the marriage, Blanca's earning ability and physical condition, Juan's ability to make support payments, and to the comparative financial resources and earning power of the spouses. The court determined that this was "more than a mere scintilla" of evidence as to Blanca's minimum reasonable needs.[112] Again, the court did not focus on adultery and cruelty in making this determination.

C. Adultery and Child Custody

A finding of adultery does not in any way create a presumption of unfitness to have custody of one's own child.[113] Generally, denial of custody because of adultery must be based on a showing that the adultery had some detrimental effect on the children.[114] For example, upon proof that the cheating spouse regularly brings illicit partners into the children's lives, the court may find it is in the best interest of the child to limit contact with that spouse.[115]

As mentioned above, in Ayala v. Ayala, Juan also contested the grant of sole managing conservatorship in favor of his ex-wife, Blanca.[116] The court explained that in determining conservatorship issues, the primary consideration of the trial court is the best interest of the child, and trial court has wide latitude in determining the best interest of minor children.[117] Factors which may be considered when deciding the best interest of the child include: (1) the desire of the child; (2) the emotional and physical needs of the child now and in the future; (3) emotional and physical danger to the child now and in the future; (4) the parental abilities of the individuals involved; (5) the best interests of the child; (6) plans for the child by these individuals; (7) the stability of the home; (8) acts or omissions of a parent which may indicate that the existing parent-child relationship is not proper; and (9) any excuse for the acts or omission of the parent.[118]

In this case, the court discussed the lack of evidence that Juan had done anything to meet the emotional and physical needs of F.A. since leaving the family home in 1998, ten years prior to the divorce. Blanca presented evidence that, in 1998, when Juan left the marital home to live with another woman with whom he subsequently had a child, F.A. was four years old. From the time he left, he had failed to provide child support or to help with home expenses, despite evidence that he earned $3,250 per month, indicating that he had the resources to do so.[119] Juan's failure to contribute to meeting F.A.'s emotional and physical needs continued despite Blanca's inability to work since 2007, due to blindness caused by her diabetic condition.[120] Rather, the F.A.'s adult siblings had helped with home expenses. [121]

Viewing the evidence in light of the factors listed above, the appellate court determined that the trial court did not abuse its discretion in naming Blanca sole conservator.[122] Again, it is important to note that the court made no connection between Juan's adultery and the allotted time with his daughter. Rather, they focused on his lack of contribution to the basic foundational elements of her upbringing.

VII. CRUEL TREATMENT

A. Cruel Treatment By Way of Adultery

In Newberry v. Newberry, the court's finding of cruel treatment was supported by a finding of adultery, by the wife's testimony that she had caught him masturbating while looking at pornography several times, and by evidence that the husband used a new email address to hold himself out as available to another woman.[123] The divorce decree was granted on the grounds of insupportability, adultery, and cruelty.[124]

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[110] Id. at 725.
[111] Id. at 729.
[112] Id. at 729.
[113] Thomas, *supra* note 9.
[114] Id.
[115] Rayne, *supra* note 129.
[116] Ayala v. Ayala, No. 01-09-00785-CV, 387 S.W.3d 721, (July 21, 2011).
[117] Id. at 730.
[118] Id. at 730.
[119] Id. at 730.
[120] Id. at 730-731.
[121] Id. at 731.
[122] Id. at 731.
[123] Newberry v. Newberry, No. 08-10-00062 CV, 351 S.W.3d 552 (Sept. 14, 2011).
[124] Id. at 555.

Ruel argued that viewing pornography and masturbating showed that he suffered from a psychological condition or disorder, which requires professional treatment, and not that he willfully inflicted suffering on his wife.[125] At trial, the wife Brisa testified that after confronting Ruel about his behavior, he explained it was due to her unwillingness to engage in sexual intercourse with him as frequently as he wanted. After attempting to engage in counseling, Brisa thought Ruel had stopped his habit of viewing pornography. Despite these efforts, Ruel continued to watch porn and admitted he had a problem with being addicted to viewing pornography. After this admission, Ruel denied viewing anymore porn, but then Brisa discovered a new laptop in his possession on which he created a new e-mail address and used an alias to communicate with another female.[126] In one e-mail, he indicated that he and Brisa were no longer in a relationship, and that he was available.[127] At trial, Brisa also testified that Ruel admitted to her that when he attended a party at a friend's house, he went into a room with his high school sweetheart, Liza, and stayed in there with her with the doors closed and lights off for more than twenty minutes.[128] The appellate court explained that adultery may be considered cruelty sufficient to support the grant of a divorce.[129] This, in addition to viewing pornography and masturbating, supported the trial court's finding of cruelty.[130]

B. Cruel Treatment and Property Division

In Kemp v. Kemp, Bill Kemp contended interalia that the trial court erred by granting the divorce on the ground of cruelty, by ordering him solely responsible for the parties' federal income tax liabilities, by granting an owelty lien for the money awarded to Anne, and by ordering him to pay off a loan that Anne made to the community estate.[131]

Anne sought a divorce on the grounds of insupportability and cruel treatment. She testified that Bill exhibited anger issues while they were married. He yelled and cursed at people who worked for account companies on the phone. Further, at times she had to intervene in an effort to calm Bill down. She also testified that Bill engaged in incidents of road rage when she was a passenger in the car. He would block other drivers in parking lots and confront them about their driving habits. Anne also said that Bill kicked his dog, and she moved out of the marital residence because she was afraid she might be the next victim. Additionally, after the trial court entered temporary orders, Anne went to the house to retrieve her personal property; when she arrived, she discovered that Bill had burned her furniture and clothing. Bill would also send her pictures of her deceased son and his deceased mother. Anne testified that she had a heart condition and that Bill's conduct made it worse.[132]

The trial court granted the divorce on the ground of insupportability and the ground of cruelty. In response to Bill's arguments, the trial court cited Family Code 6.002, and added that acts occurring after separation can support a finding of cruel treatment.[133] The appellate court determined that Anne's testimony, which was in most respects unchallenged by Bill, provided more than a scintilla of evidence to support the trial court's finding of cruelty as a ground for divorce. After considering the evidence, the court could not find that the cruelty finding was so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.[134]

As for the awards given, Anne had used funds from her separate estate to pay unsecured liabilities of Bill's separate estate. Bill argued that the trial court erred by ordering reimbursement for the loan to Anne.[135] Anne established that the funds in the account were her separate property and overcame the community property presumption with clear and convincing evidence.[136] Thus, the trial court did not abuse its discretion by awarding reimbursement to Anne.[137]

As for the federal income tax liability, the record showed that Anne asked Bill to produce copies of his tax documents, and that Bill failed to produce those documents. The appellate court stated they could not conclude that the trial court abused its discretion by ordering Bill solely responsible for the parties' federal income tax liabilities.[138] Also in the final decree the court awarded the house to Bill and awarded Anne one-half of the equity in the house to represent her share of it. The trial court then imposed an owelty lien against the house to secure Bill's payment to Anne for her share of the house, plus to secure the other sums she had been awarded.[139]

In summary, although the court granted the divorce on both fault and no-fault grounds, at no point in their discussion of the property awards did Bill's cruel treatment arise. Anne's disproportionate award was based on the fact that she had

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[125] Id. at 556.
[126] Id. at 557.
[127] Id. at 557-558.
[128] Id. at 556.
[129] Id. at 557.
[130] Id. at 558.
[131] Kemp v. Kemp, No. 11-11-00292-CV, at 1, (Oct. 31, 2013).
[132] Id. at 1.
[133] Id. at 3.
[134] Id. at 4.
[135] Id. at 4.
[136] Id. at 5.
[137] Id. at 6.
[138] Id. at 6.
[139] Id. at 8.

loaned money to Bill out of her separate property. This is consistent with the pattern established by the cases listed above, to wit, even when fault is established it appears to carry minimal weight on any property division.

C. Cruel Treatment and Spousal Maintenance

The purpose of spousal maintenance is to provide temporary and rehabilitative support for a spouse whose ability for self-support has deteriorated over time while engaged in homemaking activities and whose capital assets are insufficient to provide support.[140] The guidelines to be used in determining the maintenance award include, but are not limited to, the financial resources, age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance; the education and employment skills of both spouses; and the comparative financial resources of the spouses.[141]

In Greco v. Greco, Barbara Greco appealed from a jury verdict finding that the evidence did not support a finding of cruel treatment against Louis, but did support a finding of her adultery against her, and did not grant her request for spousal maintenance.[142]

In support of her argument for cruel treatment against Louis, Barbara complained that Louis: (1) called her Ethel (the name of her sister-in-law); (2) teased her and the boys about presents that he had not purchased; (3) refused to spend time with his family; (4) called her a derogatory name after arriving home to find the house on fire; and (5) lacked concern about her welfare after the divorce. In response, Louis explained that he was only teasing his family, that he worked long hours and spent time helping his mother and brother, and that his concern was for his children rather than his adulterous wife. The appellate court concluded that the evidence was not so weak and against the great weight and preponderance of the evidence that the jury's failure to find cruelty as the basis of the divorce is clearly wrong and unjust.[143]

Barbara also argued the sufficiency of the evidence to support the jury's finding that "grounds exist for divorce on the basis of the adultery of Mrs. Greco." During her testimony, Barbara explained that she had a friendship with the boys' school coach and that on one evening, in April of 2005, she was drunk and had a one-time affair with the coach. Louis, who suspected infidelity, followed Barbara to her friend's house and actually caught, and videotaped, Barbara and the coach together. The court deferred to the fact-finder's determination with regard to credibility and weight to be given their testimony and concluded that the evidence was factually sufficient to support the jury's finding of adultery as a basis for the divorce.[144]

Finally, Barbara asserted that the trial court abused its discretion by failing to grant her spousal maintenance. The court explained, however, that there is a general presumption that spousal maintenance is not warranted "unless the spouse seeking maintenance has exercised diligence in: (1) seeking suitable employment; or (2) developing the necessary skills to become self-supporting during a period of separation and during the time the suit for dissolution of the marriage is pending."[145]

In the present case, there was no question that the parties were married for more than ten years. Each of the parties testified about their monthly expenses and income. Barbara was awarded $1,000 per month in child support, but testified that her monthly needs amounted to $4,000 per month. She also testified that she was currently earning approximately $6.00 per hour. The parties had joint possession of the children.[146] Moreover, the trial court awarded Barbara the money in her checking account and the joint savings account, 100% of the Nationwide Retirement Account (approximately $37,000) and 50% of the CPS retirement account. The trial court further found that Barbara possessed sufficient training, skills, and education to maintain gainful employment, did not have an incapacitating physical or mental disability, and the children did not require substantial care or personal supervision. Additionally, the trial court noted the jury's finding that the cause or contributing cause of the divorce was Barbara's adultery.[147]

True to form, the appellate court discussed fault, here being adultery, as a final note and afterthought rather than according it any great weight. Based on the appellate court's discussion, it could be concluded that Barbara's adultery was not a determinative factor in the finding that she would not receive spousal maintenance.

D. Cruel Treatment and Child Custody

In Ohendalski v. Ohendalski, Ronald appealed from the terms of the trial court's order regarding his rights to visitation with his children and the court's property division in the divorce decree.[148] Paula asserted cruel treatment, adultery,

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[140] O'Carolan v. Hopper. 71 S.W.3d 529,533 (Tex. App.-Austin 2002, no pet.).
[141] Tex. Fam. Code Ann. §8.052 (West 2014).
[142] Greco v. Greco, No. 04-07-00748-CV, 2008 WL 4056328, (Aug. 29, 2008).
[143] Id. at 6.
[144] Id. at 7.
[145] Id. at 7.
[146] Id. at 8.
[147] Id. at 8.
[148] Ohendalski v. Ohendalski, 203 S.W.3d 910, 912 (Tex. App. Sept. 28, 2006).

and insupportability as grounds for divorce.[149] The evidence regarding fault in the divorce concerned primarily Ronald's affair, his alcohol use, and his mistreatment of Paula during their marriage.[150]

Ronald stipulated to an extramarital affair. With respect to his alcohol use, Ronald denied that his alcohol consumption endangered the children. The trial court heard evidence that Ronald occasionally drank before or during times that he drove and that he commonly drank on weekends. Ronald's mother testified that she suspected Ronald was drinking while driving his children based on a conversation she had with Ronald two weeks prior when he called her from his cell phone. Paula also presented direct evidence that Ronald drank eight to nine beers per day and that he often drove while drinking.[151] The record also reflected testimony concerning several physical altercations between Ronald and Paula, including an incident when Ronald kicked her in the presence of one of the children, and several other incidents of Ronald's abusive treatment of Paula.[152]

Ronald complained that the possession order limits his "total access to the children to sixty-four hours per month without provisions for any holidays, summer visitation, birthdays or Father's Day." Ronald also complains that during the periods he has possession of the children, the order prohibits his operating a vehicle while the children are passengers.[153]

The court began its review of the record noting that the Family Code creates a rebuttable presumption in favor of the terms contained in the standard possession order. Next, they looked to the trial court's specific reasons for varying from the standard order.[154] Here, the trial court's findings reflect that the court deviated from the standard possession order because Ronald committed acts of family violence in the presence of one or more of the children; demonstrated a history of chronic alcohol abuse; terrorized one or more of the children by operating a vehicle while under the influence when the children were passengers; consumed alcohol during periods of supervised visitation; and agreed prior to the divorce to arrange transportation from his home to the children's home at the end of his periods of possession. [155]

The trial court's factual findings also appeared to be based in part on interviews it conducted of the children in chambers during the trial, which were not recorded pursuant to the agreement of all parties.[156] The appellate court stated that because they did not have the full record, they had to presume that the omitted portions support the trial court's ruling. The appellate court concluded that the trial court's interview of the children, together with the above-summarized evidence at trial, supported the trial court's deviations from the standard possession order.[157]

Not surprisingly, the discussion pertaining to the decision on the custody of the children made absolutely no mention of Ronald's adultery. With respect to his cruel treatment, the appellate court emphasized the effect of the cruel treatment on the children, as opposed to the cruel treatment towards Paula. They noted that his acts of family violence were in the presence of the children, and the effects of his alcoholism on his children. Apparently, his behavior towards and against his wife and marriage were nearly inconsequential.

VIII. ARE WE GETTING THIS RIGHT?

As the cases above seem to establish, wrongdoers in a marriage appear to get off the hook fairly easily. By failing to impose any significant penalties on wrongful spouses, are the courts allowing them to forsake the sanctity of the marriage union? Might this process even be encouraging such behavior? Is it fair for a wronged spouse to be denied the satisfaction of a disproportionate judgment in their favor for no other reason than the guilty party's conduct?

At one point, adultery was a crime in many states including Texas, and today in some states it still is.[158] There is a stigma attached to adultery, and the fact that it is or was a crime maintains that stigma.[159] In the military, adultery has a maximum punishment of a dishonorable discharge and confinement for one year, according to the Uniform Code of Military Justice.[160] In the past eight years, 30% of the commanders who were fired lost their jobs due to sexual misconduct, including adultery.[161] In some states, such as Michigan and Wisconsin, adultery is categorized as a felony. Surely, this is deterrence to anyone who worries about job security and the fear of having a felony on their record. In Massachusetts, an adulterer could face up to three years in jail.

Although the author does not believe that adultery should be a crime, or that it should be grounds for jail time, there is a good argument that courts should be more receptive of divorces pleaded on fault grounds than what the current trend

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[149] Id. at 912.
[150] Id. at 913.
[151] Id. at 913.
[152] Id. at 914.
[153] Id. at 915.
[154] Id. at 915.
[155] Id. at 915-916.
[156] Id. at 916.
[157] Id. at 916.
[158] Article 392 of the Texas Penal Code of 1857 provided that adultery was a crime punishable by fine. The prohibition against adultery continued for almost a century until it was finally repealed in 1973. *See* City of Sherman v. Henry, 928 S.W.2d 464,473 (Tex. 1996).
[159] Jolie Lee, *In which states is cheating on your spouse illegal?,* USA Today Network, http://archive.freep.com/article/20140417/FEATURES01/304170139/adultery-illegal-21-states.
[160] Id.
[161] Id.

appears to show. An innocent spouse should be entitled to some per se benefit in the form of property division. A person who is about to commit adultery may be more likely to think twice before doing so if the repercussions could be a more severe penalty on the property award in a divorce proceeding, than a person who knows that in today's era, trial courts often do not want to even hear about fault grounds, or if they do are unlikely to give them much weight. With the introduction of no fault divorce, attaining divorces is easier now than it was before. Why shouldn't the law create a deterrence for inappropriate behavior that breaks down the marriage unit? Instead an unhappy spouse has the remedy of easily obtaining a divorce on no-fault grounds without engaging in damaging behavior.

At a minimum, weight should be given to fault. Especially a benefit in property division should be clearly distinguished from any per se benefits pertaining to child custody. Child custody should continue to be determined on a case-by-case basis. While there are certain benefits to a public policy that encourages successful marriages, children should never be used as a weapon between angry and emotional spouses. No matter how innocent one party is, or how guilty the other is, children should not be used as tools to injure one party over another. Whether the current judicial trend of ambivalence towards fault is the appropriate path to take, it is doubtless that many in society wholeheartedly believe it is not.

IX. CONCLUSION

It clearly appears that fault grounds in divorce proceedings are becoming less and less prevalent. No-fault divorce is the dominant ground for divorce in today's no-fault world. The trier of fact is predominantly unmoved by allegations and evidence of fault. The courts do not want to hear about the victim or the wrongdoer any more than necessary, and fault will often bear little to no impact on a "just and right" division of property or the parent-child relationship.

Unfortunately, there is no way to tell how often or how seldom a fault ground is solely alleged and awarded. Appellate discussions do not provide a real record as to frequency with which fault divorces are granted. However, the pattern at the appellate level shows that if one party alleges fault only and the other countersues with a no fault ground, it is most likely that the no fault ground will prevail.

Discussion with practitioners and other knowledgeable sources, including law processors, indicate that the pleading of a fault ground, especially adultery, can be effective with some judges, but yield a negative response with other judges. A note to all woeful victims; if you are looking for justice against your wrongdoing spouse, you had better have more than just a fault claim to offer. It seems that unless the wrongdoer actually wasted community funds, or allowed the wrongdoing to directly affect the child, bringing a fault claim will bring no equitable relief. Under the current practice, the guilty party will leave the marriage with little damage, while the innocent party will be left to deal with the

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Conflicts Arising from Texas and International Divorce Judgments

By Paul Huang[162]

I. INTRODUCTION

It's often said that the world is getting constantly smaller and smaller. Products, ideas, and people are moving across borders with a speed and ease never thought to be possible just a century ago. This trend is exemplified when a university student from Singapore enters the United States with his family in order to participate in a Visiting Scholar's program, or when a family from Texas relocates to the United Arab Emirates for work at an oil production company. In 2012, the State of Texas by itself had 4,269,693 foreign born residents (that is 16.4% of the total population of Texas).[163] Regardless of one's position on immigration, this growing influx of people is now creating an increasing number of relationships between persons from separate continents and cultures. The movement of families into the United States and the creation of relationships between foreign residents are making it increasingly important for family law attorneys in Texas to understand the international legal issues that come with these new marriages, divorces, and child custody disputes.

It's unfortunate, but not too uncommon when that well known contract of "until death do us part" is breached before the promised termination date. This premature action heralds the legal battles for marital property and custody of the child. If the couple consists of two U.S. citizens living in Texas, the issue of choice of law is relatively uncomplicated. However, complications undoubtedly arise if at least one member of the couple is a foreign national, and decides he/she would rather have the divorce be subject to the laws of their home nation.

To illustrate the issues foreign nationals bring to Texas Family Law, it is helpful to examine a hypothetical family unit from Saudi Arabia that has relocated to Houston due to the husband's career. After living in Houston as Saudi citizens under a work vista for 2 years, the couple is blessed with the birth of a child who obtains U.S. citizenship at birth. After a couple more years, the couple is able to obtain permanent resident status in the United States. The family decides to buy a house and other pieces of property in Texas. During this time in the United States, the family has moved back and forth between Texas and Saudi Arabia. The mother and child may stay in Saudi Arabia for periods up to a year. Then, due

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[163] Migration Policy Institute, Section on State Immigration Data Profile, Texas http://www.migrationpolicy.org/data/state-profiles/state/demographics/TX (last visited Dec. 23, 2014).

to whatever reason, the couple decides to divorce. The husband immediately flies to Saudi Arabia and obtains a divorce judgment under the laws of Saudi Arabia.[164] The husband would have sought and been granted a Talaq divorce according to Saudi Arabia's interpretation of Islamic law.) In compliance with Saudi Arabian family law, the husband was granted the Talaq divorce without notifying the wife of any divorce proceedings in Saudi Arabia. He then brings the divorce judgment document back to Texas during the time that his wife is attempting to obtain a divorce judgment in Texas courts. The husband seeks to have the Saudi divorce decree, along with its property and custody decisions enforced in the Texas courts and have the wife's divorce claim dismissed.

In order to file for divorce in Texas, the person must show residency and domicile in Texas.[165] Domicile is a major issue for foreign nationals filing a divorce claim in Texas, especially if it's not clear how long the immigrant has lived in Texas or the continuity of their stay in Texas. For immigrants staying in the U.S. undocumented or under a visa, it is not impossible to obtain residency and domicile because the test for residence or domicile typically involves an inquiry into a person's intent, not legal status.[166] The residency and domicile requirement could preclude a person from filing divorce in Texas and thus be subject to the foreign decree. However, because this article focuses on the conflict of a foreign divorce decree with a Texas decree, for the purposes of the hypothetical, the wife is assumed to have fulfilled the domicile and residency requirement through living in Houston, Texas for 6 months. It is also important to note that under the Fourteenth Amendment of the United States Constitution and Art 1, Sec 19 of the Texas Constitution, notice is required in Family Law Proceedings.[167] Therefore, if no notice is provided and thus the opportunity to be heard is deprived from one of the parties, a divorce judgment in Texas is to be deemed improper and reversed by the courts.

When a marriage consisting of at least one foreign individual goes sour, and one of the partners file for divorce in a foreign country, the enforceability of that judgment in Texas involves several issues such as (1) whether the Full Faith and Credit Clause of the U.S. applies; (2) will the U.S. doctrine of Comity apply; and (3) will child custody issues be subject to different rules?

II. FULL FAITH AND CREDIT CLAUSE

One argument for enforcement of the foreign divorce judgment is through the Full Faith and Credit Clause or the Uniform Enforcement of Foreign Judgment Act.[168] The first doctrine is codified in the United States Constitution.[169] Full Faith and Credit on judicial proceedings from every other state means that the courts in each state should respect and enforce another state court's judgments as long as the statute, rule of law, or contract used to reach the decision does not run "so offensive to its view of the public welfare that it will refuse to enforce such."[170]

A. *Uniform Enforcement of Foreign Judgment Act*

The Full Faith and Credit Clause is codified in Texas under the Texas Civil Practice and Remedies Code as the Uniform Enforcement of Foreign Judgment Act (UEFJA).[171] The statute states that "A filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying a judgment as a judgment of the court in which it is filed."[172] The definition of a foreign judgment is to comply with the Full Faith and Credit clause.[173]

On face value, it would seem that the Full Faith and Credit Clause and the UEFJA would dictate that judgments from a foreign state, i.e., foreign nation, are to be treated with the same effect as a judgment from a Texas court. Therefore, in the Saudi family example, the Texas court should apply the UEFJA to the Saudi Arabian divorce judgment and thus enforce the judgment as if it was from a Texas court.

Furthermore, the husband's attorney will be able to raise the issue of res judicata in order to preclude the wife's divorce action in Texas Courts. Res judicata precludes relitigation of claims that have been finally adjudicated or that arise out of the same subject matter and that could have been litigated in the prior action.[174] In order for the doctrine to apply, there must be proof of; (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action.[175]

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[164] The details of a divorce subject under Saudi Arabia's interpretation of Sharia family law will be discussed in detail starting with Section III.A.
[165] Tex. Fam. Code Ann. § 6.301 (West 2013).
[166] *In re Green*, 385 S.W.3d 665, 669 (Tex. App. – San Antonio 2012, no pet).
[167] *Eschrich v. Williamson*, 475 S.W.2d 380, 383 (Tex. Civ. App.--Beaumont 1972, writ refused no reversible error).
[168] For purposes of this paper, the term "foreign" will be defined as from a foreign country, not from a U.S. state outside of Texas.
[169] U.S. Const. art. IV, § 1
[170] Reading & Bates Const. Co. v. Baker Energy Res. Corp., 976 S.W.2d 702, 714 (Tex. App.—Houston[1st Dist.] 1998, pet. denied). (The court in Reading & Bates Const. Co. v Baker Energy Resources Corp has clearly made a distinction between a judgment from a foreign country and a judgment from a foreign sister state. The court has for purposes of the UEFJA has defined the term "state" as meaning a sister state in the U.S.).
[171] Tex. Civ. Prac. & Rem. Code Ann. § 35.001 (West 2013).
[172] Tex. Civ. Prac. & Rem. Code Ann. § 35.003(c) (West 2013).
[173] Tex. Civ. Prac. & Rem. Code Ann. § 35.001 (West 2013).
[174] *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996).
[175] *Id.*

In the Saudi couple example, the second and third elements would be met for the husband's attorney. The second element requires that the parties in the prior judgment and the second action be the same. The identity of parties in both the Saudi divorce judgment and the Texas divorce action are the husband and wife. The third element requires that the claims raised in the second action be based on the same claims that were raised or could have been raised in the prior judgment. The wife's action in Texas courts is a divorce action, the same as the divorce judgment from Saudi Arabia. The issue of res judicata would be the first element, which requires a prior judgment on the merits by a court of competent jurisdiction. This element would rely upon the prior judgment being filed and enforced in a Texas court through the UEFJA. If the prior judgment is filed in the Texas courts, then res judicata would effectively preclude the wife's divorce action.[176] It is clear that res judicata applies to a final divorce decree to the same extent that it applies to any other final judgment.[177] "If an appeal is not timely perfected from the divorce decree, res judicata bars a subsequent collateral attack. Res judicata applies even if the divorce decree improperly divided the property. Errors other than lack of jurisdiction render the judgment merely voidable and must be attacked within the prescribed time limits."[178]

The deciding factor on whether res judicata applies to this example and precludes the wife's action in Texas courts is whether Texas will apply the Full Faith and Credit/UEFJA to the Saudi judgment. A judgment rendered by a foreign state is entitled to the same recognition and credit in Texas as it would receive in the state where it was rendered.[179] This does not mean a judgment from a foreign state cannot be contested in Texas courts. A party is able to contest the jurisdictional basis of the foreign state's court when rendering the prior judgment. If the foreign state's court did not have jurisdiction, then Texas will not apply the Full Faith and Credit doctrine.[180]

The general elements for finding jurisdiction are; (1) jurisdiction over the subject matter, (2) jurisdiction over the person or res, and (3) power to render the particular relief awarded.[181] The court will examine the issue of jurisdiction using the procedural laws of the foreign state.[182] If the UEFJA means U.S. state, then the Texas attorney would have to consult an attorney from the foreign state to understand the procedural rules for jurisdiction in that country.

Once again, the issue goes back to the scope of "foreign states" in the UEFJA. The definition of a qualifying foreign judgment is a judgment, decree, or order coming from a court that is entitled to Full Faith and Credit in Texas.[183] The UEFJA statute does not explicitly define whether a nation is included in the definition of foreign state. There are other applications of the term foreign state that does include foreign nations.[184] For purposes of the Foreign Sovereign Immunities Act (FSIA), the People's Republic of China is categorized as a foreign state. The FSIA definition of foreign state shows that there are applications where Texas has defined the term foreign state as encompassing foreign countries and nations. Have Texas Courts adopted the same scope of the term for the UEFJA?

Texas courts have consistently defined the scope of foreign states as including only states in the United States. The courts have distinguished foreign country judgments and sister states judgments. The case law is clear in that "Enforcement of foreign country judgments differs significantly from enforcement of sister state judgments which are constitutionally entitled to Full Faith and Credit."[185] Furthermore, Texas courts have consistently held that because a judgment from a foreign country is to be treated differently than U.S. states, the foreign judgments will not be subject to the binding effect and validity given to a judgment of a sister state through the Full Faith and Credit doctrine.[186] Although, the UEFJA statute does not explicitly define what the scope of foreign state includes, it does define foreign judgments as those judgments, decrees, or orders of a court of the United States or of any other court that is entitled to Full Faith and Credit in this state. Since Texas does not entitle judgments from foreign countries to the Full Faith and Credit clause, the UEFJA does not treat judgments from foreign countries as a foreign judgment subject to its standards of domestication.

However, Texas Courts' position of not applying Full Faith and Credit and the UEFJA to foreign country judgments does not entirely bar the domestication of judgments from foreign countries. The party with the foreign judgment is still able to petition the Texas courts for domestication of the judgment notwithstanding the court's refusal to apply the Full Faith and Credit clause and UEFJA. The primary difference between domestication through petitioning the court to do-

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[176] *Segrest v. Segrest,* 649 S.W.2d 610, 612 (Tex. 1983).
[177] *Id.*
[178] *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990).
[179] *Johnson v. Johnson,* 37 S.W.3d 523, 526-27 (Tex. App.—El Paso 2001, no pet.).
[180] *Id.* At 527
[181] *Id.*
[182] *Id.*
[183] Tex. Civ. Prac. & Rem. Code Ann. § 35.001 (West 2013)
[184] *In re China Oil & Gas Pipeline Bureau*, 94 S.W.3d 50, 55 (Tex. App.—Houston[14th Dist.] 2002, no pet.) (the appellant claim that it is undisputed that China Oil and Gas Pipeline is covered under the Foreign Sovereign Immunities Act because they are an agency or instrumentality of the foreign state, China. In footnote 3 of the opinion the court agrees that China Oil is a foreign state because it is owned by the foreign state, People's Republic of China.)
[185] *Reading & Bates Cost. Co.,* 976 S.W.2d 714
[186] *Schacht v. Schacht*, 435 S.W.2d 197, 202 (Tex. Civ. App.—Dallas 1968, no writ) *see also; Liverpool & London & Globe Ins. Co. v. Lummus Cotton Gin Sales Co.,* 6 S.W.2d 728 (Tex.Com.App., 1928)*; Ross v. Beall,* 215 S.W.2d 225 (Tex.Civ.App.--Texarkana 1948 writ refused no reversible error).

mesticate through comity and through the Full Faith and Credit clause/UEFJA is when the court applies the Full Faith and Credit clause, they subsequently will not inquire about whether the judgment goes against public policy. Moreover, once grounds for nonrecognition have been timely asserted, the foreign country judgment will not be recognized or enforced until those objections have been expressly overruled by the trial court.[187]

B. ***Uniform Foreign Country Money Judgment Recognition Act***

The Uniform Foreign Country Money Judgment Recognition Act (UFCMJRA) is separate from the Uniform Enforcement of Foreign Judgments Act (UEFJA). The UFCMJRA is outlined in the Texas Civil Practice and Remedies Code Chapter 36. The UFCMJRA provides for the domestication of a foreign country judgment pertaining to a monetary issue. A foreign country judgment is "a judgment of a foreign country granting or denying a sum of money other than a judgment for ... support in a matrimonial or family matter."[188] Recognition of a foreign country judgment is conclusive between the parties "to the extent that it grants recovery or denial of a sum of money."[189]

Since a divorce judgment contains monetary rewards, an argument for domestication of a divorce judgment from a foreign country is for the UFCMJRA to treat the divorce judgment as a foreign judgment for the purposes of the UFCMJRA. In *Sanchez v Palau,* this argument was tested in the Houston Court of Appeals when the appellant appealed a trial court's domestication of a 2008 Mexican divorce judgment filed by the appellee.[190] In trial court, the appellee successfully domesticated his Mexican divorce decree through the UFCMJRA by portraying his Mexican Decree as a monetary judgment subject to the UFCMJRA. In the appellate case, the appellant raised the contention that the Harris County Trial Court erred in domesticating the 2008 Mexican divorce judgment under the UFCMJRA because that statute does not apply to divorce judgments from foreign countries.[191] Furthermore, appellant alleged that the Mexican divorce decree did not contain any provisions granting or denying a sum of money.[192]

The court found that the Mexican court did not order any division of property and, since no culpability was found in the case, it did not assign any payment of cost and expenses.[193] During the trial, appellant argued that enforcement of foreign country judgments is limited to money judgments as provided in Chapter 36 of the Texas Civil Practice and Remedies Code, also known as the Uniform Foreign Country Money–Judgments Recognition Act (UFCMJRA).[194] The trial court domesticated the Mexican divorce decree through the UFCMJRA. The appellate court's reversed the trial court's ruling and rejected the appellee's request to domesticate the Mexican Divorce Decree. The court came to the ruling through application of the plain language of the UFCMJRA statute. The UFCMJRA's express terms clearly provide that it applies only to money judgments.[195] Since it was already established that the Mexican divorce decree did not order any division of property or assign any payment of costs or expenses, the UFCMJRA does not provide for domestication of the Mexican divorce decree.

The Houston Appellate Court has provided Texas attorneys with a clear-cut rule for cases where the foreign divorce decree does not include provisions related to division of property or payment of costs and expenses. However, the question remains as how will a Texas court apply the UFCMJRA to divorce decrees containing provisions containing directions on division of property and payment of costs/expenses? Returning to the Saudi Arabian couple discussed earlier, assume that the husband's divorce decree obtained from a Saudi Arabian court contained a provision ordering the house and one of the family automobiles to be awarded to the husband. Furthermore, the wife is to provide the husband with 25% of her annual income in order to support the husband and their child. The husband would not be able to domesticate the divorce decree through the UEFJA; instead, his attorney argues that since the divorce decree contains monetary judgments, it should be treated as a foreign judgment subject to domestication through the UFCMJRA.

The recognition and enforcement section of the UFCMJRA details the scope of the statute, explicitly stating that "a foreign country judgment that is filed with notice given as provided by this chapter, that meets the requirements of Section 36.002 and that is not refused recognition under Section 36.0044 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money."[196] The phrase "to the extent" can be interpreted as the UFCMJRA allowing domestication of only the parts of the foreign judgments relating to monetary judgments. This would prevent the UFCMJRA from barring the entire foreign judgment simply due to part of the judgment having provisions not relating to monetary awards. This language seems to open the UFCMJRA as an avenue to domesticate divorce decrees to the extent of property division and other monetary awards.

The UFCMJRA's definition section defines what is included and excluded in the definition of "foreign country judgment" for the purposes of the act. Foreign country judgment includes all judicial proceedings that grant or deny a sum

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[187] *Duruji v. Duruji*, No. 14-05-01185-CV, 2007 WL 582282, at *4 (Tex. App. Houston[14th Dist.] Feb. 27, 2007).
[188] Tex. Civ. Prac. & Rem. Code Ann. § 36.001(2) (West 2013).
[189] Tex. Civ. Prac. & Rem. Code Ann. § 36.004 (West 2013).
[190] *Sanchez v. Palau*, 317 S.W.3d 780, 781 (Tex. App.—Houston[1st Dist.] 2010, pet. denied).
[191] *Id.*at 785
[192] *Id.*
[193] *Id.* At 786
[194] *Id.*
[195] *Id.*
[196] Tex. Civ. Prac. & Rem. Code Ann. § 36.004 (West 2013).

of money, unless that sum of money is a tax, fine, other penalties, or support in a matrimonial or family matter. Apparently this restriction is designated to explicitly prevent domestication of provisions ordering a party to pay alimony or child support. A counter argument is the scope of support for matrimonial or family matter includes only payments towards the spouse and child before the dissolution of marriage. Furthermore, once the marriage is dissolved, any support afterwards is not to your family, since the family unit has been legally dissolved.

This argument is not likely to result in a favorable ruling. Section 8.051 of the Texas Family Code refers to post-divorce alimony as "spousal maintenance."[197] The statute uses the words "spousal" and "spouse" to refer to the couple even after they are divorced. Furthermore, in Section 71.005 of the Texas Family Code, when discussing protective orders and family violence, the court defines "family" as individuals who are former spouses of each other and individuals who are parents of the same child.[198] Nowhere else in the Family Code defines "family", therefore a court could adopt this definition for purposes of the UFCMJRA. It is highly probable that the courts will find that spousal maintenance fits into the UFCMJRA's exclusion of family and matrimonial support. If the court decides to do so, the UFCMJRA would not domesticate provisions that relate to alimony or child support and provisions not relating to a monetary decree. In the Saudi couple hypothetical, the potential provisions that could be domesticated through the UFCMJRA are reduced to the ones ordering division of property and payment of costs and expenses. The provision ordering the wife to pay 25% of her annual income for alimony will probably not be subject to domestication through the UFCMJRA. This is because the alimony order is a monetary award that is given in support of a matrimonial or family affair, and is thus excluded from the list of monetary awards subject to domestication through the UFCMJRA.

As for the other provisions, the UFCMJRA and case law are not so clear. In *Sanchez v Palau*, the appellant argued that divorce decrees as a whole are not to be subject to domestication under the UFCMJRA.[199] The court's main opinion ruled that Texas could not domesticate the Mexican divorce decree because it had no mention of division of property or payments of costs and expenses.

The *Sanchez* court, in footnote 15, refers to the 2005 revision of the Uniform Foreign Money Claims Act. The 2005 revision makes it clear that the act does not apply to a foreign-country judgment even though the foreign judgment grants or denies recovery of a sum of money, to the extent that the judgment is "a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations."[200] The 2005 revision would have courts exclude everything in judgments or orders relating to a divorce regardless of whether there is a monetary award involved. The Texas Legislature incorporated the UFCMJRA into the Texas Civil Practice and Remedies Code in 1981, well before the 2005 revision of the Uniform Foreign Money Claims Act.[201] To this day, the Texas Legislature has not revisited or revised Chapter 36 of the Texas Civil Practice Remedies Code to exclude divorce judgments from domestication through the UFCMJRA. In footnote 15 of the Sanchez opinion, the court declares that the reading of both "Chapter 36 of the Civil Practice and Remedies and the 2005 Uniform Foreign Money Claims Act leads to the conclusion that the UFCMJRA does not apply to a divorce decree from a foreign country."[202]

It can be argued that the Sanchez court's statements in footnote 15 are dicta and therefore should not be treated as binding precedent in Houston courts. The *Sanchez* court had the opportunity to interpret the Texas adaptation of the UFCMJRA to exclude all divorce awards as the reason for turning down the divorce judgment in their case. Instead, the court ruled to not domesticate the foreign divorce judgment because it didn't contain an order of division of property or payment of costs and expenses.[203] The court did include their opinion of the UFCMJRA in footnote 15, but by choosing to have the opinion in a footnote, and not in the deciding opinion, the court has left it to other courts or the legislature to resolve the issue. The 2005 revision of the Uniform Foreign Money Claims Act does not change the UFCMJRA codified in Texas statutes. The main argument for having the UFCMJRA domesticate foreign divorce decree provisions pertaining to monetary orders is that the Texas Legislature has not revised Chapter 36 of the Texas Civil Practice and Remedies Code. The Legislature has had 9 years to do so and during that time, it has not revisited the Act. Therefore, until the Texas Legislature explicitly adds the exclusion of divorce decrees from chapter 36, Texas courts should grant domestication of foreign country divorce decrees to the extent that the decree grants or denies a sum of money.

C. ***Uniform Interstate Foreign Support Act***

In instances where the foreign country's divorce decree includes a provision ordering child support, an attorney is potentially able to domesticate the child support decree through the Uniform Interstate Foreign Support Act (UIFSA). The UIFSA is codified in chapter 159 of the Texas Family Code.[204] Under the UIFSA, a party may register a child support or income-withholding order issued by a tribunal of another state for enforcement in Texas.[205] The statute defines "state" as

[197] Tex. Fam. Code Ann. § 8.051 (West 2013).
[198] Tex. Fam. Code Ann. § 71.005 (West 2013).
[199] *Sanchez v Palau,* 317 S.W.3d 7 786 n.15
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] Tex. Fam. Code Ann. § 159.101 (West 2013)
[205] Tex. Fam. Code Ann. § 159.601 (West 2013).

including a foreign country or political subdivision when that foreign country has: (1) been declared to be a foreign reciprocating country or political subdivision under federal law; (2) established a reciprocal arrangement for child support with this state as provided by Section 159.308; or (3) enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this chapter. [206]

There are currently 14 nations and 12 Canadian provinces (Quebec is holding out) with foreign reciprocating country (FRC) status under U.S. Federal Law.[207] If the foreign country does not fall within the list of 26 nations and provinces categorized as FRC, the country may have signed a separate agreement with the State of Texas. In the past, when the foreign country is not a FRC or a reciprocating country with Texas, an attorney had to prove to the court that the foreign country has established a law or procedures substantially similar to the Texas UIFSA.[208] Since September 29, 2014, Congress has voted on and the president has signed into implementation the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.[209] The Convention requires that all treaty partners have similar systems in place and, as a result, more children in the United States and abroad will be receiving more support, more expeditiously than ever before.[210] The bill implementing the Hague Convention of maintenance directs the states to implement the Uniform Interstate Foreign Support Act 2008, which contains revisions in order to comply with the Hague Convention. Texas has yet to do this, and so the law in Texas is still to follow the codified UIFSA in Chapter 159 of the Family Code.[211] This is expected to change in subsequent Texas legislative sessions.

Generally, an argument could be made that, in the event the court establishes the country as a qualifying state for purposes of the UIFSA, unless the Full Faith and Credit clause applies, the child support decree could still be attacked on jurisdictional issues.[212] The UIFSA does not expressly require that Full Faith and Credit be extended to qualifying foreign country judgments.[213] Although, even if Full Faith and Credit was extended to UIFSA judgments, Texas courts have held that when asked to give Full Faith and Credit to a foreign judgment, a Texas court may consider evidence that goes to the sister state court's personal or subject-matter jurisdiction over the parties.[214] Therefore, if the child support decree is from a foreign country that qualifies as a "state" for purposes of the UIFSA, the decree will be enforced in Texas if the foreign country had jurisdiction under Texas Family Code 159.201-211. Whether Full Faith and Credit applies is of no importance for the UIFSA.

III. DOCTRINE OF COMITY

An attorney attempting to domesticate a foreign country's divorce decree, who fails under the Full Faith and Credit Doctrine, is still left with the option of domesticating the divorce decree under the U.S. Doctrine of Comity.[215] The Doctrine of Comity in regards to international law traces its roots back to 1895 when Justice Gray of the U.S. Supreme Court laid the foundation for how courts in the U.S. will treat petitions for domestication under Comity.[216] In Texas courts, "comity has been described as "a principle of mutual convenience whereby one state or jurisdiction will give effect to the laws and judicial decisions of another.[217] It is important to differentiate Comity from Full Faith and Credit. Unlike Full Faith and Credit,

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[206] Tex. Fam. Code Ann. § 159.102(21) (West 2013).
[207] U.S. Dept of Health and Human Services, Office of Child Support Enforcement, Section on Foreign Reciprocating Countries, List of FRC http://www.acf.hhs.gov/programs/css/resource/foreign-reciprocating-countries (last visited Dec. 23, 2014) (The nations are Australia, Czech Republic, El Salvador, Finland, Hungary, Ireland, Israel, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland and, The United Kingdom of Great Britain and Northern Ireland
[208] Tex. Fam. Code Ann. § 159.102(21) (West 2013)
[209] Kerry, John, *President Obama Signs Implementing Legislation for the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance,* 2014, U.S. Dept. of State, http://www.state.gov/secretary/remarks/2014/09/232337.htm (last visited Dec. 26, 2014)
[210] *Id*.
[211] Uniform Law Commission, Section Interstate Family Support Act Amendments (2008) http://www.uniformlaws.org/Act.aspx?title=Interstate%20Family%20Support%20Act%20Amendments%20%282008%29 (last visited Dec. 26, 2014).
[212] *In re E.H.*, No. 14-13-00622-CV, 2014 WL 5380088, at *4 (Tex. App.—Houston[14th Dist.] Oct. 23, 2014, pet. requested) (According to the Attorney General, application of full faith and credit principles should have defeated Shlomo's challenge to the jurisdictional recitations in the Israeli record.) .
[213] *In re E.H.*, No. 14-13-00622-CV, 2014 WL 5380088, at *3 (Compare Tex. Fam.Code § 159.603(b) ("A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state."), with Tex. Civ. Prac. & Rem.Code § 36.004 (the "Uniform Foreign Country Money–Judgment Recognition Act") (providing that a foreign country judgment which satisfies the statutory requirements "is enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit")).
[214] *Id*.
[215] *Hilton v. Guyot*, 16 S.Ct. 139, 167(1895)
[216] *Id*. at 163-64; ('Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.)
[217] *Gannon v. Payne*, 706 S.W.2d 304, 306 (Tex. 1986)

> Comity is not a rule of law but a principle of mutual convenience whereby one state or jurisdiction will give effect to the laws and judicial decisions of another. It operates not as a matter of obligation but only out of deference and respect. Thus, appellant is not entitled to the application of comity as a matter of right but only as a courtesy if the trial court in its discretion chooses to do so. The failure to do so in the present case is neither error nor an abuse of discretion." [218]

The issue that comity brings to a family law attorney presented with a divorce decree of a foreign country is when will a court domesticate the divorce decree and when will a court reject domestication of the decree. Since the doctrine of comity has yet to be codified by the Texas Legislature, the guidelines on when it applies must be determined through case law. Generally, courts in the United States will domesticate the foreign divorce decree through comity if both parties were given notice of the divorce proceedings and the foreign court had jurisdiction over the couple to issue a divorce judgment.[219]

Obstacles blocking an attorney's path to enforcement of a foreign divorce decree in Texas is the challenge of showing that both parties had notice of the judicial proceedings or that the foreign country had jurisdiction over the parties. *Schacht v Schacht* provides a good example for a divorce decree that failed to meet both requirements. In *Schacht v Schacht*, the court ruled that the divorce decree from Mexico was not entitled to Full Faith and Credit under the UFJEA. Furthermore, the court still examined whether the Mexican court had jurisdiction and whether the wife had notice of the Mexican divorce proceedings.[220] It can be assumed that if the court found those two issues met, then they would have found the divorce decree to be enforceable under Texas law. The wife was suing for marriage annulment on the grounds that her husband never divorced his first wife.[221] The husband alleges that he obtained a divorce decree from a Mexican court and thus his current wife has no grounds for annulment.

The *Schacht* court was faced with a Mexican divorce during a time when U.S. couples looking for a quick divorce were heading to Mexico to take advantage of that country's lax rules on jurisdiction and notice.[222] Schacht admitted that prior to the time he obtained a divorce in Mexico, he did not obtain any consent in writing from his wife to the Mexican divorce; that he has no recollection that he ever served his wife with any notice, citation, process or other legal papers of any kind from any court in the Republic of Mexico with respect to the divorce proceedings instituted by him; that he never obtained a signed power of attorney from her in connection with the attempt to get a Mexican divorce; and that he has no recollection that he did or did not hire an attorney to represent his wife in the Mexican divorce proceedings.[223] Schacht also admitted to not living in the Mexican state of Juarez for at least 6 months, and for only living in Juarez for the purposes of obtaining a Mexican Divorce Decree. Faced with these facts, the *Schacht* court refused to treat the divorce as valid in Texas through the Doctrine of Comity.[224]

Mexico has since "enacted prohibitive and complex residency requirements in the early 1970s, making Mexico a poor option for those seeking a quick dissolution of their marital ties."[225] Examples of such requirements include a statement from the Mexican Interior Department proclaiming the individual is a lawful resident. Because of these restrictions, few non-Mexicans will find it practical to attempt to obtain a Mexican divorce.[226]

The Mexican divorce cases are important for practicing Texas attorneys because they provide a good framework for the arguments against quick divorces from foreign countries or territories. There remain other countries with a divorce system similar to Mexico's before the 1970's, such as the Dominican Republic and the territory Guam, which do not require domicile as long as there is notice and a bilateral agreement.[227] Similar to Mexican Divorce Decrees, the Texas courts will deny enforcement of divorce decrees from those countries/territories if the practitioner can show that the court did not require notice or did not have jurisdiction over the parties.

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[218] *New Process Steel Corp. v. Steel Corp. of Texas*, 638 S.W.2d 522, 524 (Tex. App.—Houston[1st Dist.] 1982, no writ)
[219] U.S. Dept. of Interior Affairs, Bureau of Consular Affairs, Section Divorce Abroad Legal Affairs, http://travel.state.gov/content/passports/english/abroad/events-and-records/divorce/divorce-legal-issues.html (last visited Dec. 24, 2014)
[220] *Schacht*, 435 S.W.2d 202
[221] *Id.* at 199; After the husband obtained his Mexican divorce from the first wife, he married and then divorced Bunny Christmas prior to marrying the plaintiff in this case
[222] Phillips, Leane, *Divorcing Overseas: Hot Spots for Quickie Divorces*, 2009, Legalzoom, https://www.legalzoom.com/articles/divorcing-overseas-hot-spots-for-quickie-divorces (last visited Dec. 23, 2014)
(Between 1940 and 1960, there were approximately 500,000 quickie Mexican divorces. There were cases from the period where it would take a total of only 3 hours to get a divorce. Not all of the divorces required notice to the other party in order for the divorce to be granted)
[223] *Schacht*, 435 S.W.2d 199
[224] *Id.* at 202 (Under all of these undisputed facts the Mexican court was without jurisdiction to render judgment entitled to recognition in the courts of Texas.)
[225] Phillips, Leane, *Divorcing Overseas: Hot Spots for Quickie Divorces*, 2009, Legalzoom, https://www.legalzoom.com/articles/divorcing-overseas-hot-spots-for-quickie-divorces (last visited Dec. 23, 2014)
[226] Law Offices of Jeremy D Morley, International Family Law, Section Divorce in Mexico: Report from the US Embassy in Mexico http://www.international-divorce.com/d-mexico.htm (last visited Dec. 24 2014)
[227] Phillips, Leane, *Divorcing Overseas: Hot Spots for Quickie Divorces*, 2009, Legalzoom, https://www.legalzoom.com/articles/divorcing-overseas-hot-spots-for-quickie-divorces (last visited Dec. 23, 2014)

A. ***Public Policy***

An attorney faced with the opposing counsel attempting to enforce a foreign divorce judgment through comity is able to argue that the judgment runs afoul of public policy. A foreign divorce will not be recognized by comity where it was obtained under circumstances that offend the public policy of the state in which recognition is sought.[228] The most common public policy issues for family law are standards for deciding child custody and due process/discrimination of one of the parties.

The Saudi couple hypothesis is susceptible to a public policy argument; the reason being that a divorce judgment and child custody judgment under Saudi family law would deprive the wife of equal protection and due process rights provided for by Texas law.[229] Similar to other nations in the Middle East, Africa, and South East Asia, the legal system of Saudi Arabia is based upon Sharia law, also known as Islamic law.[230] The Sharia courts in Saudi Arabia govern over criminal and civil matters such as marriage, divorce, child custody, and inheritance. Courts in the U.S. have routinely refuse to enforce or give comity to laws from other jurisdictions and religious laws that conflict with the public policy of the state.[231]

This article does not allege practitioners in Texas should petition for a court to not apply comity simply because the divorce judgment is from a legal system that is based upon Sharia law. Instead, the practitioner should weigh the facts case by case in order to make the argument that the judgment deprived the client of due process or the child custody order goes against the standard used in Texas.

B. ***Notice***

One argument against applying comity to a divorce judgment from a Sharia court is that the female client never received notice. In countries with a legal system derived from Sharia, a husband is able to declare and obtain a Talaq divorce from the wife without giving the wife notice.[232] The application of the Talaq divorce differs from country to country. The common element to the Talaq divorce is the proclamation of Talaq three times in order to divorce. In one case involving a Pakistani talaq divorce, a Pakistani husband residing in Maryland was able to obtain a Talaq divorce by going to the Pakistan Embassy in Washington D.C. and executing a written document that stated;

> Now this deed witnesses that I the said Irfan Aleem, do hereby divorce Farah Aleem, daughter of Mahmood Mirza, by pronouncing upon her Divorce/Talaq three times irrevocably and by severing all connections of husband and wife with her forever and for good.
> 1. I Divorce thee Farah Aleem
> 2. I Divorce thee Farah Aleem
> 3. I Divorce thee Farah Aleem.[233]

There are some countries such as Egypt, Saudi Arabia, and recently Pakistan that proscribe a one-month period in between the three proclamations of Talaq.[234] There is a form of Talaq divorce that still persists in India where the husband is able to proclaim the triple Talaq in one sitting.[235] The Talaq divorce form written earlier is an example of the triple talaq in one sitting. The talaq in one sitting is especially problematic for the wife because the husband would only need to go to the court/consulate and instantly obtain a divorce from the wife. A wife may go to sleep married one night and wake up the next day divorced, completely without any chance of notice or opportunity to defend her property. If the talaq was over the course of 3 months, although it is not necessary for there to be notice to the wife, it is more likely the wife would be able to discover the talaq divorce proceedings.

However, whether it was over a period of 3 months or in one sitting, the Talaq divorce still provides the husband with the unilateral ability to divorce the wife, without any notice. In order for the wife to declare and obtain a Talaq divorce, the husband must have had allowed it in the marriage contract. The Talaq divorce effectively deprives the wife of any notice and opportunity to litigate the divorce action.[236] This does not mean since a foreign divorce was a Talaq divorce there was no notice. If the facts show that the wife was given notice of the divorce, and had the opportunity to litigate, then no

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[228] *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 668 (Tex. App.--Dallas 2010, review granted)(Because comity is grounded in cooperation and mutuality, Texas should extend comity by recognizing the laws and judicial decisions of other states unless: (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances; or (2) the foreign statute produces a result in violation of this state's own legitimate public policy)

[229] It is important to note that this paper does not endorse or condemn the application of Sharia law in Texas courts. Sharia law is used as an example of how a foreign divorce decree could run counter to Texas public policy. The same could be said for any legal system with similar characteristics of sharia law.

[230] U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor, Section Country Reports on Human Rights Practices Saudi Arabia 2004 http://www.state.gov/j/drl/rls/hrrpt/2003/27937.htm(last visited Dec. 23, 2014)

[231] *In re Marriage of J.B. & H.B.*, 326 S.W.3d 668; *see also Aleem v. Aleem*, 404 Md. 404, 418 (Maryland 2008); *Telnikoff v. Matusevitch*, 347 Md. 561, 576 (Maryland 1997)

[232] *Aleem* 404 Md. at 422

[233] *Id.* at 407

[234] Farhat, Hena, *Muslim women group demands ban on 'Triple Talaq in one sitting'*,2013, Ummid.com http://www.ummid.com/news/2013/October/22.10.2013/triple-talaq-should-be banned.html#sthash.4MEmuSRW.dpuf (last visited Dec 23, 2014)

[235] *Aleem, 404 Md. at 422*

[236] *Id.*

notice should not be an issue for comity.[237] The bottom line is a Talaq divorce should be given special care by Texas practitioners because there is potential for issues with notice.

C. ***Due Process***

In Pakistan[238], another country that governs family law actions under a legal system derived from Sharia law, when there is a Talaq divorce, there is no requirement for the equitable division of property unless the marriage contract provided for it.[239] This aspect of Talaq divorces coupled with notice not being required, deprives the wife of her property without due process. A Maryland court has found that Talaq lacks any significant "due process" for the wife, and its use moreover, directly deprives the wife of the "due process" she is entitled to when she initiates divorce litigation in this State. The lack of due process ran counter to Maryland's public policy that "the property interests of the spouses should be adjusted fairly and equitably."[240] Furthermore, the Maryland court found that "the talaq divorce of countries applying Islamic law, unless substantially modified, is contrary to the public policy of this state and we decline to give talaq, as it is presented in this case, any comity." The court came to this conclusion from the comparison of property division rights the wife is entitled to between a Pakistani and Maryland Divorce.[241] Michigan Courts have taken up the same position in *Tarikonda v. Pinjari*.[242] The Michigan appellate court held that talaq violates Michigan public policy because, upon divorce, Islamic law allows women to recover only the property that is in their names while Michigan law provides for an equitable division of the marital estate.[243]

Recently, Texas had the opportunity to address the validity of a talaq divorce.[244] In *Ashfaq*, the husband and wife married in Pakistan and lived there for a few months before the husband returned home to Fort Worth. The wife remained in Pakistan for almost two years before she was granted a U.S. visa and was able to join the husband in the U.S. Less than one unhappy year later, the couple returned to Pakistan for a wedding, and the husband had the wife's parents take her to their home. The husband announced to the wife his intention to divorce her and returned to Fort Worth. After the Pakistani divorce was final, the wife moved to Houston. The husband subsequently returned to Pakistan to marry another woman who returned to Fort Worth with the husband. About a month after the husband's second marriage, the wife filed for divorce in Houston.

At trial, the husband's expert witness testified that under Pakistani divorce law, a resident may obtain a Pakistani divorce. A resident is anyone who retains Pakistani citizenship regardless of where the resident currently lives. It was undisputed that the wife was a Pakistani citizen and the husband had dual U.S. and Pakistani citizenship. To obtain a divorce, the husband must pronounce "talaq" ("I divorce you") three times and then provide notice to his wife and the Chairman of the Union Council. This provides the wife an opportunity to seek reconciliation through an Arbitration Council. If, after 90 days, the parties have not reconciled, they are divorced. Additionally, if the husband offers and the wife accepts return of her dowry, the wife has indicated her acceptance of the divorce and cannot later deny its validity. The expert testified that the husband followed the requirements laid out by Pakistani law to obtain a divorce. The wife admitted to receiving a copy of the divorce papers before the divorce was finalized, and the wife's family accepted the return of her dowry before the divorce was finalized. At the conclusion of the trial, the trial court determined that the Pakistani divorce was valid, dismissed the divorce for want of jurisdiction, and treated the remainder of the wife's pleading as a post-divorce petition for division of assets, upon which it entered a judgment.

The wife appealed, arguing that Texas had sole jurisdiction over the parties' divorce because the parties lived in Texas, that the Pakistani divorce should not have been recognized, and that the husband failed to comply with Pakistani law in procuring the divorce. The wife further argued that Pakistani divorce law denied her due process, was fundamentally unfair, and violated public policy.

The *Ashfaq* court affirmed the trial court noting that the U.S. federal government recognizes the above described procedure for divorce as valid proof of marital status for immigration purposes. Moreover, the federal government presumably must have found this Pakistani divorce valid because it issued Husband's new wife a visa.

In the event that a talaq divorce judgment attempts to divide the marital estate, unlike in *Ashfaq*, Texas courts should consider adopting the Maryland and Michigan position on domestication of talaq divorce judgments. The courts found

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[237] *See Ashfaq v. Ashfaq*, 2015 WL 1925832, No. 01-14-00329-CV (Tex. App.—Houston [1st Dist.] 2015 no pet.)(wife claimed notice not timely, but admitted receiving divorce papers and accepting return of her dowry).

[238] Cases involving Pakistan Talaq are good precedent for Talaq divorces worldwide because the issues presented in the Talaq divorce may apply to Talaq divorces in other countries. While each country following Islamic Law have a different interpretation of the Talaq divorce, many of the public policy issues such as lack of notice, due process, and gender discrimination are found in varying degrees in their Family Law Code.

[239] *Id*. (Additionally, the Pakistani statutes proffered by petitioner as establishing that all of the property titled in his name, however and whenever acquired, is his property free of any claim by the wife arising out of the marriage.)

[240] *Id*. at 423

[241] Id. at 425 (the 'default' under Pakistani law is that Wife has no rights to property titled in Husband's name, while the 'default' under Maryland law is that the wife has marital property rights in property titled in the husband's name. We hold that this conflict is so substantial that applying Pakistani law in the instant matter would be contrary to Maryland public policy.")

[242] *Tarikonda v. Pinjari*, No. 287403, 2009 WL 930007, at *3 (Mich. Ct. App. Apr. 7, 2009)

[243] Id. (Given this difference between the Muslim personal law in India and Michigan law, affording comity to the Indian divorce would again ignore the rights of citizens and persons under the protection of Michigan's laws.)

[244] *See Ashfaq v. Ashfaq*, 2015 WL 1925832, No. 01-14-00329-CV (Tex. App.—Houston [1st Dist.] 2015 no pet.)

that the conflict between the property division laws in the state court and foreign court was substantial enough for the talaq to violate their public policy.[245] A Texas family law practitioner should argue that the Texas property division laws are substantially different from their talaq counterparts; different enough for the talaq property division decree to run counter to Texas public policy. Chapter 7 of the Texas Family Code states Texas's public policy towards awards of marital property as "the court shall order a division of the estate of the parties (i.e. community property) in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage." The Texas Legislature has followed this public policy when they established the community property system. When awarding the marital property to the spouses, the judge will take into account many factors such as the nature of the community estate, the disparity of the earning power of the parties, and the size of the parties' separate estates, the spouses' capacities and abilities, relative physical conditions, business opportunities, and relative financial conditions.[246] Out of all those factors, the talaq policy of recovering only property under the wife's name ignores almost all of the factors stated. If the talaq policy was to be added to the possible factors in Texas, it is very possible that it would conflict with every single factor the court is statutory obligated to use. Thus, Texas courts should not apply comity, when presented with a talaq divorce awarding all property under the name of the husband to the husband.

D. *Discrimination*

Under the Texas Constitution equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.[247] This statute is very similar to Maryland's Equality Protection Act in Article 46 of the Maryland Declaration of Rights.[248] The Maryland court proceeded to find that the talaq system's requirement that the wife needs the husband's consent for her to declare a Talaq divorce while the husband may unilaterally obtain one runs counter to the Maryland Constitution and therefore also against Maryland's public policy. The similarities of the Maryland and Texas equal protection clauses indicate that Texas courts should adopt the same view on Talaq divorces where the husband unilaterally obtains the divorce.

As for the Saudi Arabian couple hypothetical even if Saudi family law proclaims an equal opportunity to obtain the Talaq, the wife is provided with notice, and she litigates the issue, the argument is persuasive that the Texas Equality Under the Law statute would preclude comity from applying. The legal system in Saudi Arabia will treat testimony from one man as equal to two women.[249] Moreover, it is general practice for the court to require the female to deputize a male to speak on her behalf.[250] If wife or one of her witnesses does not follow the Muslim faith, the judge may discount testimony from that person.[251] These policies directly run counter to Texas's guarantee of equality under the law for the genders and all religions. Practicing family attorneys should argue against domestication and enforcement of divorce decrees governed by this and like structured legal systems through the doctrine of comity for the reason that the gender and religious discriminations in those legal systems run counter to the Texas Constitution and public policy.

IV. CHILD CUSTODY

The hypothetical involving the Saudi family unit, has the child being born in the United States and with U.S. citizenship. Nevertheless, jurisdiction over child custody in Texas is not decided based upon citizenship, but rather which jurisdiction is the home state of the child.[252] The home state is the state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding.[253] If the child in the hypothetical family unit has been living in Texas for six consecutive months before the wife filed a divorce action in a Texas court, then Texas would be the child's home state and Texas would have jurisdiction over any issue over child custody. Issues would arise in the hypothetical if the father took the child with him to Saudi Arabia for a few months immediately prior to the mother filing for divorce and child custody in Texas.

When Texas is not the home state, attorneys practicing Texas family law encountering child custody order from a foreign country, must examine the issue of enforceability through the lenses of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA has been codified into the Texas Family Code in Chapter 152.[254] The UCCJEA does require that Texas give Full Faith and Credit to a child custody order issued by another state.[255] However, it

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[245] *See Aleem,* 404 Md. at 425; *Tarikonda,* No. 287403, 2009 WL 930007, at *3
[246] *Matter of Marriage of Moore*, 890 S.W.2d 821, 842 (Tex. App.—Amarillo 1994, no writ)
[247] Tex. Const. art. I, § 3a (West 2013)
[248] *Aleem,* 404 Md. at 422;(Equality of rights under the law shall not be abridged or denied because of sex).
[249] U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor, Section Country Reports on Human Rights Practices Saudi Arabia 2004 http://www.state.gov/j/drl/rls/hrrpt/2003/27937.htm (last visited Dec. 23, 2014)
[250] *Id.*
[251] *Id.*
[252] Tex. Fam. Code Ann. § 152.201 (West 2013)
[253] Tex. Fam. Code Ann. § 152.102 (West 2013)
[254] Tex. Fam. Code Ann. § 152.101 (West 2013)
[255] UCCJEA Family Code 152. A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under Subchapter C § 152.313. Recognition and Enforcement)

would be a mistake to assume that since Full Faith and Credit applies it is necessary to examine only jurisdiction and notice.

The UCCJEA has a section on the international application of chapter 152. Section 152.105(a) explicitly states that "a court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this subchapter and Subchapter C.[256] This provision subjects child custody orders from foreign countries to the same jurisdictional analysis that orders from U.S. states must go through in Subchapter C. What sets international child custody orders separate from just a Full Faith and Credit analysis of jurisdiction and notice are the next two provisions.

Section 152.105(b) states that "except as otherwise provided in Subsection (c), a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under Subchapter D."[257] Does this provision require that child custody orders substantially conform to the standards of a Texas child custody judgment? In Texas courts, the standard used is the "best interest of the child." Under Family Code Section 153.002, "The 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."[258] The standard in some legal systems follow a rule where the child is to stay with mother until he becomes of age, and then custody rights are transferred to the father.[259] This standard relies exclusively on gender to decide what is in the best interests of the child. The question is then whether Section 152.105(b) excludes these child custody orders from enforcement under the UCCJEA in Texas. Section 152.105(b) likely deals only in jurisdictional issues. Jurisdictional issues includes whether the foreign country was the proper home state or if not the home state, whether it meets the alternative jurisdictional requirements. Jurisdictional issues do not include whether the standard of child custody applied to the foreign child custody order is similar to Texas's standard. An attorney would have difficulty convincing a court to not domesticate a child custody order based solely upon the argument that the standard applied did not substantially conform to the best interest of the child standard applied in Texas.

Section 152.105(c) states, "A court of this state need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights."[260] Is this where the attorney should raise the issue of the standard being substantially different from the Best Interest of the Child standard? An attorney should argue that a standard that relies upon gender stereotypes amounts to gender discrimination and thus violates fundamental principles of human rights. This is the argument that a husband used in a Dallas appellate court when appealing the trial courts enforcement of his wife's child custody order obtained in Egypt.[261] The court first found that Egypt had jurisdiction and that the husband was properly served with notice. The husband argued since Egyptian law has an irrebuttable presumption that the child is to remain with the mother until he or she is 10 years old, an enforcement of that Egyptian law would violate the Equal Rights Amendment of the Texas Constitution.[262] Furthermore, the husband argued that his rights to due process under the United States Constitution and the Constitution of the State of Texas were violated because he failed to receive notice of the lawsuit. He also argued that to enforce the laws of Egypt would be a clear violation of the standards of human rights.[263]

The court did not rule on whether there was a violation of fundamental principles of human rights. The court overruled this issue because the record does not reflect that the husband raised this argument at the hearing. His point on appeal is not the same as any argument raised in the trial court, and thus the husband has failed to preserve error for review.[264] By avoiding a ruling, the court preserved the issue for litigation in future cases.

The UCCJEA does not define "fundamental principles of human rights so it is up to the courts to give us the standard for purposes of the UCCJEA. The fact that the legislature chose such strong language indicates that the standard will not be easily met. If the child custody laws of a country violate fundamental principles of human rights, there will be significant international backlash consisting of at minimum a study done by a government or at the most a formal declaration by a government. The case law in the United States has significantly sided with refusing to vacate a foreign child custody order based solely upon the argument that the country where the order was obtained has violated fundamental principles of human rights when issuing the order.[265]A child custody standard that relies on gender stereotypes is not likely to fulfill the rendering of a child custody order unenforceable under 152.105(c).

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[256] Tex. Fam. Code Ann. § 152.105(a) (West 2013)
[257] Tex. Fam. Code Ann. § 152.105(b) (West 2013)
[258] Tex. Fam. Code Ann. § 153.002 (West 2013)
[259] Cyra Akila Choudhury, *Shari'ah Law As National Security Threat?,* 46 Akron L. Rev. 49, 72 (2013) (Under Islamic law, child custody follows what might be construed as a combination of the "tender years" doctrine and the Roman conception of patria potestas.133 That is to say, that upon divorce, children of a young age are left with the mother until they reach a certain age at which time the father gains custody.)
[260] Tex. Fam. Code Ann. § 152.105(c) (West 2013)
[261] *In re Y.M.A.,* 111 S.W.3d 790, 791 (Tex. App.—Dallas 2003, no pet.)
[262] *Id.*
[263] *Id.* at 792
[264] *Id.*
[265] *See, Toland v. Futagi,* 425 Md. 365, 391, 40 A.3d 1051, 1066 (2012), cert. denied, 133 S. Ct. 265, 184 L. Ed. 2d 45 (2012); *See also Matter of Yaman*, No. 2013-781, 2014 WL 5798586, at *7 (N.H. Nov. 7, 2014); *S.B. v. W.A.,* 38 Misc. 3d 780, 810, 959 N.Y.S.2d 802, 826 (Sup. Ct. 2012)

V. CONCLUSION

When presented with litigation to enforce a divorce decree and child custody order from a foreign country, a Texas attorney will have many issues to consider. First, the attorney should look into the applicability of the Full Faith and Credit doctrine to the divorce decree. If the Full Faith and Credit doctrine applies to the divorce decree, then the only issues the attorney would need to consider are jurisdiction and notice. A divorce decree is not entitled automatically to Full Faith and Credit through the Uniform Enforcement of Foreign Judgment Act. However, there is an argument for and against the monetary award provisions of the divorce decree to have Full Faith and Credit apply through the Uniform Foreign Country Money Judgment Recognition Act. If the divorce decree contains an order for child support, the Uniform Interstate Foreign Support Act would apply.

If there is no Full Faith and Credit, the attorney must then look into whether the court will domesticate the judgment through comity. If there is jurisdiction and notice, the court will generally enforce the judgment, although there are arguments against application of comity in special circumstances. When the divorce decree seems to exclude the client of rights available under Texas laws, the attorney is able to make a public policy argument. Public policy arguments available to the attorney include due process and discrimination.

In instances when there is a child custody order with the divorce decree, the attorney must follow the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). Full Faith and Credit is given to the UCCJEA and foreign countries are treated as U.S. states for the purposes of the UCCJEA. However, foreign countries are subject to some additional requirements that the attorney must consider. The most notable of the requirements is that the child custody order must not violate fundamental principles of human rights. The standard for this requirement seems to be very high and for most circumstances will not be met.

DIVORCE
COLLABORATIVE LAW

WIFE ESTABLISHED FACT ISSUE AS TO WHETHER HUSBAND BREACHED COLLABORATIVE LAW AGREEMENT BY FAILING TO DISCLOSE DEVELOPMENTS AFFECTING HIS INCOME.

¶15-5-01. *Rawls v. Rawls*, No. 01-13-00568-CV, 2015 WL 5076283 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (08-27-15).

Facts: During their divorce, Husband and Wife entered a collaborative law agreement and reached a settlement agreement. In the settlement agreement, Wife was entitled to portions of Husband's bonuses over the next few years. However, Wife later discovered that before the settlement agreement was signed, Husband received a job offer and resigned from his job. Although a non-compete period prevented him from immediately taking the job offer, he was able to accept the job after a 90-day period elapsed. Wife alleged that, during negotiations, Husband suggested modifications to the settlement agreement that appeared innocuous to Wife at the time but were designed to deprive Wife of any of Husband's future bonuses.

Wife filed a bill of review attacking the decree and a petition for enforcement. The trial court granted a Husband's partial motion for summary judgment. During a bench trial, the parties disputed whether the summary judgment disposed of all of Wife's claims. The trial court signed a final judgment stating that the summary judgment disposed of the majority of Wife's claims and denied the remainder. Wife appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: The disclosure provision in the parties' collaborative law agreement required Husband to disclose "all developments affecting…[his] income." However, Husband failed to disclose that prior to signing the settlement agreement, he received a job offer, resigned from his current job, and was told that he could inquire about the offer again after his 90-day non-compete period elapsed. Thus, there was a genuine issue of material fact regarding whether Husband breached the collaborative law agreement.

Additionally, Husband owed a duty to Wife that arose from the collaborative law agreement. While represented parties in a divorce generally do not owe a fiduciary duty to one another, Wife presented fact issues as to whether Husband breached his fiduciary duty pursuant to the collaborative law agreement and committed fraud by non-disclosure.

A summary judgment cannot dispose of claims not addressed in a motion for summary judgment. Because Husband did not address Wife's bill of review, petition for post-divorce division, and enforcement claims based on non-disclosure, the trial court erred in granting summary judgment on those claims.

To successfully challenge a summary judgment on appeal, an appellant must address each argument that could support the summary judgment. Here, however, Wife only addressed one of Husband's many urged grounds. Therefore, to the extent summary judgment was granted on claims addressed in Husband's motion for summary judgment, Wife waived her claims.

Finally, when the trial court excluded evidence regarding the applicable tax rate of the 2009 bonus, Wife made an offer of proof. The court of appeals held that the excluded evidence was necessary to show whether Wife's contention was correct, and if so, to calculate her award. Thus, the trial court erred in excluding the evidence.

Editor's comment: *Compare Pribyl v. Pribyl, 307 S.W.3d 882 (Tex. App. - Austin 2010, no pet.), a collaborative law case involving undisclosed assets, in which the Austin court dismissed a cause of action for breach of a collaborative law agreement as "an impermissible collateral attack" on a final judgment. J.V.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TRIAL COURT MAINTAINED INHERENT POWER TO AWARD ATTORNEY'S FEES AS A SANCTION DESPITE MSA PROVISION THAT EACH PARTY WOULD BE RESPONSIBLE FOR HIS OR HER OWN FEES.

¶15-5-02. *Clements v. Clements*, No. 13-13-00560-CV, 2015 WL 3523028 (Tex. App.—Corpus Christi 2015, no pet. h.) (mem. op.) (06-04-15).

Facts: Husband and Wife reached an MSA in their divorce proceedings that addressed all the legal issues between them. Additionally, the MSA provided that each party would be responsible for his or her own attorney's fees. After a hearing, the trial court orally rendered judgment granting the divorce and incorporating the MSA. Wife requested attorney's fees pursuant to Husband's delay in proceedings of an already settled case. The trial court denied Wife's request, noting the MSA prohibited such an award. The trial court instructed Wife's counsel to present the court with a separate final decree of divorce incorporating the MSA. About two months later, Wife presented the trial court with a final decree and a request for attorney's fees incident to the motion for entry of judgment. Wife's attorney testified as to attorney's fees caused by Husband's delay in signing the final decree. The trial court signed the final decree and granted Wife's request for attorney's fees related to her pursuit of entry of final judgment. Husband appealed.

Holding: Affirmed

Opinion: Because the MSA provided that each party would be responsible for his or her own attorney's fees, the trial court was prohibited from granting attorney's fees as it related to the divorce. However, an award of attorney's fees as a sanction is within the trial court's inherent powers. Here, after the trial court orally rendered judgment granting the divorce, Husband's actions delayed getting the written judgment entered, caused Wife delay in finalizing the sale of a house, and caused Wife to incur further legal fees. Further, the award was not excessive because Wife's counsel testified as to the amount of fees that specifically correlated to the work in getting the divorce decree signed.

WIFE PRESENTED FACT ISSUE AS TO WHETHER HUSBAND'S POST-MSA BONUS WAS COMMUNITY PROPERTY SUBJECT TO DIVISION OR WAS "FUTURE EARNINGS" PARTITIONED BY MSA.

¶15-5-03. ***Loya v. Loya*, ___ S.W.3d ___, 2015 WL 4546398, 14-14-00208-CV** (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (07-28-15).

Facts: Husband and Wife were married for almost thirty years. During the marriage, Husband worked for a company that provided discretionary annual bonuses. A few months after receiving a bonus, the parties signed an MSA, which served as "an immediate partition" of all future earnings of the parties. Shortly thereafter, Wife moved to set aside the MSA, asserting there was no meeting of the minds because the parties had not reached an agreement as to the division of Husband's next bonus, a portion of which pertained to services rendered prior to the signing of the MSA. The trial court denied Wife's motion and signed a final decree incorporating the terms of the MSA. Wife did not appeal the decree.

Less than a year later, Husband received his $4.5 million bonus, and Wife filed an original petition for post-divorce division of property. Husband moved for a partial summary judgment on the ground that the bonus had been partitioned by the MSA. Wife responded that a genuine issue of fact existed as to whether the bonus was subject to division. The trial court granted Husband's partial summary judgment, heard evidence on attorney's fees, and then signed a final judgment. Wife appealed.

Holding: Reversed and Remanded

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

The parties' MSA expressly partitioned only "future earnings" and had no impact on the characterization of earnings prior to the execution of the MSA. Additionally, because there is no bright line rule for bonuses, Wife presented a fact issue as to whether some portion of Husband's bonus was community property undivided by the MSA.

Dissenting Opinion: (C.J. Frost)

The parties' MSA provided that "All future earnings…are partitioned to the person providing the services giving rise to the earnings." When drafting the divorce decree, the parties disagreed about this provision, and after arbitration, the following language was used in the decree: "All future income and earnings are partitioned as of June 13, 2010…" The arbitrator's provision also included an exception for the purpose of calculating tax liability for the year of the parties' divorce. The plain meaning of "income" and "earnings" as defined by Black's Law Dictionary and the Texas Family Code encompassed Husband's post-MSA bonus. Even if a portion of the bonus could be characterized as community property, the parties partitioned that community property in their MSA.

WHETHER OR NOT MSA WAS AMBIGUOUS, TRIAL COURT LACKED DISCRETION TO SET ASIDE STATUTORILY COMPLIANT MSA.

¶15-5-04. *In re Lauriette*, No. 05-15-00518-CV, 2015 WL 4967233 (Tex. App.—Dallas 2015, orig. proceeding [Mandamus pending in Texas Supreme Court]) (mem. op.) (08-20-15).

Facts: Father and Mother had one Child during their marriage. During their divorce proceedings they attended mediation and signed a binding MSA. The MSA provided that Father would pay to Mother monthly post-divorce maintenance payments for 72 months. The MSA further provided that if Father became the sole managing conservator because Mother moved outside of a specified geographical area, the monthly "alimony" payments would be terminated. The "alimony" would not terminate upon death of Father, cohabitation of Mother, or marriage of Mother. The final decree was to be prepared consistently with the Texas Family Law Practice Manual ("TFLPM"). There was no arbitration provision, but the MSA provided that they would return to mediation if they disagreed about the drafting of the final decree.

Mother and Father could not reach an agreement regarding the tax treatment of the alimony. Mother argued that the payments would terminate "only if" Father became sole managing conservator under the conditions described above. Father argued that because the decree was to be prepared consistently with the TFLPM, and because the MSA did not explicitly provide otherwise, the payments terminated upon Mother's death.

At a hearing on the parties' motions—Mother's motion to enter her version of a decree and Father's motion to set aside the MSA—Father presented evidence that a prior version of the MSA included a provision that the payments would not terminate upon Mother's death, but that provision was deleted from the final, signed MSA. The trial court determined there was an ambiguity as a matter of law and that it could not assess the parties' intent regarding tax treatment. Thus, the trial court granted Father's motion to set aside the MSA.

Mother filed a petition for writ of mandamus complaining that the trial court abused its discretion by setting aside a statutorily compliant MSA. Father argued that because the parties had already re-attempted mediation—as provided in the MSA—and failed to resolve the issue, and because the trial court could not determine the parties' intent, the only remaining solution was to set aside the MSA.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Relying on *Milner v. Milner*, 361 S.W.3d 615, 619 (Tex. 2012), the court of appeals determined that because the MSA Texas Family Code's statutory requirements, the trial court lacked the authority to set it aside. Unlike *Milner*, the parties here had not agreed to binding arbitration in the event of a dispute regarding the terms of the MSA. Therefore, the trial court was still the trial of fact and had a duty to resolve any remaining fact questions before entering a final decree.

The court of appeals offered no guidance as to whether the MSA was ambiguous, or if it was not, which parties' interpretation was correct.

The court of appeals noted in a footnote that—although not at issue in this case—mediated settlement agreements are not enforceable when they are illegal in nature or procured by fraud, duress, coercion, or other dishonest means.

Editor's Comment: *The COA's opinion leaves more questions than it answers. A petition for writ of mandamus has been filed with the Texas Supreme Court and that Court has requested a response. Hopefully, the Supreme Court will clarify how a trial court should resolve an ambiguous MSA when it cannot determine the parties' intent. G.L.S.*

DIVORCE
DIVISION OF PROPERTY

DIVISION OF MARITAL ESTATE MANIFESTLY UNJUST BECAUSE TRIAL COURT ERRONEOUSLY INCLUDED THE SAME MORTGAGE TWICE.

¶15-5-05. *Zarnesky v. Zarnesky*, No. 03-13-00692-CV, 2015 WL 3918513 (Tex. App.—Austin 2015, no pet. h.) (mem. op.) (06-24-15).

Facts: After the final contested hearing in the divorce proceedings, the court directed Husband and Wife to prepare a list of agreed community assets and debts. The parties were able to reach an agreement on most of the estate and submitted an exhibit to the court evidencing their agreement. The trial court entered a decree that incorporated the agreement and divided the remaining disputed assets. However, upon discovering an error in the parties' exhibit, Husband moved for a new trial, which the trial court denied. The error was a duplication of the mortgage on a home awarded to Wife. In the debts section of the exhibit, the mortgage was listed correctly. However, in the assets section, rather than listing the market value of the home, the exhibit listed its net value. Husband argued that by listing the net value, the mortgage was included twice, which caused the trial court to underestimate the proportion of the estate it had awarded to Wife. Thus, Husband argued, the trial court abused its discretion in ordering a division that was so erroneously disproportionate as to be manifestly unjust.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: While a trial court has discretion to make an unequal division of the marital estate, there must be a reasonable basis for an unequal division. Here, neither party sought an unequal award, and Wife's only asserted ground for divorce was insupportability. After accounting for the error in the exhibit, Wife received a significantly greater share of the marital estate, which was not supported by the evidence of a reasonable basis.

PASTOR-HUSBAND'S NET INCOME INCLUDED "GIFTS" RECEIVED FROM HIS CHURCH; PARTIES' HOUSE NOT PART OF COMMUNITY AND NOT SUBJECT TO DIVISION BECAUSE HUSBAND'S ONE-SPOUSE DEED OF HOUSE TO CHURCH BECAME OPERATIVE ONCE WIFE'S HOMESTEAD INTEREST WAS DIVESTED BY FINAL DECREE.

¶15-5-06. *West v. West*, No. 01-14-00350-CV, 2015 WL 4251159 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (07-14-15).

Facts: Husband was a pastor of a church. During the marriage, the church wanted to give Husband a house, but it could not obtain financing. Instead, Husband purchased a house, and the church provided him with an annual $50,000 housing allowance. After purchasing the house, Husband and Wife deeded the house to the church. Subsequently, when interest rates dropped, the church wanted to refinance the mortgage on the house, but it was still unable to obtain financing. Thus, the church deeded the house back to Husband and Wife, who refinanced the mortgage. Subsequently, Husband deeded the house back to the church, but Wife did not sign that deed.

In its final decree of divorce, the trial court divided the assets relatively equally, with Husband receiving the house and Wife receiving a number of bank accounts. Husband appealed, arguing that the trial court erred in including the house in the property division.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Whether a homestead is the separate property of either spouse or community property, neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse except as otherwise provided by law. A one-spouse homestead transaction is not void but is inoperative while the property remains the non-signing spouse's homestead. On the termination of a homestead, title passes to the grantee.

Here, Husband's conveyance of his interest in the house was not void, but it was inoperative against Wife's homestead claim to the house. However, once the trial court, in its final decree, divested Wife of her interest in the property, Husband's deed to the church became operative. Thus, the house was not part of the community estate subject to division. Further, the house was the party's largest asset in the trial court's property division. Thus, the entire division had to be

remanded to the trial court for a new just and right division.

Editor's Comment: *Forget the homestead part, didn't the house remain community property since Wife did not sign the deed? How can the court say "the evidence establishes that the house was not part of the community estate subject to division?" Could not the court have awarded the house to Wife had it decided to? J.V.*

HOUSE WAS ONLY VALUED ASSET, SO NET VALUE OF COMMUNITY ESTATE CORRESPONDED TO EQUITY IN HOUSE; AWARD OF HOUSE TO WIFE WAS AWARD OF 100% OF THE COMMUNITY ESTATE, BUT NO REASONABLE BASIS EXISTED FOR DOING SO.

¶15-5-07. ***Kaftousian v. Rezaeipanah***, ___ S.W.3d ___, 2015 WL 4389581, 08-14-00019-CV (Tex. App.—El Paso 2015, no pet. h.) (07-17-15).

Facts: During their divorce proceedings, Husband and Wife each testified as to the composition of the marital estate. The evidence established that the parties had significant debt, that each was living paycheck-to-paycheck, and that their house was encumbered by two mortgages. Wife wanted to live in the house for eight years—until their Child was grown—after which time, she intended to sell the house and give Husband his share of the proceeds. Husband wanted to sell the house immediately in order to pay the Parties' debts. After the bench trial, the court awarded Wife the marital residence and mortgages and divided the remaining assets and debts equally. Husband appealed, arguing that the trial court's division was manifestly unjust because it awarded a disproportionate share to Wife without a reasonable basis for doing so.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Based on the evidence presented at trial, the community estate consisted of the home, the two cars, two mortgages, and two car notes. The only evidence regarding value was related to the house. Therefore, the entire basis of the trial court's value of the community estate was the net value of the home, which was awarded 100% to Wife. The trial court granted the divorce on the ground of insupportability, and there was no evidence justifying a disproportionate award to Wife.

BECAUSE PARTIES' AGREEMENT TO USE CERTAIN VALUATION EXPERT DID NOT PROVIDE THAT THE EXPERT'S VALUE WOULD BE FINAL AND BINDING, HUSBAND WAS ENTITLED TO RETAIN HIS OWN ADDITIONAL VALUATION EXPERT TO TESTIFY.

¶15-5-08. ***Stearns v. Martens*****,** ___ S.W.3d ___, 2015 WL 5092497, 14-13-00094-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (08-27-15).

Facts: Husband had a pool business before marriage. During the marriage, the business was incorporated and shares were issued separately to Husband and Wife. Husband actively served in the army, and before one of his deployments, Husband and Wife executed a stock transfer agreement in which Wife purchased Husband's stock for $10. The agreement did not contain the term "gift," "partition," "separate property," "separate use," or "separate estate." During their divorce, Husband and Wife disputed both the character and the value of the stocks.

The issue of character was tried to a jury. After Wife presented her case-in-chief and rested, she moved for a directed verdict, which the trial court granted in part—finding that 49% of the stocks were Wife's separate property. The jury found the other shares were community property.

The remaining issues, including the value of the stocks, were tried to the bench. The parties had agreed to use an appraiser who valued the stocks at slightly under $500k. However, Husband additionally retained another appraiser who valued the stocks at $1.6 million. Wife objected to the testimony of Husband's expert because the parties had agreed to use a single expert. The trial court sustained her objection and excluded Husband's expert's testimony.

Additionally, Wife requested monetary sanctions for Husband's failure to attend court-ordered mediation. Wife complained that every time the case required Husband's direct participation, he claimed he could not participate because he was serving in the military.

In its final decree, the trial court found that 49% of the stocks were Wife's separate and 51% were community property; used the agreed expert's value for the stocks; and ordered Husband to pay sanctions for his failure to attend mediation.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A trial court should not render a verdict against a party before that party has had a full opportunity to present his case and has rested, except under certain exceptions not present here. Thus, the trial court erred in granting a directed verdict against Husband before he had an opportunity to present his case-in-chief. Moreover, because the stock transfer agreement contained no recital stating anything about gift or separate property, Husband was entitled to use parol evidence regarding the parties' intent behind the stock transfer agreement.

The trial court granted a motion to give the parties 30 days to agree on an appraiser of Husband's business, which they did. However, neither the trial court nor the parties stated that the appraiser's valuation would be final and binding on the parties. Moreover, the trial court signed a docket control order providing for a deadline for the designation of experts. Husband timely designated a second expert and timely provided an expert report from that expert. Thus, the trial court erred in excluding the testimony of Husband's expert.

While the Servicemembers Civil Relief Act should be construed liberally to accomplish its purpose, it should not be used as a device to delay the proper and expeditious determination of legal proceedings. Section 521 of that Act allows a defendant to seek a stay when he has not made an appearance. Here, Husband had filed an answer and counterpetition. In seeking a stay under Section 522, the movant must provide a letter from his commanding officer stating the duties preventing appearance. Here, Husband provided two letters, but neither was from his commanding officer. Thus, the trial court did not err in denying Husband a stay and in finding his failure to attend the court-ordered mediation was sanctionable.

Editor's Comment: *"According to basic principles of trial procedure, a trial court should not render a directed verdict against a party before that party has had a full opportunity to present the party's case and has rested." 'Nuff said. J.V.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

TRIAL COURT RETAINED AUTHORITY TO ENFORCE JUDGMENT AFTER PLENARY POWER EXPIRED, BUT TRIAL COURT COULD NOT ENTER ENFORCEMENT ORDER INCONSISTENT WITH JUDGMENT.

¶15-5-09. *Bhardwaj v. Pathak*, No. 05-14-01030-CV, 2015 WL 4882522 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-17-15).

Facts: Husband and Wife divorced in California. The decree ordered that a property in Texas was to be sold and the proceeds divided equally between the parties. Wife domesticated the California judgment in Texas. Subsequently, Wife obtained a California order to aid in enforcing the California judgment, which she filed in Texas. In response to Wife's request, the Texas trial court entered an enforcement order appointing a receiver to sell the property and deliver the proceeds to Wife. Husband appealed the Texas enforcement order and raised a number of issues related to the Uniform Enforcement of Foreign Judgments Act, whether Texas had personal jurisdiction over him, whether California had jurisdiction over the Texas property, and whether the Texas Court properly applied the Full Faith and Credit Clause.

Holding: Affirmed as Modified

Opinion: Filing the enforcement order only enforced the already domesticated Texas judgment and did not affect the appellate timetable. Thus, by the time the enforcement order was entered, Husband had already missed the deadline to appeal the underlying judgment. Additionally, his notice of appeal was to the enforcement order. Thus, the court of appeals could not address the majority of Husband's complaints.

A trial court retains authority to enforce its judgment after its plenary power expires. However, once its plenary power has expired, the trial court cannot make orders inconsistent with its final judgment. The underlying judgment ordered that proceeds be divided equally between Husband and Wife. Thus, while the trial court could enter orders enforcing the sale of the house pursuant to the underlying judgment, it could not order the proceeds be delivered solely to Wife.

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

DESPITE HAVING A MEDICAL DEGREE, WIFE ESTABLISHED THAT SHE LACKED RESOURCES TO PROVIDE FOR HER MINIMUM REASONABLE NEEDS AND THAT SHE HAD BEEN DILIGENT IN IS SEEKING SUITABLE EMPLOYMENT; DISABLED HUSBAND ORDERED TO PAY SPOUSAL SUPPORT.

¶15-5-10. *In re Marriage of Boyd*, No. 07-14-00211-CV, 2015 WL 3941614 (Tex. App.—Amarillo 2015, no pet. h.) (mem. op.) (06-24-15).

Facts: Husband and Wife had been married about 21 years. When they married, Husband was an anesthesiologist, and Wife was in med school. After completing, med school, Wife took the board certification exam 11 times but was unable to pass. Thus, she never obtained a license to practice medicine. During the marriage, Father developed significant health issues related to weight gain. He applied for disability under multiple policies and at the time of divorce, he was unemployed but receiving non-taxable $28,689 per month plus social security disability payments. As Husband's disabilities worsened throughout the marriage, Wife spent most of her time tending to Husband's basic necessities and basic life functions. Wife only held three jobs during the marriage, the first of which was phased out, the second was discontinued, and the third was a contract position after which she was not rehired. When the divorce process began, Wife made efforts to find work in California, where she planned to live.

After a trial, the court entered a decree that provided for spousal maintenance payments to Wife of $3200 per month. Husband appealed arguing that the evidence was insufficient to support findings that Wife was unable to earn sufficient income to provide for her needs, that the property awarded to her in the decree was inadequate to provide for her needs, or the amount of her reasonable financial needs.

Holding: Affirmed

Opinion: Although Wife had a medical degree, she was never able to pass the licensure examination and had never been able to practice medicine. Additionally, she was 51-years old, only had sporadic employment outside the home during the 21-year marriage, and she had fallen behind on basic computer skills. Wife spent much of the marriage caring for Husband, which caused her to become functionally unemployable.

Wife had contacted a former employer about future opportunities, checked internet job-posting boards daily, and had spoken with headhunters. Wife had purchased two self-help books to improve her basic computer skills. Wife testified that if she took her social security early, her total monthly income would be $900 per month. She further testified that her monthly expenses were well over $10,000 a month, not including the mortgage. Husband did not controvert this evidence; in fact, he estimated her minimum reasonable needs to be $15,000 per month. Finally, although Wife was awarded significant property in the divorce, most of that property was non-liquid and would require time before cash value could be realized or would carry significant tax consequences if accessed. Additionally, although the marital home had been on the market throughout the divorce proceedings, it had received no offers.

WIFE'S CHILD SUPPORT OBLIGATION BASED ON MINIMUM WAGE WAS INCONSISTENT WITH CONCLUSION THAT WIFE'S DISABILITY WARRANTED AN AWARD OF SPOUSAL MAINTENANCE.

¶15-5-11. *K.T. v. M.T.*, No. 02-14-00044-CV, 2015 WL 4910097 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (08-13-15).

Facts: Husband and Wife had two children. Wife alleged that she was unable work due to physical pain for which she took medication. There was evidence that Wife was addicted to pain medication, doctor shopped, and filled her prescriptions more often that recommended. While in Wife's possession, one of the Children once texted Husband to tell him that Wife was passed out but not dead. Ultimately, Wife was awarded only limited supervised possession of the Children.

The community estate was comprised mostly of debt. One of the only valuable assets was Husband's deferred compensation account. Husband testified that the account was set up for the purpose of paying for the Children's college education and was a gift to the Children. The trial court found that the account was a gift and did not include it in the division of the estate. The trial court awarded Husband control of the account to be used solely for the Children's educations.

Wife testified that her monthly expenses exceeded $14,000 not including monthly rent. Husband testified that Wife lived beyond her means and that he had paid over $200,000 in temporary spousal support while the divorce was pending. The trial court awarded Wife spousal maintenance of $1,250 per month for one year. Additionally, Wife was ordered to pay child support based on minimum wage.

Wife appealed raising a number of issues, including the failure to include the deferred compensation account in the division of the community estate, the award of spousal maintenance, and her child support obligation.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (C.J. Livingston, J. Dauphinot) Although Husband testified that the deferred compensation account was set up for the purpose of paying for the Children's college educations, the account was still in his name, and future distributions were to be made to Husband. Additionally, there was no evidence of a divestiture of ownership indicating a gift. While the evidence supported a disproportionate division in Husband's favor, it did not support giving Wife 86%–76% of the community debt while giving Husband the only liquid asset that could potentially be used to pay off debt.

There is no requirement that an award of spousal maintenance eliminate a shortfall between monthly income and expenses. However, by determining that Wife was entitled to spousal maintenance—presumably due to her inability to be employed as a result of her drug addiction—the award of spousal maintenance was incongruous with the award of child support. That the trial court implicitly found that Wife was unable to support herself and that child support should be set based on Wife earning minimum wage was inconsistent.

Concurring and Dissenting Opinion: (J. Gabriel) When reversible error materially affects the just and right division of the community estate, the appellate court must remand the case for a new division. Because the majority held that the trial court erred in finding that the deferred compensation account was a gift to the children and that the failure to include it resulted in an inequitable division of the community estate, the majority should not have addressed Wife's remaining property-related issues.

Further, the majority reached its determination regarding spousal support based on speculative inferences derived from the trial court's actual findings.

Editor's Comment: *In this case, the trial court held that a noncustodial parent who receives maintenance because of an inability to work cannot be ordered to pay child support. How far can that holding be extended to other cases? Can a spouse receiving maintenance ever be ordered to pay child support if the recipient spouse is unable to meet his or her minimum reasonable needs despite being employed? J.V.*

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SAPCR
STANDING AND PROCEDURE

MATERNAL GREAT-AUNT NOT REQUIRED TO ENTER PLEADINGS OR PRESENT EVIDENCE PRIOR TO TRIAL COURT APPOINTING HER SOLE MANAGING CONSERVATOR.

¶15-5-12. *In re R.A.*, No. 10-14-00352-CV, 2015 WL 3646528 (Tex. App.—Waco 2015, no pet. h.) (mem. op.) (06-11-15).

Facts: After the Child was severely burned, his Mother and her boyfriend failed to seek medical treatment for almost a day. The Child was removed and placed with his four siblings, who were residing with the Child's Maternal Great-Aunt. By the time the case got to trial, TDFPS concluded that termination of Father's parental rights was not in the Child's best interest, but that the Maternal Great-Aunt should be appointed the Child's managing conservator. The Maternal Great-Aunt was not made a party to the proceedings, but she was present at the final hearing. The trial court entered an order following TDFPS's recommendations. Father appealed, arguing the trial court erred in appointing the Maternal Great-Aunt as sole managing conservator because she had no affirmative pleadings on file and did not present any evidence.

Holding: Affirmed

Opinion: The Family Code provides that the Department can recommend a relative be named managing conservator in its permanency plan. Father presented no authority supporting his claim that a relative who had been recommended for placement by TDFPS would be required to file her own pleadings or present evidence. Rather, TDFPS as petitioner, bore the burden to establish that Father should not have been named managing conservator and that the Maternal Great-Aunt should have been. TDFPS's pleadings and evidence was sufficient to support the trial court's appointment.

SAPCR
PATERNITY

DISCOVERY RULE DID NOT TOLL FOUR-YEAR STATUTE OF LIMITATION TO CHALLENGE PATERNITY; MISREPRESENTATION EXCEPTION OF TEX. FAM. CODE § 160.607(b) DOES NOT APPLY RETROACTIVELY.

¶15-5-13. ***In re S.T.***, ___ S.W.3d ___, 2015 WL 3646990, 02-15-00014-CV (Tex. App.—Fort Worth 2015, no pet. h.) (06-12-15).

Facts: During Husband and Wife's marriage, one Child was born. Husband, and Texas law, presumed he was the father of the Child. Wife never gave Husband any reason to think otherwise. However, as the Child grew older, Husband began to suspect that the Child's father was not his. Husband filed for divorce and denied his paternity of the Child. Husband sought genetic testing and named an unknown father as a respondent to the suit. Wife countersued and asserted that Husband's denial of paternity was barred by the statute of limitations. Husband filed a third-party petition against Wife's lover seeking money damages in an amount equivalent to unpaid child support. Husband and Wife entered a Rule 11 agreement, in which they agreed that Husband would not be adjudicated to be the father of the Child in the final decree, and he would have no duties with respect to the Child, including the duty of child support. The agreement also provided that if Wife ever received child support from the Child's father, Husband would be entitled to one-third of the funds received. Wife's lover filed an objection to the Rule 11 agreement, arguing that adjudicating Husband not to be the Child's father violated public policy. Wife's lover also filed a counterclaim for a declaratory judgment that Husband's attempt to challenge his paternity was barred by a four-year statute of limitations. After a hearing, the trial court entered an agreed Order for Stipulation of Facts that incorporated Husband and Wife's Rule 11 agreement. Wife's lover filed a petition for writ of mandamus. Husband filed a response asserting that the discovery rule applied and that Wife's deception prevented him from asserting a claim within the four-year statute of limitations. Husband argued that Tex. Fam. Code § 160.607(b), which had been amended more than four-years after the Child was born to include just such an exception, was merely a codification of the existing common law.

Holding: Writ of Mandamus Conditionally Granted

Opinion: When the Child was born, Tex. Fam. Code § 160.607(b) did not include an exception providing for inaction due to deception. The legislative addition of such an exception was not added until after the Child was four years old. Thus, the statutory exception was unavailable to toll the statute of limitations.

The discovery rule has never been applied in a situation involving a presumed father and the conception of a child during the marriage. Thus, there was no common law discovery rule that could have tolled the four-year statute of limitation.

Because the legislature had not yet endorsed the misrepresentation exception, Wife's lover had a vested right to rely on the four-year statute of limitations. Public policy favors preserving an established family unit where there has been a long-term relationship between a child and a presumed father.

Even though the Order for Stipulations of Facts did not directly purport to impose liability on Wife's lover or adjudicate him to be the father of the Child, the stipulation was contrary to the court of appeals' holding that the limitations period had run. Thus, Husband and Wife could not bind Wife's lover—a third party to the proceeding—by stipulation.

Moreover, under the statutory scheme of Texas Family Code Chapter 160 Subchapter G contemplated that a child would not be left without a means of support, either by a presumed father or an adjudicated father. Husband and Wife's stipulation attempted to contravene that statutory scheme.

CHILDREN'S FATHER COULD NOT RELY ON COURT ORDER CHANGING HIS GENDER IDENTITY TO MALE TO CONFER STANDING TO ADJUDICATE PARENTAGE.

¶15-5-14. ***In re Sandoval***, ___ S.W.3d ___, 2015 WL 4759972, 04-15-00244-CV (Tex. App.—San Antonio 2015, orig. proceeding) (08-12-15).

Facts: Some of the facts below come from the first case involving these parties: *In re N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (03-11-15).

Father was born female but self-identified as male and had been raised as a boy. When Father and Mother met, Mother knew that Father had been born female. The two began a romantic relationship, and during the relationship, Mother adopted two Children as newborns, the second adoption occurring when the first Child was two-years old. The Children referred to Father as their father, and Father was known as the Children's father to family, friends, school officials, and church officials. When the Children were six- and four-years old, Father quit his job to be a stay at home parent. Three years later, Mother and Father separated, and Father moved out of the family home. He continued to care for the Children after school, in the mornings, and on weekends. Nearly three years later, Mother refused to allow any contact between Father and the Children. About a week later, Father obtained an order to legally change his female birth name to the masculine name he had gone by since he was a Child. A few weeks later, Father filed a SAPCR seeking joint managing conservatorship and equal periods of possession and access. Father subsequently filed a voluntary statement of paternity. Father then obtained an order changing his identity from female to male. Mother filed a motion to dismiss Father's petition for lack of standing, which the trial court granted. Father appealed, asserting standing under Tex. Fam. Code § 160.602(a)(3), § 102.003(a)(8) and (9), and under the common law doctrines of *in loco parentis*, unconsionability, estoppel, and psychological parent.

The court of appeals determined that because Father was not a "man" at the time that he filed his SAPCR, he lacked standing under both Tex. Fam. Code § 160.602(a)(3) and Tex. Fam. Code § 102.003(a)(8). Additionally, Father lacked standing under Tex. Fam. Code § 102.003(a)(9) because, after their separation, which occurred almost three years before he filed suit, Father was not as involved with the actual care, control, and possession of the Children.

Moreover, Father failed to show that he had standing under the asserted common law doctrines. *In loco parentis* has never been applied when the actual parent has maintained custody of the child. Further, Father cited no authority that unconscionability or estoppel were independent grounds for standing. Finally, Father pointed to no Texas law recognizing the concept of psychological parent.

Five days after losing that appeal, Father filed a second suit to adjudicate parentage, asserting standing under Tex. Fam. Code § 102.003(a)(8). Father asserted he was "a man alleging himself to be the father of minor children." Mother again filed a plea to the jurisdiction, which the trial court denied. The trial court entered temporary orders allowing Father possession of the Children, appointing an amicus attorney, and enjoining the parties from initiating any adoption proceedings. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: In 2009, the Tex. Fam. Code § 2.005(b)(8) was added to allow a court order relating to an individual's sex change to be an acceptable form of identification to establish a person's identity and age for the purpose of obtaining a marriage license. The San Antonio Court of Appeals refused to extend the applicability of this section to confer standing to maintain a suit to adjudicate parentage under Tex. Fam. Code § 160.602(a)(3).

SAPCR
CONSERVATORSHIP

FINDING OF FAMILY VIOLENCE PRECLUDED APPOINTMENT OF PARENTS AS JOINT MANAGING CONSERVATORS; MOTHER'S FAILURE TO DISCLOSE HER METHODS FOR CALCULATING ECONOMIC DAMAGES DID NOT WARRANT STRIKING HER CLAIMS SEEKING NON-ECONOMIC DAMAGES.

¶15-5-15. ***Baker v. Baker***, ___ S.W.3d ___, 2015 WL 3917922, 14-14-00083-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (06-25-15).

Facts: Mother and Father had two Children. At trial, Mother testified about a history of domestic violence against her by Father, including his pushing her, throwing a chair at her, spitting on her, and calling her derogatory names in front of the Children. She had ultimately filed for divorce because Father had punched her in the face, breaking at least two bones in her skull. Mother had to undergo surgery to save her eye. In addition to the requesting a divorce, Mother asserted several tort claims against Father, including assault, battery, terroristic threats, and IIED.

During discovery, Mother responded to Father's request for disclosure and included the medical bills associated with the punching incident. However, she did not disclose the amount or method for calculating her requested economic damages, including lost earnings and lost earning capacity. Father filed a motion to exclude Mother's tort claims, which the trial court granted. At the conclusion of the trial, the trial court awarded Mother a disproportionate share of the marital estate and appointed the parents joint managing conservators ("JMC"). In its subsequent findings of fact and conclusions of law, the court found "[f]amily violence has occurred in the past but the court declines to find that it is likely to occur in the future." The court further found that the appointment of the parents as JMC was in the children's best interest.

Mother appealed arguing that the trial court erred in appointing the parents JMC despite its family violence finding, in striking her tort claims as sanctions, and in granting the divorce on the ground of insupportability as opposed to cruelty.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Conservatorship: Tex. Fam. Code § 153.004 prohibits the appointment of the parents as JMC when there is a "history or pattern of past or present neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child." The court of appeals held that a finding of "family violence," although not explicitly included in the language of § 153.004, precludes such an appointment under that section.

Although Father argued that the trial court's finding of family violence could have been based on the punching event alone, Mother introduced evidence of other acts of abuse, and a single act can amount to history of physical abuse. Moreover, § 153.004 does not require evidence that Father *intended* to harm Mother. Thus there was sufficient evidence to establish a history of violence.

Additionally, although Mother never sought a protective order, that is not a perquisite to a finding of physical abuse. Unlike the requirements for obtaining a protective order, § 153.004 does not require a finding that violence is likely to occur in the future.

Because the family violence finding precluded an appointment of the parents as JMC, the court of appeals remanded the case to the trial court for a determination as to which parent should be appointed the sole managing conservator of the children.

Discovery Sanctions: Although Mother did not disclose the amount or any method of calculating economic damages, Mother also sought non-economic damages. Therefore, striking all of her tort claims was an excessive discovery sanction. Because the court of appeals remanded the case for a consideration of Mother's tort claims, the court was also obligated to remand the divorce decree's property division to avoid awarding Mother a double recovery.

Ground for Divorce: The trial court made a finding of fact that the marriage had become insupportable. Mother did not challenge that finding, and the evidence supported the finding. Thus, the court did not abuse its discretion in not finding that the marriage should have been dissolved based on cruelty.

Editor's Comment: *The trial court mixed up the requirement for nixing a JMC appointment with the requirements for issuance of a Protective Order. Both require past family violence findings, but a no-JMC appointment does not require a finding that family violence is likely to occur in the future. Issuance of a PO does. J.V.*

ALTHOUGH THERE WAS SOME EVIDENCE OF MOTHER'S PHYSICAL VIOLENCE, FATHER COULD NOT COMPLAIN ON APPEAL OF APPOINTMENT OF MOTHER AS JMC BECAUSE HE INVITED THE ERROR BY REQUESTING THAT RELIEF IN HIS LIVE PLEADING.

¶15-5-16. *Kimbell v. Kimbell*, No. 02-14-00202-CV, 2015 WL 4663396 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (08-06-15).

Facts: Mother and Father dated for a few years but broke up when Mother was accepted into nursing school. Subsequently, Mother married another man. However, the marriage ended a few weeks later after Mother discovered that her husband had a wife and child in Mexico. When she discovered the deceit, Mother threw a coat hanger at her husband, which led to her being arrested. The charge was later dismissed for lack of evidence.

A few years later, Mother and Father began dating again, got married, and had two Children. During their subsequent divorce proceedings, Father testified that Mother had bloodied his lip and left scratches on his neck. He did not seek medical attention after the incident, but he did filed a police report. As a result, Mother was convicted of a Class C Assault. The appeal of that conviction was pending at the time of the divorce proceedings.

In the final decree, the trial court ordered Mother to take an anger management class, appointed the parents joint managing conservators, and granted Mother the exclusive right to determine the primary residence of the Children. Father appealed, arguing the trial court erred in appointing Mother a joint managing conservator when there was credible evidence of violence by her against Father as well as against her first husband.

Holding: Affirmed

Opinion: The invited error doctrine prevents a party from asking for relief from the trial court and later complaining on appeal that the trial court gave it. Here, Father asked in his live petition for the trial court to appoint the parents joint managing conservators. Thus, whether there was a history or pattern of past or present physical abuse, Father waived his complaint.

Editor's Comment: *I find the holding in this opinion very concerning. Here, there is no dispute that family violence has occurred, what happened to best interest being paramount. The Family Code is clear—no joint managing conservators if history or pattern of family violence. What about the line of cases that hold "Pleadings are of little importance in child custody cases and the trial court's efforts to exercise broad, equitable powers in determining what will be best for the future welfare of a child should be unhampered by narrow technical rulings." What if Mother had been a child molester, meth addict, etc.? G.L.S.*

MOTHER AWARDED SOLE MANAGING CONSERVATORSHIP OF FATHER'S NIECE, WHO HAD BEEN LIVING WITH THE COUPLE FOR YEARS, BECAUSE CREDIBLE EVIDENCE THAT FATHER COMMITTED FAMILY VIOLENCE.

¶15-5-17. *In re K.A.K.*, No. 05-14-000628-CV, 2015 WL 4736566 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-11-15).

Facts: Mother and Father moved to the United States from Sudan with two Children of their own and Father's cousin's child ("Niece"). After moving, the couple had two more Children. During their divorce proceedings, all five Children were subject to the suit. The Niece's father was not made a party to the suit. A protective order had been entered against Father before the suit was filed. Relying in part on the family violence finding in that order, the trial court appointed Mother the sole managing conservator of all five Children and entered a supervised possession order for Father. Among other complaints on appeal, Father argued that it was error to appoint Mother the sole managing conservator of his Niece when the Niece's father had recently expressed a different preference for custody.

Holding: Affirmed

Opinion: Because there was credible evidence that Father had committed family violence, he could not be appointed a joint managing conservator of any of the Children the subject of the suit. Nothing in the Family Code gives a biological relative greater rights than another person with standing under Tex. Fam. Code § 102.003(a)(9). Further, the trial court could not appoint another individual as a managing conservator because there was no pleading, evidence, or finding that such an appointment would be in the Niece's best interest.

FATHER GRANTED EXCLUSIVE RIGHT TO DESIGNATE CHILDREN'S PRIMARY RESIDENCE BECAUSE TRIAL COURT DOUBTED WHETHER MOTHER—IF GIVEN THE SAME RIGHT—WOULD EVER ALLOW THE CHILDREN TO HAVE A GOOD RELATIONSHIP WITH FATHER.

¶15-5-18. ***Allen v. Allen*, ___ S.W.3d ___, 2015 WL 5025844, 14-14-00426-CV** (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (08-25-15).

Facts: Mother and Father had two Children of the marriage. When they separated, they agreed that Mother would be the primary conservator and that Father would not be required to pay child support. However, Father subsequently revoked his consent to the agreement. After the divorce was filed, the trial court entered agreed temporary orders appointing Mother the joint conservator with the exclusive right to designate the Children's primary residence and requiring Father to pay child support. At trial, Father sought to be named sole managing conservator or, in the alternative, the conservator with the exclusive right to designate the Children's primary residence.

Father testified about multiple allegations by Mother to CPS that Father had abused or neglected the Children. Each allegation was ruled out or deemed inconclusive. Additionally, Father testified about multiple occasions on which Mother denied Father access to the Children. Once when Father arrived to pick up the Children, Mother called the police to accuse Father of trespass. Additionally, Mother informed the Children's school that Father and his family were not allowed to have contact with the Children.

The guardian ad litem testified that both parents were capable of taking care of the Children. However, she expressed concerns that Mother created a wedge between Father and the Children, and Mother seemed intent on continuing her feud with Father.

The trial court appointed the parents joint managing conservator and granted Father the exclusive right to designate the Children's primary residence. Mother appealed, arguing the trial court erred in granting Father that right.

Holding: Affirmed

Opinion: The trial court could have reasonably determined that Mother's actions were aimed at preventing Father access rather than preventing abuse of the Children. Persistent alienation of the other parent can be a guiding consideration in making possession and access determinations.

SAPCR
CHILD SUPPORT

PASTOR-HUSBAND'S NET INCOME INCLUDED "GIFTS" RECEIVED FROM HIS CHURCH; PARTIES' HOUSE NOT PART OF COMMUNITY AND NOT SUBJECT TO DIVISION BECAUSE HUSBAND'S ONE-SPOUSE DEED OF HOUSE TO CHURCH BECAME OPERATIVE ONCE WIFE'S HOMESTEAD INTEREST WAS DIVESTED BY FINAL DECREE.

¶15-5-19. *West v. West*, No. 01-14-00350-CV, 2015 WL 4251159 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (07-14-15).

Facts: Husband was a pastor of a church, and he received an annual salary of just over $30,000 in addition to periodic gifts and allowances from the church and congregation averaging just under $40,000 per year. In its final decree of divorce, the trial court found that Husband was intentionally underemployed and ordered him to pay $1,906 per month in child support for the parties' three Children. Husband appealed, arguing that the trial court erred in finding him intentionally underemployed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Although Husband referred to certain monies received from the church as "gifts," when a religious institution is intrinsically involved in facilitating the collection of funds from congregants for its pastor under a regularly conducted program, and the pastor receives little other compensation, the contributions constitute income. Additionally, all the gifts and allowances from the church were non-taxable. Thus when including his salary, gifts, and housing allowance, the evidence supported a finding that Husband's net monthly income exceeded $7,500, and Husband was actually ordered to pay less than the statutory guidelines.

TEXAS FAMILY CODE CHILD SUPPORT GUIDELINES SHOULD HAVE BEEN APPLIED WHEN CALCULATING AMOUNT OF SUPPORT FOR ADULT DISABLED CHILD.

¶15-5-20. ***In re J.M.W.***, ___ S.W.3d ___, 2015 WL 10123434, 14-14-00135-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (07-23-15).

Facts: When Mother and Father divorced, Father was ordered to pay child support. Subsequently, the Child was diagnosed with bipolar disorder and ADHD. A court-appointed psychiatrist testified that the Child was unable to support himself, and if not for Mother's care, the Child would need full-time, structured residential placement. Per the divorce decree, Father exercised his visitation and paid child support until the Child was 18, after which time, Father stopped paying child support and reduced his visitation with the Child to twice a year for a few hours each time.

Mother filed a SAPCR seeking support for the adult disabled Child. During the trial court proceedings, Mother argued that under Tex. Fam. Code § 154.306, the court was able to consider Father's new wife's resources for the purpose of setting support, which the trial court did. The trial court signed a final order ordering Father to pay child support indefinitely, plus retroactive support going back to when Father had stopped paying. Father requested findings of fact and conclusions of law pursuant to Tex. Fam. Code § 154.130; however, other than finding the guidelines were unjust and inappropriate in this case, the trial court failed to include the findings required by that section. Subsequently, Father requested additional findings twice, but the trial court denied his requests.

Father appealed and, among other complaints, argued that the trial court erred in disregarding the guidelines and in including his wife's income in its calculation.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Despite Mother's argument to the contrary, Tex. Fam. Code § 154.306, which provides factors to be given "special consideration" when determining the amount of child support after a child's 18th birthday, cannot be read in isolation. The factors in this section are not the sole or exclusive factors to consider when setting child support for an adult disabled child. Further, interpreting this section to trump consideration or application of the child-support guidelines does not accord with common sense.

Additionally, pursuant to Tex. Fam. Code § 154.069, even though a spouse's income is community property, that income cannot be included when calculating a child support obligor's net resources.

TRIAL COURT LACKED SUBJECT-MATTER JURISDICTION UNDER UIFSA TO HEAR GUATEMALAN MOTHER'S SUIT TO ESTABLISH CHILD SUPPORT BECAUSE GUATEMALA IS NOT A "STATE" AS DEFINED BY UIFSA.

¶15-5-21. *In re M.I.M.*, No. 05-14-00662-CV, 2015 WL 4472741 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (07-22-15).

Facts: The OAG filed a suit on Mother's behalf to establish child support for her Child under UIFSA. Mother and the Child were residents of Guatemala. Father filed a motion to dismiss, arguing that because Guatemala is not a "State" as defined by UIFSA, the trial court lacked of subject-matter jurisdiction. The trial court agreed and dismissed the case with prejudice. The OAG appealed.

Holding: Affirmed as Modified

Opinion: Pursuant to Tex. Fam. Code § 159.102(21)(B), which is a UIFSA provision, a "State" includes a foreign country or political subdivision that meets one of three defined criteria--(i) been declared to be a foreign reciprocating country or political subdivision under federal law; (ii) established a reciprocal arrangement for child support with this state as provided by Section 159.308; or (iii) enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this chapter. Nothing in the record revealed that Guatemala met any of those criteria. Thus, Guatemala is not a "State" under UIFSA, and Mother could not be a petitioner to an action under that Act. Further, because the OAG only has authority to initiate a proceeding on behalf of a "petitioner," it lacked authority to file a suit on Mother's behalf. However, because a dismissal for jurisdiction does not reach the merits of a dispute, the dismissal "with prejudice" was improper.

TRIAL COURT ERRED IN ORDERING FATHER TO PAY MORE THAN 100% OF THE PROVEN NEEDS OF THE CHILD.

¶15-5-22. *Carter v. Carter*, No. 09-13-00461-CV, 2015 WL 4571315 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (07-30-15).

Facts: Mother and Father had one Child. During trial, evidence established that Father's net monthly income exceeded $7,500, which was the cap at the time. In the final decree, the trial court ordered Father to pay $2000 per month in Child support, plus one-half of the costs associated with the Child attending private school. The trial court issued findings of fact that provided the net resources of both parents and that the applied percentage was 20%. (The court of appeals noted that 20% of $7,500 is $1,500, not $2000.) Father appealed and asserted, among other complaints, that the trial court erred in ordering him to pay child support over and above the presumptive award.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: A trial court may order an obligor to pay more than the presumptive award established by the Texas Family Code child support guidelines. However, the court must calculate the extra amount by subtracting the presumptive award from the proven needs of the child. Additionally, the obligor cannot be required to pay for greater than the higher of the presumptive amount or 100% of the proven needs of the child.

Here, the only evidence of the Child's "needs" was his monthly tuition for attending private school. Even if the private school tuition was a proven need of the Child, Father was ordered to pay 50% of the tuition in addition to an amount that was $500 greater than the presumptive child support award. The court of appeals further noted in a footnote that a child support order should specify the exact amount an obligor is required to pay and that a requirement to pay unspecified costs of private school was too vague to be enforceable.

SAPCR
ENFORCEMENT OF CHILD SUPPORT

TRIAL COURT'S JUDICIAL NOTICE OF OAG PRINTOUT OF CHILD SUPPORT PAYMENTS DID NOT CONSTITUTE EVIDENCE TO SUPPORT ARREARAGE JUDGMENT.

¶15-5-23. *In re T.S.P.*, No. 04-14-00547-CV, 2015 WL 5037123 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (08-26-15).

Facts: Mother and Father divorced more than a decade ago, and Father was ordered to pay child support. In 2013, the trial court signed an order of enforcement by contempt, in which it found Father in contempt and assessed a fine, payable to Mother. Subsequently, Mother filed an amended motion for enforcement asserting Father failed to pay child support and the contempt fine. Mother attached to her motion a printout from the office of the attorney general reflecting payments made by Father since the divorce. During the hearing, Mother's counsel asked the trial court to take judicial notice of the prior orders in the file, the attorney general printout, and an updated payment record. The trial court agreed to take judicial notice. The trial court entered an order holding Father in contempt and assessing arrearages. The trial court additionally ordered Father to pay the fine based on the prior order. Father appealed.

Holding: Reversed and Remanded in Part; Vacated in Part

Opinion: Tex. Fam. Code § 157.162(c) provides that a payment record attached to a motion for enforcement of child support is admissible to prove facts related to nonpayment. However, the fact that a record is admissible does not render it admitted. Additionally, a trial court may not take judicial notice of the truth of the allegations within a document.

Here, other than the attorney general's payment record, no evidence supported any finding regarding the amount of arrearages. Because the printout was not admitted into evidence—the trial court only took judicial notice of it—it could not support the trial court's judgment.

Additionally, the portion of the order that a civil contempt fine be paid to Mother, a private party, was improper and was vacated.

Editor's Comment: *A hyper-technical decision: A trial court may not take judicial notice of the AG's child support printout - which the law provides "is the official record of a payment received directly by the unit" - because it was not admitted into evidence. Anyhow, better offer those printouts into evidence. J.V.*

WIFE RESTRAINED ILLEGALLY BECAUSE CONTEMPT ORDER FAILED TO DIRECT OFFICER TO TAKE WIFE INTO CUSTODY.

¶15-5-24. *In re S.W.*, No. 02-15-00232-CV, 2015 WL 5103634 (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (08-28-15).

Facts: Wife was found in contempt for failing to comply with terms of a modified divorce decree. She was ordered to be confined in the county jail for 180 days. Wife filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: An order that lacks a directive to the sheriff to take a person into custody cannot constitute a commitment order. Here, although the trial court titled its order as being both a "contempt" and "commitment" order, the order did not direct the sheriff or other ministerial officer to take Wife into custody.

SAPCR
MODIFICATION

EVIDENCE INSUFFICIENT TO SUPPORT CHILD SUPPORT MODIFICATION BECAUSE NO EVIDENCE OF FINANCIAL CIRCUMSTANCES AT TIME OF PRIOR ORDER.

¶15-5-25. *In re Todd*, Nos. 14-15-00412-CV, 14-15-00413-CV, 2015 WL 4249799 (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (07-14-15).

Facts: A 2013 Georgia court order found Father in child support arrears and ordered him to make payments of $400 per month. Almost a year later, after the Children had moved to Texas, Father filed a petition in Texas to modify the Georgia order. Mother filed a counter-petition also seeking modification. A temporary orders hearing was set, and although Father was properly noticed, he did not appear. At the hearing's conclusion, the trial court increased Father's child support obligation to $1000 per month. Subsequently, because Father had failed to pay child support or attorney's fees as ordered, Mother filed a motion for enforcement and to modify the temporary orders. The day before the hearing on Mother's motions, Father filed petitions for writ of prohibition and for writ of mandamus. Father argued that the trial court erred in increasing his child support obligation.

Holding: Writ of Mandamus Conditionally Granted in Part and Denied in Part

Opinion: Although Mother testified as to Father's profession and his current earning ability, she failed to demonstrate that the circumstances of the children or an affected party had materially and substantially changed since the prior child support order. Mother presented no evidence of the financial circumstances at the time the prior order was rendered.

SUPPORTING AFFIDAVIT NOT REQUIRED WITH SAPCR FILED TWENTY DAYS AFTER AGREED CHILD SUPPORT ORDER BECAUSE THE PRIOR ORDER ADDRESSED ONLY CHILD SUPPORT, NOT CONSERVATORSHIP.

¶15-5-26. ***In re J.A.***, ___ S.W.3d ___, 2015 WL 4985914, 08-13-00253-CV (Tex. App.—El Paso 2015, no pet. h.) (08-21-15).

Facts: An order was entered appointing the parents joint managing conservators of their Child and granted Mother the exclusive right to designate the Child's primary residence. Two years later, the Office of the Attorney General initiated a child support review. An agreed order was entered increasing Father's child support obligation. Twenty days later, Father filed a SAPCR seeking the exclusive right to designate the Child's primary residence. Mother filed an answer and motion for Rule 13 sanctions. Although neither Father nor his attorney appeared at a sanctions hearing, a sanctions order was entered dismissing Father's modification and ordering Father to pay $2500 in attorney's fees to Mother's attorney. The order did not state the particulars of the court's reasoning for granting sanctions. Father did not request findings of fact and conclusions of law, and he did not object to the failure to articulate the reasons for sanctions. Father appealed. He did not file a reporter's record, and Mother did not file a responsive brief.

Holding: Affirmed

Opinion: Tex. Fam. Code § 156.102 requires an attached supporting affidavit when a party seeks to modify the exclusive right to designate the Child's primary residence within one year of a prior order. Here, although there was a prior child support order within one year of Father's petition, that order did not change or reiterate the custodial designations, and it did not incorporate any prior order by reference. Thus, Father was not required to attach an affidavit to his petition for modification.

Additionally, while a moving party cannot be defaulted for failure to appear, a trial court may, under Rule 13, impose appropriate sanctions if a pleading, motion, or other paper is signed in violation of that rule. Here, Father's suit was not dismissed on the merits by default; it was dismissed for violating Rule 13.

Rule 13 requires that the particulars of the cause for sanctions be included in a sanction order or in its findings of fact and conclusions of law. However, a party who fails to raise an objection to an insufficient sanctions order waives that

complaint for appellate review. Father made no timely objection and did not request findings of fact and conclusions of law.

SAPCR
TERMINATION OF PARENTAL RIGHTS

CHILD LACKED STANDING TO SEEK INVOLUNTARY TERMINATION OF HIS RELATIONSHIP WITH HIS FATHER.

¶15-5-27. *In re I.C.G.*, No. 05-14-01629-CV, 2015 WL 3454278 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (06-01-15).

Facts: Mother had a Child while she was in a relationship with Acknowledged Father. Although the couple was not married, Mother gave the Child Acknowledged Father's last name, and Acknowledged Father signed an affidavit acknowledging his paternity of the Child. A few years later, the couple broke up, and a court order appointed them joint managing conservators of the Child and ordered Acknowledged Father to pay Child support. About five years later, the Child, through Mother as his next friend, filed a petition challenging Acknowledged Father's paternity. The Child alleged that a DNA test revealed that another man was his father, that Mother had not had sexual relations with Acknowledged Father for at least four months before the Child was conceived, and that Acknowledged Father had fraudulently signed the affidavit acknowledging his paternity. The Child sought to change his last name to his biological father's last name. In the alternative, the Child sought involuntary termination of Acknowledged Father's parental rights. After a bench trial, the trial court signed an order terminating Acknowledged Father's parental rights. Acknowledged Father appealed arguing the Child did not have standing to sue for the relief granted.

Holding: Vacated and Dismissed

Opinion: Neither Texas Family Code § 102.003 nor Texas Family Code Ch. 161 contains a provision giving a child standing to file a SAPCR through his mother as next friend. The Child did not cite any provision of the Texas Family Code giving him standing to seek involuntary termination of Acknowledged Father's parental rights.

MOTHER NOT ENTITLED TO NEW TRIAL AFTER TERMINATION OF HER PARENTAL RIGHTS BECAUSE HER TRIAL COUNSEL "PRESENTED AN ADMIRABLE CASE" ON HER BEHALF.

¶15-5-28. ***In re D.V.***, ___ S.W.3d ___, 2015 WL 4035050, 08-15-00037-CV (Tex. App.—El Paso 2015, no pet. h.) (06-03-15).

Facts: Mother was bipolar with anxiety and depression. She had not finished high school, was 22 years old at the time of trial, used to live under a bridge, and had worked as a stripper. She had a history of using drugs, seeking but failing to complete rehabilitation, and relapsing into her drug habits. When TDFPS removed her Child, Mother failed to complete her court-ordered services. Mother showed little interest in visiting her Child during the pendency of the proceedings. Mother also had a history of dating abusive men, one of whom threw her down the stairs.

Mother was present in court at a hearing when the final trial date was set. However, she failed to appear at trial. Her counsel appeared and announced not ready because he had not spoken to Mother recently. Nevertheless, Mother's counsel participated in the trial and cross-examined witnesses. At the trial's conclusion, Mother's rights were terminated. She appealed, and in addition to challenging the sufficiency of the evidence, she complained of the trial court's denial of her motion for new trial. She alleged that her failure to appear was due to mistake, rather than conscious disregard. Additionally, she contended that because of her mental health issues, a guardian ad litem should have been appointed.

Holding: Affirmed

Opinion: Absent a request for the appointment of a guardian ad litem, Mother could not later complain on appeal that the trial court abused its discretion in failing to appoint one. Additionally, Mother was present when the trial date was set, so she had actual knowledge of the date. Further, although Mother did not appear at the final trial, the record established that her trial counsel "presented an admirable case" on her behalf.

NO GROUNDS FOR TERMINATION BASED ON CONSTRUCTIVE ABANDONMENT BECAUSE TDFPS MADE NO EFFORT TO RETURN THE CHILD TO FATHER; CASEWORKER'S UNSUPPORTED CONCLUSORY OPINIONS OF FATHER WAS INSUFFICIENT TO SUPPORT TERMINATION BASED ON ENDANGERMENT.

¶15-5-29. ***In re A.L.H.,*** ___ S.W.3d ___, 2015 WL 3759162, 14-14-01029-CV & 14-14-01030 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (06-16-15).

Facts: TDFPS sought to terminate Mother's and Father's parental rights to the Child. Mother signed an affidavit voluntarily relinquishing her rights. TDFPS sought to terminate Father's rights on the grounds of constructive abandonment and that Father knowingly allowed the Child to remain in dangerous conditions. At trial, a TDFPS caseworker testified that she believed termination was in the Child's best interest, yet she never had face-to-face contact with the Father. The caseworker testified that Father was not involved in the Child's life, he knew that Mother had a drug problem, and he knowingly left the Child in a dangerous environment by leaving the Child with Mother.

Additionally, Father's sister testified that if the Child were placed in her care, she would protect the Child and not allow the parents to be involved in the Child's life.

After their rights were terminated, both parents appealed arguing there was insufficient evidence to support the terminations.

Holding: Affirmed in Part; Reversed in Part

Opinion: Mother presented no evidence that she signed the relinquishment affidavit involuntarily. The court of appeals affirmed the termination of her rights.

However, in order for TDFPS to terminate on the basis of constructive abandonment it must show that it made reasonable efforts to return the Child to the parent. Here, TDFPS made no service plan for Father. Further, placing the Child with Father's sister did not qualify as an effort to return the Child to him because the sister testified that she would not allow the parents to be in the Child's life.

Unsupported conclusory opinions of a witness do not constitute evidence of probative force. A witness's belief is no more than mere suspicion, which is not the same as evidence. Although the TDFPS caseworker testified that Father knew of Mother's drug use, but there was no evidence to support her conclusory statement. If Father did not know of Mother's drug use, he could not have "knowingly" placed the Child in danger. Thus there was insufficient evidence to support termination under Tex. Fam. Code § 161.001(1)(D).

TDFPS FAILED TO INTRODUCE EVIDENCE AT FINAL TRIAL SUPPORTING TERMINATION; TRIAL COURT COULD NOT TAKE JUDICIAL NOTICE OF THE FACTUAL STATEMENTS AND ALLEGATIONS WITHIN ITS FILE; MOTHER'S AGREEMENT NOT TO CHALLENGE GROUND FOR TERMINATION DID NOT RELIEVE TDFPS OF ITS BURDEN OF PROOF.

¶15-5-30. ***In re E.W.,*** ___ S.W.3d ___, 2015 WL 3918292, 06-15-00018-CV (Tex. App.—Texarkana 2015, no pet. h.) (06-26-15).

Facts: TDFPS sought to terminate Mother's and Father's parental rights as to the Child. After a settlement conference, Mother signed a Rule 11 agreement in which TDFPS agreed to seek termination under Tex. Fam. Code § 161.001(O) (failure to comply with a court order), and Mother agreed not to challenge that request. Additionally, TDFPS promised Mother would have the right to receive pictures and bi-annual updates of the Child and would be allowed to communicate with the Child and send him gifts.

A final hearing was held two months before the date by which the parents were required to complete their service plans. At the final hearing, the TDFPS caseworker testified that she had been recently assigned the case and was not sure which court-ordered services Mother had completed. TDFPS recommended that Father's rights be terminated on endangerment grounds and Mother's be terminated on Tex. Fam. Code § 161.001(O) as provided in the Rule 11 agreement.

Mother, who was 17 at the time of trial, admitted signing the Rule 11 agreement but stated that she wanted to revoke her agreement. When Father was asked if there had been a history of family violence, he testified to arguing and name calling but nothing physical.

At the trial's conclusion, per the parties' request, the trial court took judicial notice of the contents of its file and ruled that Mother's rights be terminated and that TDFPS proved endangerment grounds and Tex. Fam. Code § 161.001(O) by

clear and convincing evidence. Additionally, the trial court found TDFPS proved endangerment grounds as to Father. The trial court further found that termination was in the Child's best interest.

Mother and Father appealed arguing the evidence was insufficient to support the termination. Mother also argued that the trial court improperly relied on her agreement to support a finding that termination was appropriate under Tex. Fam. Code § 161.001(O).

Holding: Reversed and Remanded

Opinion: A trial court may take judicial notice of the existence of certain documents in its records, but it may not take judicial notice of the truth of factual statements and allegations within those documents. Thus, for testimony from a prior hearing to be considered in a subsequent proceeding, the transcript of that testimony must be properly authenticated and entered into evidence.

Here, TDFPS offered no such transcripts. Considering only the evidence actually introduced at trial, there was no evidence to support endangerment findings in support of termination.

In the Rule 11 Agreement between Mother and the TDFPS, Mother only agreed not to challenge TDFPS's request to terminate her parental rights on the ground that she failed to complete her services. However, this agreement did not relieve TDFPS of its burden to prove that ground by clear and convincing evidence.

Moreover, Tex. Fam. Code § 161.001(O) allows termination for failure to comply with a court order when the removal from the parent was based on the abuse or neglect of the child. No one testified that the Child was removed due to the abuse or neglect of either parent, so termination could not be supported under Tex. Fam. Code § 161.001(O).

With respect to the best interest finding, the only evidence before the court recited that the Child was in foster care, his needs were being met, he had bonded with the foster family, and the foster family wanted to adopt him. There was no evidence indicating that termination was appropriate under the *Holley* factors.

Finally, although the court of appeals reversed and remanded the termination order, the parents did not contest the appointment of TDFPS as the Child's managing conservator. Thus, the court of appeals' opinion did not affect the conservatorship appointment.

EVIDENCE DID NOT SUPPORT BEST INTEREST FINDING BECAUSE CHILD WANTED TO LIVE WITH FATHER, THERE WAS NO EVIDENCE FATHER EVER LASHED OUT AT CHILD, AND FATHER WAS COMPLETING SERVICES REQUESTED OF HIM.

¶15-5-31. ***In re B.C.S.***, ___ S.W.3d ___, 2015 WL 4134582, 08-15-00084-CV (Tex. App.—El Paso 2015, no pet. h.) (07-08-15).

Facts: Father was in the army and had a Child with Mother. The couple lived in Massachusetts and were married only briefly. Subsequently Mother was incarcerated, and the Child lived with Father's mother until Father returned from his deployment. The Father and the Child then moved to Texas. At some point, Father received a traumatic brain injury and was discharged from the army.

TDFPS became involved after a report of negligent supervision. There was evidence of a great deal of violence between Father and his new wife. During the investigation, Father was arrested for aggravated assault and battery, assault and battery with a dangerous weapon, violation of an abuse prevention order, and breaking and entering into a motel room where his wife was staying. TDFPS tried to place the Child with Father's mother, but she lived in a one-bedroom apartment. Still focused on a family placement, TDFPS placed the Child with his paternal aunt and uncle, where he was safe and cared for. At trial, Father's mother testified that she wanted the Child to live with her, wanted Father to be a part of the Child's life, and was looking for a better apartment. The paternal aunt testified that she and her husband were willing to keep the Child but only if Father's rights were terminated. She stated that her husband was adamant about that condition. The Child's ad litem was opposed to termination, but the CASA advocate favored it. Ultimately the trial court terminated Father's rights on five statutory grounds. Father appealed and argued that the evidence did not support termination.

Holding: Reversed and Remanded

Opinion: In his appeal, Father clearly articulated the burden of proof and standard of review, but he failed to adequately challenge the specific grounds for termination. He did not raise any challenge to the endangerment findings.

However, applying the *Holley* factors, the evidence did not support a finding that termination was in the Child's best interest. The Child desired to live with his Father. Although Father's brain injury, anger issues, and history of violence posed a potential danger to the Child, no one testified that Father ever lashed out at the Child. TDFPS did not present any evidence regarding the length of time that Father would be incarcerated. Father's mother wanted to keep the Child until Father could take possession of the Child again. Father's mother's small apartment was only reason TDFPS had not

placed the Child with her, and she was actively looking for a suitable two-bedroom apartment. Contrarily, the great-aunt testified that the Child could not and would not come between her and her husband. Father's acts and omissions may have prevented him from providing a safe environment for the Child without further therapy, but that was not sufficient evidence to conclude the parent-child relationship was improper. Additionally, he was asked to obtain services, and he did so.

SPOUSAL PRIVILEGE DID NOT PROTECT RECORDED JAIL CONVERSATION IN TERMINATION PROCEEDING.

¶15-5-32. ***In re L.E.S.***, ___ S.W.3d ___, 2015 WL 4914743, 06-15-00015-CV (Tex. App.—Texarkana 2015, no pet. h.) (08-18-15).

Facts: Mother and Father's relationship began when Father was 26 years old and Mother was 16 years old. There was a lot of evidence regarding domestic abuse and drug use. For the protection of Mother and the Child, Mother agreed to have no contact with Father. Subsequently, Mother, Father, and the Child were pulled over by police, and Father was arrested on outstanding warrants. Mother claimed that that was the first time she had seen Father in months and that she was only giving Father a ride to the bus station.

In spite of a no contact order, Mother visited Father in jail five times. Mother admitted that she did not think she would get caught if she and the Child visited Father at jail. At least one of the visits was recorded. During the termination trial, TDFPS entered a recording of a jail visit. On the recording, Mother told Father about a "stash" she was saving for Father that "Johnny and them" wanted. Mother testified that she could not recall whether the stash was illegal drugs. The trial court terminated both parents' parental rights to the Child. Both parents appealed, challenging the sufficiency of the evidence to support the termination. They also complained that trial court erred by admitting the recorded jail conversation because it was protected by the spousal privilege.

Holding: Affirmed

Opinion: Tex. Fam. Code § 261.202 provides that "[i]n a proceeding regarding the abuse or neglect of a child, evidence may not be excluded on the ground of privileged communication except in the case of communications between an attorney and client."

Nothing in the record indicated that Mother or Father knew their conversation was being recorded, they signed no statement agreeing that their telephone calls could be recorded, and they were the only two people on the recording. Thus, it was a privileged communication between spouses.

Regardless, pursuant to Tex. Fam. Code § 261.202, the parents could not rely on privilege to exclude the conversation.

FATHER NOT ENTITLED TO CHALLENGE THE EFFECTIVENESS OF RETAINED COUNSEL IN PRIVATE TERMINATION PROCEEDING.

¶15-5-33. ***In re A.B.B.***, ___ S.W.3d ___, 2015 WL 4985353, 08-15-00123-CV (Tex. App.—El Paso 2015, no pet. h.) (08-21-15).

Facts: Father was arrested for attempted murder and was sentenced to life in prison. At the time of this appeal, his criminal appeal was pending. After Father's conviction, Mother sought to terminate Father's parental rights to their two Children. The Children's stepfather sought to adopt the Children.

Father retained an attorney. The record was unclear as to whether Father and his attorney had the same intentions. Father wanted a jury trial at which he and his daughter could testify. Father's attorney warned him that he had little chance of prevailing due to his life sentences. Father's attorney discussed with Father the possibility of signing a voluntary relinquishment of parental rights to spare the Children of the ordeal of testifying, avoid complicating his criminal appeal, and avoid the expense of a jury trial to ensure adequate funding for his criminal appeal.

Father's attorney sent him an affidavit believing he intended to sign it. Because Father's attorney lived out of town, she informed the trial court that Father's affidavit was forthcoming and that she would be available by telephone at trial if necessary. Neither Father, nor his attorney appeared at the final trial, and Father's rights were terminated.

Father appealed, asserting ineffective assistance of counsel. He did not challenge the statutory grounds for termination or the best interest finding.

Holding: Affirmed

Opinion: The Texas Family Code provides for the mandatory appointment of counsel in a termination suit *filed by a government entity* against an indigent parent. The Texas Supreme Court has held that a parent whose parental rights have been terminated can seek reversal based on ineffective assistance of appointed counsel. However, no Texas court has allowed a parent to seek the same relief for *retained* counsel.

Here, the termination suit was filed by Mother, not a government entity. Additionally, Father's counsel was retained, not appointed.

The court of appeals expressed its sympathies for Father, considering criminal defendants have the right to challenge the effectiveness of legal counsel, whether retained or appointed. "However, as an intermediate appellate court, it [was] not within [court of appeals'] purview to legislate rights or create them by judicial fiat."

MISCELLANOUS

★★★TEXAS SUPREME COURT ★★★

STATE LACKED STANDING TO INTERVENE OR SEEK APPELLATE RELIEF BECAUSE IT FAILED TO INTERVENE BEFORE THE TRIAL COURT'S JUDGMENT, THE JUDGMENT WAS NOT SET ASIDE, AND THE STATE DID NOT SATISFY THE DOCTRINE OF VIRTUAL REPRESENTATION.

¶15-5-34. ***State v. Naylor*****,** ___ S.W.3d ___, 11-0114, 11-0222, 2015 WL 3852284 (Tex. 2015) (06-19-15).

Facts: Two Texas women were married in Massachusetts and sought a divorce in Travis County. They were raising a child and operating a business together, and the Petitioner sought a judgment addressing their respective rights, some of which had been previously settled in a SAPCR. Initially, the Respondent challenged the divorce, arguing that Texas lacked jurisdiction to recognize their marriage. However, the parties reached an agreement that was read into the record. The trial court then granted an ostensible divorce pursuant to the agreement, stipulating that the judgment "is intended to be a substitute for…a valid and subsisting divorce," and "is intended to dispose of all economic issues and liabilities as between the parties whether they [are] divorced or not."

The next day, the State, which had been present during the hearing and the announcement of the judgment, filed a petition in intervention to defend the constitutionality of Texas laws limiting divorce actions to opposite-sex couples. The State had not previously attempted to intervene or otherwise make its interests known. The trial court denied the petition in intervention. The State appealed, but the court of appeals held that the State lacked appellate standing. The State sought both appellate and mandamus relief from the Texas Supreme Court.

Holding: Trial Court and COA Affirmed; Mandamus Denied.

Majority Opinion: (J. Brown, C.J. Hecht, J. Green, J. Johnson, J. Boyd) (J. Lehrmann did not participate)

The State did not timely intervene and was not a party of record. Once a judgment is rendered, intervention may only be allowed if the trial court sets aside its judgment.

An appellant may be "deemed to be a party" under the Doctrine of Virtual Representation if the appellant establishes (1) it is bound by the judgment, (2) its privity of estate, title, or interest appears from the record; and (3) there is an identity of interest between the appellant and a party to the judgment. None of these elements were satisfied. Further, the State identified no equitable doctrine that might allow it to seek appellate review. While equity is a factor in determining whether a party may intervene, such equity is applied in a determination of whether intervention will prejudice the existing parties, not the intervenor. The courts lack authority to expand the scope of their respective jurisdictions, which are determined by the Texas constitution and legislature.

While a party may seek mandamus from the Texas Supreme Court without first seeking it from the courts of appeals, the relator must present a compelling reason for such action. Here, the State argued that it did not file a mandamus because it thought it would have standing to appeal. Additionally, the State contended that the effort would have been futile because the lower court had "already made clear its skepticism of the State's argument." Neither a misunderstanding of the law, nor an argument of futility constituted a "compelling reason" for not seeking mandamus from the court of appeals.

Concurring Opinion: (J. Boyd)

Only those with a justiciable interest in a trial court's judgment have standing to appeal. A post-judgment intervention is only permissible if the trial court sets aside its judgment. The trial court was not asked to, and did not, set aside its judgment, and the virtual representation doctrine did not apply.

Contrary to J. Willet's dissent, the Court has never allowed a non-party to appeal if it did not meet the requirements of virtual representation. If equity is applied to an intervenor it is used to deny an intervention. If a party does not have standing to pursue its appeal, "no amount of equity can overcome that barrier."

Dissenting Opinion: (J. Willett, J. Guzman, J. Devine)

Because the question before the trial court was Constitutional in nature, the State should have received notice while the case was pending. Further, because intervention is an equitable doctrine, the State should have been permitted to intervene even if its petition was filed after the judgment.

Here, the parties had no interest in including the State in their dispute, but the State had an interest in the proceedings because they questioned the constitutionality of a Texas law, which the State had a duty to defend. The parties should not have been permitted to subvert the State's right to defend the law through a "legally baseless agreed judgment." A court should seek arguments from the attorney general on alleged bars to jurisdiction when the nature of the proceedings removes any expectation that the parties themselves will address the issue.

Moreover, because the decree was void, it could be collaterally attacked for as long as the parties were alive. As that left the State and the parties in a place of uncertainty, they all deserved a "definitive, once-and-for-all ruling."

Dissenting Opinion: (J. Devine)

Although the question was not before the court, J. Devine fully addressed whether a same-sex divorce should be permitted in Texas and answered the question in the negative.

Under Texas law, because Texas did not recognize same-sex marriage, the parties' only option was to have their marriage declared void through an in rem proceeding. Texas' prohibition on same-sex marriage did not violate the Due Process or Equal Protection Clauses because same-sex marriage has never been considered a fundamental right, and homosexuals are not a suspect class. Therefore, the classification was only subject to rational review, as opposed to strict scrutiny. Texas had a rational interest in defining marriage based on history and tradition and in a manner that promoted family stability and the well-being of children.

Because *Windsor* did not overturn the portion of DOMA that explicitly provided states with no duty to recognize same-sex marriages performed in other states, and because such marriages violated Texas' public policy, Texas was not required to give Full Faith and Credit to the parties' out-of-state marriage. Finally, there was no allegation that Texas' ban on same-sex marriage deterred the parties; right to travel.

Editor's comment: *On June 26, 2015, the US Supreme Court issued a 5-4 decision in Obergefell v. Hodges, upholding a constitutional right for same sex couples to marry in all 50 states. (See below) Even though the TX Supreme Court majority determined that it procedurally could not reach these compelling constitutional issues as presented under TX law, the majority opinion provided insight into how they would have decided it by stating "We have no quarrel with Justice Devine's analysis." Even though this case has been pending at the TX SCt since 2011, the timing of the opinions are politically interesting. All justices authoring opinions expressly refer to the upcoming and expected Obergefell decision, but all were apparently unwilling to wait it out. S.S.S.*

★★★UNITED STATES SUPREME COURT ★★★

SAME-SEX COUPLES MAY EXERCISE THE FUNDAMENTAL RIGHT TO MARRY IN ALL STATES; THERE IS NO LAWFUL BASIS FOR A STATE TO REFUSE TO RECOGNIZE A LAWFUL SAME-SEX MARRIAGE PERFORMED IN ANOTHER STATE ON THE GROUND OF ITS SAME-SEX CHARACTER.

¶15-5-35. ***Obergefell v. Hodges*****,** 576 U.S. ___, 14-556, 14-562, 14-571, and 14-574, 2015 WL 2473451 (06-26-15).

Facts: Petitioners were fourteen same-sex couples and two men whose same-sex partners were deceased. Respondents were state officials responsible for enforcing the challenged laws. The petitioners claimed that the respondents violated the Fourteenth Amendment by denying them the right to marry or to recognize their lawfully performed out-of-state marriages. In each case, the trial courts ruled in the petitioners' favor. The respondents appealed to the Sixth Circuit, which consolidated the cases and reversed the lower courts' rulings. The petitioners appealed to the US Supreme Court.

In its Opinion, the Supreme Court provided the facts for three of the petitioners:

Obergefell was in a long-term relationship with a man named John Arthur, who was diagnosed with ALS. The couple wanted to get married before Arthur died. Because same-sex marriage was not allowed in Ohio, they flew to Maryland to

get married. However, due to Arthur's condition, they wed inside the medical transport plane on the tarmac in Baltimore. After Arthur passed away, Ohio refused to list Obergefell as the surviving spouse on Arthur's death certificate.

Two women in Michigan lived as a family and had each individually adopted one child. Michigan would not permit the two women to adopt both children together, so they lived in fear that if an emergency arose, schools and hospitals would treat the children as if they only had one parent. Further, if either mother died, the surviving mother would have no legal rights to protect the child she was unable to adopt.

A soldier and his partner were legally married in New York. After the soldier returned from a tour of duty in Afghanistan, the couple moved to Tennessee, where same-sex marriage was not recognized. Despite the soldier having served this Nation to preserve our Constitutional freedoms, his lawful marriage was stripped from him when he crossed state lines.

Holding: Judgment of the Sixth Circuit is Reversed.

Majority Opinion: (J. Kennedy, J. Ginsburg, J. Breyer, J. Sotomayor, J. Kagan)

Marriage has evolved over time. Once, it was viewed as an arrangement by a couple's parents, but later it was understood to be a voluntary contract. The law of coverture has been abandoned. The "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."

Until the mid-20th century, same-sex intimacy had been condemned as immoral. However, in more recent years, psychiatrists and others have recognized that sexual orientation is both a normal expression of human sexuality and immutable. Same-sex couples have started to lead more open and public lives and to establish families. Although some states have concluded that same-sex couples must be allowed to marry, the States were divided.

The Due Process Clause of the Fourteenth Amendment requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them respect. We must respect and learn from our history without allowing the past alone to rule the present. "When new insight reveals discord between the Constitution's central protections and a received legal structure, a claim to liberty must be addressed."

The reasons marriage is fundamental under the Constitution apply with equal force to same sex marriage. The Court provided four premises of relevant precedent to extend the fundamental right to marry to same-sex couples:

(1) The right to personal choice regarding marriage is inherent in the concept of individual autonomy. Through the bond of marriage, two persons together can find other freedoms, such as expression, intimacy, and spirituality.
(2) The right to marry support a two-person union unlike any other in its importance to committed individuals. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association.
(3) The right to marry safeguards children and families and allows children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. While procreation is not a prerequisite to marriage, the laws banning same-sex marriage harm and humiliate the children of same-sex parents.
(4) Marriage is a keystone of our social order. Exclusion from marriage has the effect of teaching that gays and lesbians are unequal in important respects.

Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right. The "right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty." "The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights." Further, "individuals need not await legislative action before asserting a fundamental right." "Fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."

This ruling does not prevent religious organizations from continuing to teach the principals central to its practitioners' lives and faith.

Dissenting Opinion: (C.J. Roberts, J. Scalia, J. Thomas)

Fundamental rights implied under the Due Process Clause must be so rooted in the traditions and conscience of the American people as to be ranked as fundamental. While there have been cases holding that the right to marry was fundamental, none of those cases purported to change the core definition of marriage. Further, the other cases relied on by the majority correspond to a right of privacy or a right to be let alone. The bans on same-sex marriage did not impose any government intrusion on the petitioners. Moreover, the majority offered no reason as to why its reasoning could not be applied to polygamous relationships. Additionally, the majority overlooked the history and tradition of marriage. Furthermore, despite the majority's conclusory assertion that the Equal Protection Clause requires states to license and recognize same-sex marriages, it did not seriously engage with the claim.

Despite the evolution of certain characteristics of marriage, its core structure has endured. The same-sex marriage decision should have been left to public debate. People denied a voice are less likely to accept a ruling on an issue that does not seem to be the sort of thing courts usually decide. It is beyond the Court's power to address concerns not before the court or to anticipate problems that may arise from the exercise of a new right. Further, the majority's decision cast "Americans who did nothing more than follow the understanding of marriage that has existed for our entire history" as bigoted.

Dissenting Opinion: (J. Scalia, J. Thomas)

Scalia began by noting that the substance of the majority's decision was not "of immense personal importance to [him]." While he joined in the other three dissents, he wrote separately to opine that the make-up of the Supreme Court Justices is hardly a reflective cross-section of Americans as a whole. Thus, it was inappropriate for the nine Justices to make such a sweeping decision and stop the public debate of the subject. There should be "no social transformation without representation."

Additionally, there was no basis for striking down a practice that was not expressly prohibited by the Fourteenth Amendment's text. Rather, the majority "discovered" a fundamental right "overlooked" by every person alive at the time of the Fourteenth Amendment's ratification and in the time since. Further, the opinion was couched in a style that was pretentious and egotistical. The language used, while appropriate in a concurrence or dissent, was out of place in an Opinion of the Court. Moreover, "the opinion's showy profundities [were] often profoundly incoherent." Scalia noted in a footnote that "If…I ever joined an opinion that began [with the first sentence of the majority opinion], I would hide my head in a bag."

Finally, under the majority's reasoning, the Due Process Clause stands for nothing except those freedoms and entitlements that the US Supreme Court prefers. "With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the 'reasoned judgment' of a bare majority of this Court—we move one step closer to being reminded of our impotence."

Dissenting Opinion: (J. Thomas, J. Scalia)

"Due Process" guarantees whatever "process" is "due" before a person is deprived of life, liberty, or property. "Liberty" refers to "the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." Even assuming "liberty" encompasses more than freedom from physical restraint, liberty has long been understood as individual freedom from government action, not a right to a particular government entitlement.

The petitioners here cannot claim to have been physically restrained or that the States restricted their ability to go about their daily lives. Rather, the plaintiffs seek privileges and benefits that exist solely because of the government. Further, the precedents relied on by the majority all involved absolute prohibitions on private actions associated with marriage. Here, nothing prohibited the petitioners from getting married in a state that recognizes same-sex marriage or through a private religious ceremony. Additionally, the majority disregarded the political process and threatened religious liberty. It is inevitable that individuals and churches will be confronted to demands to participate in ceremonies that violate their religious faith. The majority's discussion of advancing the dignity of same-sex couples was flawed. The government cannot bestow dignity, and it cannot take it away. One's liberty and dignity is something to be shielded from, not provided by the State.

Dissenting Opinion: (J. Alito, J. Scalia, J. Thomas)

The Constitution says nothing about a right to same-sex marriage. Every person in our nation has the unalienable right to liberty, but liberty means different things to different people. The US Supreme Court has previously held that "liberty" under the Due Process Clause includes only those rights that are "deeply rooted in this Nation's history and tradition." Same-sex marriage is not among those rights.

States have reasonable secular grounds for restricting marriage to same-sex couples, including the traditional tie between marriage and procreation. Although this tie has been fraying in recent years, that does not mean the States should not be concerned about contributing further to traditional marriage's decay.

Further, the language of the majority opinion could be used to vilify Americans who are unwilling to assent to the new orthodoxy. By comparing traditional marriage laws to laws that denied equal treatment for African-Americans and women, those who oppose same-sex marriage risk being labeled as bigots if they express their views in public.

★★★TEXAS SUPREME COURT ★★★

WIFE'S ATTORNEYS PROTECTED BY LITIGATION IMMUNITY FROM CIVIL LIABILITY TO THIRD PARTIES BECAUSE CONDUCT, ALTHOUGH WRONGFUL AND FRAUDULENT, WAS CONDUCT IN WHICH AN ATTORNEY ENGAGES TO DISCHARGE HIS DUTIES TO HIS CLIENT.

¶15-5-36. ***Cantley Hanger v. Byrd*, ___ S.W.3d ___, 13-0861, 2015 WL 3976267 (Tex. 2015)** (06-26-15).

Facts: In their divorce decree, Wife was awarded an airplane that had been owned by Husband's company. Additionally, Wife was awarded all tax liabilities and debts associated with the airplane. The decree provided that Wife's attorney would prepare the documents to effectuate the transfer within ten-days. No documents were executed within that time-frame. About a year later, Husband discovered that Wife's attorneys had aided her in executing a bill of sale to sell the airplane to a third party. The bill of sale listed Wife on the bill of sale as a manager of Husband's company, when she had never had any role in the company, and used her married name, although her maiden name had been long-since restored. As a result of the sale, Husband's company became responsible for the tax liability associated with the airplane. Husband sued Wife's attorneys for fraud, aiding and abetting, and conspiracy. At trial, Wife's attorney's moved for summary judgment on attorney-immunity grounds. The trial court granted the summary judgment and dismissed Husband's claims with prejudice. The court of appeals reversed, holding that the attorneys' fraudulent conduct had nothing to do with the divorce decree and was outside the scope of representation of a client. Wife's attorneys petitioned the Texas Supreme Court for relief.

Holding: Court of Appeals' Judgment Reversed; Trial Court Judgment Reinstated

Majority Opinion: (J. Lehrman, J. Guzman, J. Boyd, J. Devine, J. Brown)

Attorneys are immune from civil liability to non-clients for actions taken in connection with representing a client in litigation, even if wrongful or fraudulent. Attorneys are not protected from liability to non-clients when the actions do not qualify as the kind of conduct in which an attorney engages when discharging his duties to his client. An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that his conduct was part of the discharge of his duties to his client.

Here, because the divorce decree awarded the aircraft to Wife and provided that Wife's attorney would draft the necessary documents, the preparation of the bill of sale was "conduct in which an attorney engages to discharge his duties to his client" and was not "foreign to the duties of an attorney."

Any claims of fraud should be against Wife and not her attorneys.

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

There are two theories of attorney immunity: (1) litigation immunity, which requires the conduct to have occurred in the litigation context; and (2) judicial proceedings privilege, which applies to statements made in the course of or in serious contemplation of a judicial or quasi-judicial proceeding. Here, there was no evidence that the judicial proceedings privilege applied.

Without the litigation immunity, an attorney's zealous advocacy at trial would be diluted. The dissent agreed that there is no exception for wrongful or fraudulent conduct. However, rather than an analysis of whether the conduct occurred in the litigation context, the majority instead asked whether the conduct occurred in the scope of representation. Under a scope-of-representation test, almost anything an attorney does would be protected from civil liability.

Further, the summary judgment evidence did not conclusively establish that the conduct occurred in the litigation context. The bill of sale was signed over a year after the divorce decree was signed. The airplane was sold to a third party. The fact that the sale had tax implications was inconsequential because the litigation had ended, and the decree did not address subsequent sales to third parties.

Moreover, the holding created a judicial dichotomy, in that the undisturbed court of appeals holding—that the fraud claims were not claims for enforcement of the decree—was contrary to the majority's holding that the attorneys' conduct was within the scope of representation in the divorce proceeding. The conflict created a question of jurisdiction as to whether the fraud claims against Wife are within the divorce courts' continuing, exclusive jurisdiction.

★★★TEXAS SUPREME COURT ★★★

NO LEGAL REQUIREMENT FOR ATTORNEYS TO EXPLAIN TO PROSPECTIVE CLIENTS ARBITRATION PROVISIONS IN ATTORNEY-CLIENT EMPLOYMENT CONTRACTS; HUSBAND FAILED TO PROVE A DEFENSE TO ARBITRATION.

¶15-5-37. ***Royston, Razor, Vickery, & Williams, LLP v. Lopez,*** ___ S.W.3d ___, No 14-0109, 2015 WL 3976101 (Tex. 2015) (06-26-15).

Facts: Husband hired a law firm to represent him in his divorce from his common-law wife who had won $11 million in the lottery. The attorney-client employment contract included an arbitration provision which stated that the parties agreed to resolve any disputes between them in binding arbitration, except claims made by the firm for the recovery of its fees and expenses. Husband signed the agreement, and the firm represented him throughout the divorce proceedings. After a settlement agreement was reached between Husband and Wife, Husband sued his law firm claiming the attorneys induced him to accept an inadequate settlement. The firm moved to compel arbitration.

In the trial court, Husband had raised affirmative defenses to arbitration, including that the arbitration provision was substantively unconscionable, the arbitration provision violated public policy, the law firm failed to explain the effects of arbitration to Husband as a prospective client, and the provision was illusory because it allowed the firm to avoid arbitration as to its fee disputes while requiring Husband to arbitrate all his disputes. At the hearing on the motion to compel arbitration, Husband introduced no evidence of his own, but rather, relied solely on the language of the attorney-client employment contract.

The trial court denied the firm's motion, so the law firm filed an interlocutory appeal and a petition for writ of mandamus. The court of appeals affirmed the trial court's refusal and denied mandamus relief. The law firm then sought relief from the Texas Supreme Court, asking the court to hold all of Husband's defenses to arbitration invalid, reverse the court of appeals' judgment, and remand the case to the trial court with instruction to order the parties to arbitration.

Holding: Court of Appeals Reversed; Remanded to Trial Court; Mandamus Denied

Majority Opinion: (J. Johnson, joined by all)

Texas law protects a broad freedom of contract. Substantive unconscionability refers to the fairness of the arbitration provision, and procedural unconscionability refers to the circumstances surrounding the adoption of the arbitration provision. Arbitration clauses in agreements are enforceable absent proof of a defense, and a person who signs a contract with an arbitration clause is deemed to know and understand its contacts and is bound by its terms. An arbitration agreement is unenforceable if it is procedurally unconscionable, substantively unconscionable, or both.

Although Husband challenged certain terms of the contract as being "one-sided," his complaints were not directed specifically to the arbitration provision. Moreover, excepting certain claims from arbitration does not make an arbitration agreement so one-sided as to be unconscionable. The provision equally bound both parties to arbitrate claims within its scope and ensured that the same rules applied to both parties.

There are two competing policies to be considered with respect to an attorney-client arbitration agreement: (1) the policy of holding attorneys to the highest level of ethical conduct; and (2) the policy of encouraging and enforcing arbitration agreements. While an ethics opinion provided that Disciplinary Rule 1.03(b) advised that the rule applied to prospective clients, ethics opinions are advisory only. Further, even if Rule 1.03(b) did apply to prospective clients, the burden would be on Husband to establish that explanations required by the Rule were not made, which he did not do.

Finally, the fact that the scope of an arbitration provision binds parties to arbitrate only certain disagreements does not make it illusory.

Concurring Opinion: (J. Guzman, J. Lehrmann, J. Devine)

The ethical rules need more specificity delineating the means and methods by which attorneys can discharge their ethical responsibilities in the context of attorney-client contracts and arbitration provisions. Vulnerable or unsophisticated clients are less likely to fully appreciate the implications of an arbitration agreement, understand the process and its procedures, or seek independent counsel regarding the costs and benefits of arbitration. An attorney has an ethical responsibility to the client, but the Disciplinary Rules lack clear guidance.

ANY TEXAS LAW DENYING SAME SEX COUPLES THE RIGHT TO MARRY OR REFUSING TO RECOGNIZE SAME-SEX MARRIAGES PERFORMED IN OTHER STATES VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES AND CANNOT BE ENFORCED.

¶15-5-38. ***De Leon v. Abott,*** ___ F.3d ___, SA-13-CA-00982-OLG, 2015 WL 4032161 (5th Cir. 2015) (07-01-15).

Facts: Plaintiffs were two same-sex couple who sought to marry in Texas or have their out-of-state marriage recognized in Texas. They sought a declaration that Texas's law denying same-sex marriage violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. Additionally, they sought a permanent injunction enjoining Texas from

enforcing laws prohibiting same-sex couples from marrying or prohibiting the recognition of same-sex marriages performed in other states. The federal district court granted a preliminary injunction, which the State appealed. Upon appeal, the injunction was stayed.

Holding: Preliminary Injunction Affirmed and Remanded for Judgment for Plaintiffs

Opinion: While the appeal was pending, the United States Supreme Court decided *Obergefell v. Hodges*, __ U.S. __, 2015 WL 2473451 (2015). In light of that decision:

1) Any Texas law denying same-sex couples the right to marry, including Article I, § 32 of the Texas Constitution, any related provisions of the Texas Family Code, and any other laws or regulations prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;
2) Defendants [Texas Governor, et al.] are permanently enjoined from enforcing Texas's laws prohibiting same-sex marriage; and
3) Any taxable costs in this case are assessed against the Defendants.

BECAUSE A DIVORCE INVOLVING CHILDREN IS NOT SUBJECT TO TEX. R. CIV. P. 76a, TRIAL COURT ABUSED DISCRETION BY UNSEALING THE FILE PURSUANT TO THAT RULE.

¶15-5-39. *In re S.M.B.*, No. 05-14-00745-CV, 2015 WL 3988034 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (07-01-15).

Facts: During their divorce proceedings, Mother and Father entered into an Agreed Confidentiality Order to seal their case file. About three years after the divorce, Mother filed a motion to unseal the record, stating that the circumstances of the parties and children had substantially changed; that due to electronic filing, Mother and her attorney could not review the online docket or verify filings or court settings; that Mother's attorney could not adequately represent Mother because the case was sealed; and that the parties' youngest Child was about to graduate from high school and confidentiality was no longer necessary. The only cited authority in Mother's motion to unseal was Tex. R. Civ. P. 76a. The trial court granted the motion to unseal. Father appealed, arguing that the records in this case were not subjection to Rule 76a.

Holding: Reversed

Opinion: Under Tex. R. Civ. P. 76a, court records are presumed to be open to the general public, and the Rule sets forth limited circumstances and procedures for overcoming the presumption. While the Rule's definition of court records is broadly written to include "all documents of any nature filed in connection with any matter before any civil court," Tex. R. Civ. P. 76a(2)(a), the Rule specifically excludes "documents filed in an action originally arising under the Family Code." Tex. R. Civ. P. 76a(2)(a)(3).

Editor's Comment: *Perhaps because records have become more publically accessible, generating a greater desire for privacy, it seems that more and more often we see confidentiality agreements or orders sealing files in family cases, and not just in those cases where evil secrets are being buried!. To the extent that there could be a need or desire to unseal matters in the future, this case reminds us that when drafting these agreements and orders we should contemplate drafting the grounds and/or authority for undoing them later when warranted. S.S.S.*

FATHER NOT REQUIRED TO ATTACH SUPPORTING AFFIDAVIT TO SAPCR BECAUSE HIS PETITION WAS FILED MORE THAN A YEAR AFTER THE COURT ORALLY RENDERED JUDGMENT IN THE PRIOR SAPCR.

¶15-5-40. *In re K.R.Z.*, 04-14-00876-CV, 2015 WL 4478123 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (07-22-15).

Facts: A final order granted Mother the exclusive right to designate their Child's primary residence. Subsequently, Father filed a SAPCR and sought the exclusive right to designate the Child's primary residence. Mother filed a motion to dismiss, alleging that Father's motion had been filed less than a year after the prior order was signed, and Father failed to

attach a supporting affidavit as required by Tex. Fam. Code § 156.102. The trial court dismissed Father's motion without prejudice and granted Mother's request for attorney's fees. Father appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 156.102 requires the filing of a supporting affidavit if a SAPCR seeks to change the designation of the person having the exclusive right to designate the primary residence within one year of the date of the rendition of the prior order. A rendition can be oral or in writing. Here, the order recited that it was pronounced on July 26, 2013 and signed September 11, 2013. Mother did not contest this recital. Thus, one year after the rendition of this order was July 26, 2014. Father's petition was filed until August 11, 2014 and thus, was not required by Tex. Fam. Code § 156.102 to include a supporting affidavit.

WIFE ENTITLED TO RESTRICTED APPEAL BECAUSE, DESPITE RECITATION IN ORDER, THERE WAS NO EVIDENCE SHE WAS PROPERLY SERVED.

¶15-5-41. *Schamp v. Mitchell*, 04-14-00741-CV, 2015 WL 4478150 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (07-22-15).

Facts: In their divorce decree, Wife was obligated to refinance a promissory note in her name and pay the remaining balance. Almost 9 years later, Husband filed a petition for enforcement, claiming Wife had failed to comply with the divorce decree. Although the docket sheet indicated that Husband requested the clerk issue citation, there was no entry indicating service was accomplished. Additionally, the docket sheet included a note that Husband requested a non-jury trial setting, but there was no order for a setting. Further, the docket sheet did not include an entry showing a trial took place. Nevertheless, the final order on enforcement contained recitals that each party appeared in person and announced ready for trial. Less than six months later, Wife filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Despite the recitation in the final order, nothing else in the record or docket indicated Wife was served with notice of the suit or the trial, that she waived notice, or that she appeared. Thus, because the record did not affirmatively show proper service, there was error apparent on the face of the record.

ALTHOUGH WIFE CITED TEX. R. CIV. P. 91a IN HER MOTION TO DISMISS BILL OF REVIEW, HUSBAND'S BILL OF REVIEW DISMISSED BECAUSE HE FAILED TO ESTABLISH THAT HE EXERCISED DILIGENCE IN PURSUING ALL OTHER LEGAL REMEDIES.

¶15-5-42. *Bergenholtz v. Eskenazi*, 05-14-00609-CV, 2015 WL 4481664 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (07-23-15).

Facts: During their divorce proceedings, Husband and Wife entered into an AID that divided the marital estate and appointed them joint managing conservators of their two Children. The trial court signed a final decree incorporating their agreement. A few months later, upon Wife's motion, the trial court modified the agreed final decree. Husband appealed the modified decree, but during the pendency of the appeal, Husband and Wife reached a settlement agreement. A provision of that agreement required Husband to dismiss his appeal, which he did. Over two years later, Husband filed a pro se bill of review asserting Wife had committed fraud by concealing assets. Husband asserted that Wife's fraudulent acts compelled him to enter the settlement agreement. Wife filed a motion to dismiss the bill of review, citing Tex. R. Civ. P. 91a (a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact) and asserting that Husband failed to establish the prerequisites for a bill of review. After a hearing the trial court signed a judgment dismissing Husband's bill of review with prejudice on the ground that he did not exercise due diligence in pursuing all available legal remedies against the judgment. Husband appealed, arguing that a dismissal based on Tex. R. Civ. P. 91a was improper.

Holding: Affirmed

Opinion: A party may not move to dismiss a case brought under the family code based on Tex. R. Civ. P. 91.a. Although Wife's motion mentioned rule 91a, Wife clearly alleged that Husband was not entitled to a bill of review because he failed

to meet the pleading and proof requirements for his bill of review. Additionally, although rule 91a was discussed at the hearing on Wife's motion to dismiss, the trial court decision was not based on rule 91a, but rather that Husband failed to establish that he was not negligent or a fault. Thus, the court of appeals expressed no opinion as to whether a rule 91a motion to dismiss could be used to attack a bill of review when the underlying judgement is a divorce decree.

Additionally, in his appeal, Husband only asserted that dismissal under 91a was improper. Husband did not assert that the trial court erred in determining he failed to exercise due diligence in pursuing all legal remedies against the judgment.

EVIDENCE SUPPORTED DISMISSAL OF JURORS BECAUSE ONE WAS STATUTORILY DISQUALIFIED AND OTHER WAS CONSTITUTIONALLY DISABLED FROM SERVING.

¶15-5-43. ***In re M.G.N.***, ___ S.W.3d ___, 04-12-00108-CV, 2015 WL 4554525 (Tex. App.—San Antonio 2015, no pet. h.) (07-29-15).

Facts: The Parents had been appointed joint managing conservators of their two Children. A few years later, Father filed a SAPCR, and Mother filed a counter-petition, with each parent seeking sole managing conservatorship.

During the cross-examination of a witness, Mother's attorney suggested that the witness had been responsible for running a certain business to the ground. Subsequently, a juror related to the court that he was in the same business as the one in question and knew the individuals in question. Further, the juror stated that he knew that the business struggles were due to the economy and not due to anything the witness had done. The trial court dismissed that juror, noting that there was an alternate juror to take the dismissed juror's place.

Subsequently, on the morning of the last day of trial, a juror contacted the court to report that he had been up sick the entire night before and that he did not know when he would be well enough to return to court. The trial court proceeded without the sick juror, and a verdict was returned by the remaining eleven jurors.

After a final judgment was signed, Father appealed arguing that the trial court abused its discretion by dismissing the jurors, excluding certain evidence during the trial, and ordering him to pay 75% of the Children's dental care when Mother's pleadings had not sought such relief.

Holding: Affirmed

Opinion: A juror is statutorily disqualified if the juror admits bias or prejudice. Here, the first dismissed juror stated that it would be difficult for him not to convey his understanding of the "true" source of the business's economic problems to the other jurors. Further, the trial judge is in the best position to evaluate the sincerity and attitude of a juror.

A jury of less than twelve people if, during trial, no more than three juror die or become disabled from sitting. A juror can be dismissed if he suffers from a constitutional disability that is in the nature of physical or mental incapacity. The second dismissed juror was physically incapable of sitting for the last day of trial and could not determine when he would be well enough to return.

After determining there was no error in allowing a panel of eleven jurors to return a verdict, the court of appeals addressed the merits of Father's appeal. However, Father waived the majority of his complaints because he rested his case-in-chief without obtaining rulings on his objections to the trial court's exclusions of his proffered evidence. Although Father made offers of proof after resting, his late offers of proof failed to preserve his complaints for appeal.

Additionally, although Father argued that Mother's pleadings did not support the court's order regarding payment for the Child's dental care, that issue was tried by consent because it was addressed at length during trial.

APPEAL OF DENIAL OF PLEA TO JURISDICTION IN SAME-SEX DIVORCE CASE DISMISSED AS MOOT IN LIGHT OF *OBERGEFELL*.

¶15-5-44. *In re A.L.F.L.*, No. 04-14-00364-CV, 2015 WL 4561231 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (07-29-15).

Facts: The trial court denied a plea to the jurisdiction in a same-sex divorce. The court of appeals had previously stayed all trial proceedings, despite the involvement of a child, because the same issues presented were pending before the Texas Supreme Court.

Holding: Dismissed

Opinion: In light of *Obergefell*, the court of appeals and appellant agreed the appeal was moot.

HUSBAND ENTITLED TO RECOVERY FROM WIFE IN CROSS-CLAIM FOR LIABILITY FOR DEBT INCURRED DURING MARRIAGE.

¶15-5-45. *Simcoe v. Christopher*, No. 04-14-00735-CV, 2015 WL 4554335 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (07-29-15).

Facts: Wife's parents financed two vehicles for Husband and Wife during their marriage. When Husband and Wife divorce, initially, each kept one of the two vehicles. However, Husband found that he could not afford the payments and returned his vehicle to his In-Laws. Mother-In-Law made one more payment on that vehicle and then called the finance company to have the vehicle repossessed. The vehicle was repossessed and sold at auction, leaving a remaining debt of about $18,000.

Subsequently, the In-Laws sued Husband, alleging that he had orally promised to make payments on the vehicle until it was paid in full or to refinance the vehicle into his own name. Husband answered and raised affirmative defenses, including statute of frauds. Husband also joined Wife in the suit, contending that he was entitled to contribution from her for any liability found against him. The trial court found that Husband was liable to the In-Laws for the debt. Additionally, the trial court rendered a take-nothing judgment as to Wife. Husband appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Father failed to adequately challenge the trial court's finding that he was liable for the debt, so the court of appeals was obligated to affirm that portion of the judgment.

Obligations of multiple parties to a contract are usually "joint and several." Here, the vehicles were acquired during the marriage. Although the Mother-In-Law testified that Husband agreed to be responsible for the debt for "his" vehicle, Wife admitted that she and Husband agreed to pay for both vehicles, they did not distinguish between the two vehicles, and they intended to refinance the vehicles into "their" names.

UNMARRIED COUPLE FOUND TO HAVE BEEN IN A CONFIDENTIAL RELATIONSHIP, AND BOYFRIEND ENTITLED TO REIMBURSEMENT FOR GIRLFRIEND'S CONSTRUCTIVE FRAUD.

¶15-5-46. *Rubio v. Klein*, 11-13-00189-CV, 2015 WL 4720792 (Tex. App.—Eastland 2015, no pet. h.) (mem. op.) (07-30-15).

Facts: Girlfriend and Boyfriend dated for ten years and lived together for nine. They exchanged rings and opened a joint back account, but they never formally married. During the relationship, they lived in Girlfriend's house. When they moved in together, Girlfriend was unemployed and had a mortgage on the house. Throughout the relationship, Boyfriend paid the mortgage and property taxes. Girlfriend alleged that she made some of these payments but provided no documentary evidence or specific testimony to support this claim. Boyfriend testified that he understood that he would get his money back if the house were ever sold. Girlfriend denied ever having any such conversation. Girlfriend's ex-husband testified that Boyfriend had intended the payments to be a gift to Girlfriend, but Boyfriend denied ever discussing the payments with Girlfriend's ex-husband. Additionally, Boyfriend provided Girlfriend with money to open and run a hair salon. At the time of the couple's break-up, Girlfriend owned and ran two salons.

After a bench trial, the court found that there had been no common law marriage. However, the trial court found that there had been a confidential relationship and that Girlfriend had breached her fiduciary duty to Boyfriend. The court awarded Boyfriend a reimbursement award. Girlfriend appealed, arguing the court erred in finding she had committed constructive fraud.

Holding: Affirmed

Opinion: A confidential relationship that gives rise to an informal fiduciary relationship exists where one person trusts in and relies upon another. One party is justified in expecting another to act in its best interest when the parties have dealt with each other for a sufficient time and have become accustomed to being guided by the judgment or advice of the other. However, subjective trust alone is insufficient to create such a relationship.

Although there was conflicting evidence, because the trial court is the sole factfinder, the trial court did not err in finding that a confidential relationship existed and that Girlfriend breached her fiduciary duty.

UNCONTROVERTED EVIDENCE OF TOTAL FEES INCURRED WITH TESTIMONY THAT THE FEES WERE "FAIR AND REASONABLE FOR THE COMPLEXITY OF THIS CASE" WAS SUFFICIENT TO SUPPORT ATTORNEY FEE AWARD.

¶15-5-47. *In re J.R., III*, 05-14-00338-CV, 2015 WL 4639625 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-05-15).

Facts: Mother and Father were not married, but they lived together and had one Child. Mother filed a petition for divorce alleging an informal marriage and sought to be named the Child's sole managing conservator. Father denied that the couple was ever informally married and also sought sole managing conservatorship. Subsequently, Mother nonsuited her divorce, and the property-related claims were vacated. Although the parties initially agreed to let Mother live in Father's home with the Child during the pending SAPCR, Mother later moved out, and Father saw her take many of his personal possessions during the process. Father called the police, but they did not assist. Thus, Father amended his petition to include claims for theft and conversion. Per the scheduling order, the parties attending mediation, which was unsuccessful. During the proceedings, Mother had two different attorneys, who each withdrew. After a final trial, the trial court signed a final order appointing the parents joint managing conservators, awarded Father a $24,428.82 judgment for conversion, awarded Father $779.64 for utilities Mother failed to pay while in the home, and awarded Father $5,000 in attorney's fees. Among other complaints, Mother appealed the award of attorney's fees.

Holding: Affirmed

Opinion: In *In re Marriage of Pyrtle*, 433 S.W.3d 152, 167 (Tex.App.–Dallas 2014, pet. denied), the court stated that under the "lodestar" method, a party desiring to prove-up attorney's fees must establish (1) the number of hours reasonably spent on the case, (2) the fee application and record must include proof documenting the performance of specific tasks, (3) the time required for those tasks, (4) the person who performed the work, and (5) his or her specific rate. However, *Pyrtle* did not involve a statute that required attorney's fees to be determined under the lodestar method. Nevertheless, because the record did not include testimony, contradicted or uncontradicted, respecting the hourly rate or reasonableness of the fees, the award of attorney's fees could not be upheld.

Here, the parties did not dispute that attorney's fees in a SAPCR must be calculated according to the lodestar method. However, a trial court has broad discretion to award reasonable attorney's fees in a SAPCR, and a trial court does not abuse its discretion when there is some evidence to support the award.

Father's attorney did not testify about the specific number of hours he worked, but he did state the total fees incurred and that they were "fair and reasonable for the complexity of this case." This evidence was uncontroverted. Further, the trial court was authorized to consider the entire record and its own common knowledge in determining whether the fees were reasonable.

NO EVIDENCE SUPPORTED TRIAL COURT'S BAD-FAITH FINDING IN ORDER FOR SANCTIONS; CONTENTS OF AFFIDAVIT NOT IN EVIDENCE BECAUSE ATTACHED TO SANCTIONS MOTION BUT NOT INTRODUCED DURING SANCTIONS HEARING.

¶15-5-48. *O'Donnell v. Vargo*, 05-14-00404-CV, 2015 WL 4722459 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-10-15).

Facts: Husband was Wife's second husband. After an 11-year marriage, Wife filed for divorce in Collin County from Husband. Husband responded by filing a petition to have the marriage declared void because he alleged Wife's prior divorce decree was void. In Wife's prior divorce proceeding in Dallas County, the case was dismissed for want of prosecution, and then the divorce decree was signed without an order reinstating the case. The Collin County trial court denied Husband's request without stating a reason. Subsequently the case was transferred to a different Collin County court. Husband filed an amended petition to have his marriage to Wife declared void. The second Collin County trial court denied Husband's request, stating that the declaratory judgments act did not authorize it to declare a different court's judgment void.

Husband then filed a petition for declaratory judgment in the Dallas County court that had signed Wife's prior divorce decree. Wife filed a response and motion for sanctions. Each party filed a motion for summary judgment. The trial court granted Wife's, denied Husband's, and awarded Wife sanctions. In its findings of fact, the trial court found that

Husband's filings were groundless because the statute of limitations for his cause of action expired 20 years before he filed. Additionally, the trial court held that the case was brought in bad faith. Husband appealed only the sanctions award.

Holding: Affirmed in Part; Reversed and Rendered in Part

Opinion: "Bad faith" under Tex. R. Civ. P. 13 is not simply bad judgment or negligence, but means the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. There is a rebuttable presumption of good faith.

Here, the only evidence supporting sanctions included Husband's amended petition for declaratory judgment, Wife's response and plea to the jurisdiction, and Wife's attorney's fee statements. The Dallas County trial court also took judicial notice of the Collin County court orders and pleadings attached to the summary judgment motions. However, one Collin County judge did not state the reason for denying Husband's relief, and the other Collin County judge stated that it lacked authority to declare void a final judgment of another court. Neither ruling held that Husband could not seek relief from the Dallas County district court that rendered Wife's prior divorce.

Wife attached an affidavit to her sanctions motion, but the affidavit was not admitted into evidence during the hearing on her motion. Further, while the trial court could take judicial notice that the affidavit had been filed, it could not take judicial notice of the contents of the affidavit. Thus, the affidavit's contents could not support the bad-faith finding.

Based on the trial court's findings of fact, its Chapter 10 sanctions appeared to be a sanction under Tex. Civ. Prac. & Rem. Code § 10.001(1), which requires a finding that pleadings no be presented for an improper purpose. Here, the only "improper purpose" found by the trial court was "bad faith," which was not supported by the record.

MOTHER FAILED TO ESTABLISH APPELLATE ATTORNEYS FEES WERE NECESSARY TO PROTECT THE SAFETY AND WELFARE OF THE CHILDREN.

¶15-5-49. *In re Wiese*, 03-15-00062-CV, 2015 WL 4907030 (Tex. App.—Austin 2015, orig. proceeding) (mem. op.) (on reh'g) (08-12-15).

Facts: In Mother and Father's divorce decree, they were appointed joint managing conservators of the Children, and Father was granted the exclusive right to designate the Children's primary residence. The decree further provided that neither parent could travel internationally with the Children without written consent of the other party. About ten years later, Mother initiated a SAPCR, and the trial court modified the decree to allow the parties to travel internationally with the Children. Father appealed. Mother filed a motion, and received an order, for appellate attorney's fees under Tex. Fam. Code § 109.001. Father filed a petition for writ of mandamus arguing the trial court abused its discretion in determining that an award of appellate attorney's fees was "necessary to preserve and protect the safety and welfare of the child[ren] during the pendency of the appeal."

Holding: Writ of Mandamus Conditionally Granted

Opinion: A party seeking a temporary order for appellate attorney fees under Tex. Fam. Code § 109.001 must demonstrate that the fees are necessary to preserve and protect the safety and welfare of the children. Here, Mother testified that Father had more financial resources, that an appeal would divert her resources away from the Children, and that without additional funds from Father, the Children would be unable to travel internationally. However, Mother presented no evidence that the disparity of the parties' incomes would negatively affect the Children during the pendency of the appeal. Rather, Mother asked the trial court to take judicial notice of the prior proceedings, which it did. Under Tex. Fam. Code § 109.001, the operative standard is the "safety and welfare" of the Children, not "best interests." Although Mother argued that international travel would be in the Children's best interest, she presented no evidence as to how international travel affected the Children's safety and welfare.

SEVERANCE OF DIVORCE AND SAPCR APPROPRIATE BECAUSE IN CHILD'S BEST INTEREST.

¶15-5-50. *In re B.T.G.*, 05-13-00305-CV, 2015 WL 4911856 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (08-18-15).

Facts: Husband and Wife were married for one year and had one Child of the marriage. Wife also had a teenage son from a previous marriage. During the marriage, the parties accumulated no community property or debt other than personal belongings.

Both Husband and Wife filed for divorce and SAPCR in Dallas County, so there were simultaneous proceedings in two district courts. After the cases were consolidated and unconsolidated many times, the 302nd assumed jurisdiction over all the proceedings with the judge of the 330th presiding.

The trial court entered temporary orders in the SAPCR, found that Husband had committed family violence, appointed Wife temporary sole managing conservator of their Child, and granted Wife temporary exclusive possession of the parties' residence. Subsequently, because Husband refused to move out of the residence, Wife obtained financing to buy a HUD home. She moved to sever the divorce from the SAPCR because if the divorce was not finalized "soon enough" she would lose out on the opportunity to buy a home at price she could afford.

The trial court severed the divorce from the SAPCR and proceeded with a bench trial on the divorce. A divorce was granted on the ground of insupportability and provided that the child-related issues would be addressed in the pending SAPCR. The severance order and the divorce decree stated that severance was in the best interest of the Child.

Husband appealed arguing that the trial court erred in severing the divorce from the SAPCR.

Holding: Affirmed

Opinion: Tex. Fam. Code § 6.406 requires the joinder of petitions for divorce and SAPCRs related to the parties' minor children. However, there is no authority that prohibits a subsequent severance of the divorce and SAPCR.

Here, the trial court had the opportunity to acquaint itself with the issues. The trial court determined that severance was in the best interest of the Child because it would allow Wife to purchase a house for her and her children. Further, due to the limited community property, which amounted only to personal belongings, the issues in the divorce and SAPCR were not so interwoven that they could not be severed.

Editor's Comment: *For the first time, a Court of Appeals has held that in a non-UCCJEA/UIFSA case, the SAPCR may be tried and finalized separately from the property division under limited circumstances. Don't understand why this is not a reported opinion. G.L.S.*

TRIAL COURT HAD NO JURISDICTION TO CONSIDER NEW MODIFICATION PROCEEDING DURING PENDENCY OF APPEAL OF PRIOR SAPCR ORDER.

¶15-5-51. ***In re E.W.N.,*** ___ S.W.3d ___, 08-13-00345-CV, 2015 WL 5047612 (Tex. App.—El Paso 2015, no pet. h.) (08-26-15).

Facts: The trial court appointed Mother and Father joint managing conservators and ordered Father to pay child support. Father appealed. While his appeal was pending, he filed in the trial court a petition to reduce his child support obligation, and the trial court entered temporary orders. On Mother's motion, the trial court dismissed Father's modification without prejudice because the appellate court had the exclusive "power" of the cause. Father appealed arguing that because the trial court had continuing, exclusive jurisdiction, it had jurisdiction over the parent-child relationship regardless of whether an appeal was pending.

Holding: Affirmed

Opinion: Tex. Fam. Code § 109.001 authorizes a trial court to enter temporary orders during the pendency of an appeal under certain circumstances. If the continuing, exclusive jurisdiction of a trial court to enter orders affecting a child was automatically retained during the pendency of an appeal, Section 109.001 would be unnecessary.

The court of appeals noted that there are available remedies to petitioners who need emergency relief to protect a child during the pendency of an appeal. For example, Tex. Fam. Code § 109.002 provides that an appellate court may, on a proper showing, permit the trial court's order to be suspended. Additionally, pursuant to Tex. R. App. P. 10, a litigant may file a motion with the court of appeals explaining the circumstances that require abatement of the appeal to permit the trial court to set an emergency hearing to protect the child.

Here, after the appeal was perfected, and the trial court's plenary power expired, the trial court had no authority to consider Father's subsequent petition to modify.

Editor's Comment: *Although this case was transferred from the 5th Court of Appeals to the 8th Court of Appeals, the 8th Court of Appeals chose not to follow the prior opinion issued by the Dallas Court of Appeals, which held to the contrary in Hudson v. Markham, 931 S.W.2d 336 (Tex. App.—Dallas 1996, writ denied). Accordingly, a conflict exists between these two courts. G.L.S.*

TRIAL COURTS CANNOT TAKE JUDICIAL NOTICE OF THE TRUTH OF FACTUAL STATEMENTS AND ALLEGATIONS CONTAINED IN PLEADINGS, AFFIDAVITS, OR OTHER DOCUMENTS

¶15-5-52. ***Perez v. Williams*****,** ___ S.W.3d ___, 01-14-00504-CV, 2015 WL 5076294 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (08-27-15).

Facts: When Mother and Father began living together, Mother was still married to another man. Mother and Father's only Child was born less than a month before Mother's divorce was finalized. Mother and her other children had violent tendencies. Father told Mother to leave their residence a few times, but she kept coming back until Father changed the locks. Father filed a SAPCR, and Mother responded by filing a counter-petition alleging an informal marriage. Father filed partial motions for summary judgment to adjudicate his parentage of the Child and to determine that no informal marriage existed. After a hearing, the trial court granted Father summary judgment on both issues. The trial court dismissed the issues of marriage and division of property, and the remaining issues were tried to the bench. The trial court appointed the parents joint managing conservators, granted Father the exclusive right to determine the Child's primary residence, and awarded Mother a step-up possession schedule. Mother appealed, raising a number of complaints.

Holding: Affirmed

Opinion: Mother failed to file a motion to substitute new lead counsel mid-trial. Because the trial court and other parties had no notice of this request, the trial court did not err in denying Mother's oral request to substitute counsel.

Because Mother did not offer certified copies of certain motions and a Rule 11 agreement from Father's divorce from his ex-wife, the motions and agreement were not documents of which the trial court could take judicial notice. Moreover, even if the trial court had taken judicial notice of the documents, it could not have taken judicial notice of the contents of the motions or Rule 11 agreement.

ATTORNEY'S AFFIDAVIT INSUFFICIENT TO SUPPORT AWARD OF ATTORNEY'S FEES BECAUSE IT DID NOT INCLUDE ANY PROOF AS TO HOW MUCH TIME WAS SPENT PERFORMING DIFFERENT CATEGORIES OF WORK.

¶15-5-53. ***Auz v. Cisneros*****,** ___ S.W.3d ___, 14-13-00989-CV, 2015 WL 6156878 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (08-27-15).

Facts: Plaintiff filed a motion for summary judgment on a breach of contract claim and a request for necessary attorney's fees, which the trial court granted. Plaintiff then filed a motion for judgment seeking judgment as a matter of law that Defendant take noting on his counterclaims. The trial court granted the motion and rendered a final judgment.

Defendant appealed, arguing that the trial court erred in awarding attorney's fees because Plaintiff's supporting affidavit was insufficient to support the award.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (C.J. Frost, J. McCally) The lodestar method is used in awarding attorney's fees under Tex. Civ. Prac. & Rem. Code § 38.001. Under this method, the court must first determine the reasonable hours spent by counsel and reasonable hourly rate for such work. The court then multiplies the number of hours by the applicable rate to assess the base fee or lodestar. The base lodestar may be adjusted up or down if relevant factors indicate such adjustment is necessary. Basic facts underlying the lodestar include: (1) the nature of the work; (2) who performed the services and their rate; (3) approximately when the services were performed; and (4) the number of hours worked.

Here, in his affidavit, Plaintiff's attorney provided the total amount of his fees, the number of hours worked, and his hourly rate. He also stated that each of these amounts were reasonable. Additionally, Plaintiff's attorney asserted generally as to eight different categories of work performed. However, he did not present any proof as to how much time was devoted to each of these eight categories. He did not submit any time records or other documentary records that would have provided this information.

Concurring Opinion: (J. Boyce, J. McCally) The Texas Supreme Court has allowed some flexibility in requiring documentation for the simplest cases, and such flexibility should have been applied here. This is a simple case involving a

simple commercial dispute requiring a modest expenditure of 30 attorney hours. A reversal was an unduly formalistic result for a failure to allocate not very many hours to not very many specific tasks.

NO MANDAMUS RELIEF FOR AWARD OF UNCONDITIONAL APPELLATE ATTORNEY'S FEES PENDING APPEAL.

¶15-5-54. *In re McCoy*, 02-15-00273-CV, 2015 WL 5168111 (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (08-28-15).

Facts: The trial court signed temporary orders pending appeal requiring Husband to pay Wife's appellate attorney fees without conditioning the award on Wife meeting her burden of proof.

Holding: Writ of Mandamus Denied

Majority Opinion: (Per Curiam) (J. Meier, J. Dauphinot) Because no reporter's record was made, the court of appeals had no way to determine whether Wife met her burden of proof for attorney's fees. The court of appeals denied mandamus relief but noted that the denial should not affect whether Husband could properly raise the issue in his appeal.

Dissenting Opinion: (J. Walker) Husband is proceeding in his appeal pro se. He alleged that requiring him to pay his Wife's attorney's fees would make him destitute. Because the ordered payment has the potential to preclude Husband's continued prosecution of his appeal, the dissent would grant an emergency stay of the trial court's temporary order and request a response from Wife to Husband's petition for mandamus.

SUPREME COURT WATCH

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

14-0638
Preston A. Ochsner v. Victoria V. Ochsner
from Harris County and Houston's 14th Court of Appeals
Oral argument set November 2

The issue is whether child-support payments should be credited when made directly to a day care facility and private school instead of, as the divorce decree specifies, to the court registry.

14-0797
In re Steven C. Phillips
original appeal under the Tim Cole Act
Oral argument set November 3

The principal issues are (1) whether the comptroller's payment to an innocent inmate for wrongful incarceration may properly adjust payment for court-ordered child-support arrearages and (2) whether the comptroller, by adjusting the state's payment for wrongful incarceration to account for the child support but on the former inmate's arrearage claim, collaterally attack the court's arrearage order or, in doing so, violate the separation-of-powers doctrine.