SECTION REPORT
FAMILY LAW
http://www.sbotfam.org Volume 2015-2 (Spring)

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IN THIS MONTH'S REPORT

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Section Wear and Publications

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MESSAGE FROM THE CHAIR

This is my last Message from the Chair and it's hard to believe that this year has gone by so quickly. It also gives me a chance to reflect on the past year.

CLE

The Family Law Section continues to produce some of the most interesting and innovative CLE in the country. In December, the Section presented its second Family Law and Technology Course in Austin at the AT&T Center. A special thanks to Mark Unger and the planning committee who put together a great program.

Steve Naylor, Lisa Hoppes and the planning committee have put together a great program for Marriage Dissolution. Lisa is the course director for the 101 Course, which will begin on Wednesday afternoon on April 8. Steve is the course director of the main course on April 9-10. Marriage Dissolution will be at the Westin Galleria in Dallas.

PRO BONO

We continue to advance the Family Law Section's goal of providing an attorney for indigent Texans across the State. The Pro Bono Committee, chaired by Dick Sutherland, the State Bar and the legal aid providers have planned our family law essentials seminars for 2015. We will have six seminars this year – Bryan-College Station, Laredo, McAllen, McKinney, Midland and Waco. As you probably know, the price of admission to the seminar, which qualifies for mandatory CLE credit, is the commitment to handle two family law pro bono matters in the next twelve months. The Section will continue its pro bono efforts including the development of a pro bono webinar. As with its live seminars, the goal of the webinar is to provide free CLE to attorneys willing to take on pro bono cases. With the development of the webinar, CLE will be made available to attorneys across the state. Thank you to the Pro Bono Committee and the many volunteers who donated their time to make our pro bono efforts successful. If you are interested in speaking at one of the family law essentials seminars, please contact Dick Sutherland at rtsutherland@wf.net.

Also in October, we put together a pro bono presentation focusing on domestic violence. It was entitled "Domestic Violence 101 – Prosecuting and Defending a Domestic Violence Case." The price of admission to the seminar is the commitment to handle one pro bono domestic violence case within twelve months. Thank you to Richard Fry for being the driving force behind this seminar. The seminar was in Austin, but we hope to spread this concept to other areas of the state.

TEXAS FAMILY LAW FOUNDATION

The legislative session is in full swing and the Foundation's lobby team is hard at work promoting the Section's bills and attempting to keep imprudent ideas from becoming law. Each week, two family lawyers come to Austin to work on our behalf. As you know, all of the lobbying volunteers donate their time and pay their own way. If you would like to get involved in the Family Law Foundation, please go to the website at www.texasfamilylawfoundation.com. Thank you to all of those who donate their efforts and funds to the Texas Family Law Foundation to make our legislative efforts successful.

PUBLICATIONS

I am excited to announce that the Family Section is printing its own annotated Family Code. Hopefully it will ready for release by Advanced Family Law in August. This has been a multi-year project and many family lawyers have donated hundreds and hundreds of hours on this project. I especially want to thank Jimmy Verner, Chris Nickelson, Charlie Hodges, Sherri Evans, Diana Friedman, Judge Jack Marr, Steve Naylor, Judge Dean Rucker, Brian Webb, Aimee Pingenot, Charles Hardy, Cindy Tisdale, Dick Sutherland, Ellen Yarrell, Emily Miskel, Eric Robertson, Fred Adams, Jonathon Bates, Jessica Janicek, Larry Martin, Latrelle Bright Joy, Ann Watson, Derek Bragg, Kathleen Brown, Kelly Caperton Fischer, Larry Doss, Sarah Arvidsson, Hunter Lewis, and Jim Mueller. We also hope to have additional new resources for family law practitioners ready for release by Advanced Family Law in August.

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UPCOMING CLE

Upcoming CLE seminars include:

- **Marriage Dissolution** – April 9-10, 2015, Westin Galleria, Dallas
  Course Director: Steve Naylor
  101 Course Director: Lisa Hoppes
- **Advanced Family Law –** August 3-6, 2015, Marriott Rivercenter, San Antonio
  Course Directors: Judy Warne & Kristal Thomson,
  101 Course Director: Natalie Webb
- **Masters in Family Law** – September 24-26, 2015, Horseshoe Bay Resort
- **New Frontiers in Marital Property Law** – October 15-16, 2015,
  Brown Palace Hotel and Spa, Denver
  Course Directors: Cindy Tisdale and Chris Nickelson

UPCOMING COLLABORATIVE CLE

The upcoming Collaborative CLE seminars include:

- March 26-27, 2015 – Advanced Collaborative Law Training presented by the Collaborative Law Institute of Texas in Houston.
- May 7-8, 2015 - Basic Interdisciplinary Training presented by the Collaborative Law Institute of Texas in Dallas.

Finally, it has been such an honor to serve as the Chair of the Family Law Section. I do not plan to ride off into the sunset, but I will continue to dedicate my time and efforts for the benefit of the Section. I want to thank all of the former Chairs who continue to dedicate their time year after year for the benefit of our Section and its members.

See you at Marriage Dissolution in Dallas!

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

2015 Recommended Nominations Slate
State Bar of Texas Family Law Section

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

Officers		**Nominations to the Class 2020**
Chair:	**Heather King**	**1. Cindi Barella Graham (Amarillo)**
Chair-Elect:	**Kathryn Murphy**	**2. Lisa Hoppes (Ft.Worth)**
Vice-Chair:	**Cindy Tisdale**	**3. Lon M. Loveless (Dallas)**
Treasurer:	**Steve Naylor**	**4. Heather Ronconi-Algermissen (El Paso)**
Secretary:	**Chris Nickelson**	
Immediate Past Chair:	**Jimmy Vaught**	**5. Sara Springer Valentine (Houston)**

The election will take place on **April 9, 2015** at the section meeting during Marriage Dissolution.

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TABLE OF CASES

In the Law Reviews and Legal Publications

LEAD ARTICLES

Parenting Plans for Special Needs Children: Applying a Risk-Assessment Model. Daniel B. **Pickar** & Robert L. **Kaufman**, 53 Fam. Ct. Rev 113 (January 2015).

Reforming Relocation Law: A Reply to Prof. Thompson. Patrick **Parkinson** & Judy **Cashmore**, 53 Fam. Ct. Rev. 56 (January 2015).

Reforming Relocation Law: An Evidence-Based Approach. Patrick **Parkinson** & Judy **Cashmore**, 53 Fam. Ct. Rev. 23 (January 2015).

A Rigorous Quasi-Experimental Design to Evaluate the Causal Effect of a Mandatory Divorce Education Program. Stephanie R. **deLusé** & Sanford L. **Braver**, 53 Fam. Ct. Rev. 66 (January 2015).

Cognitive-Behavioral Methods in High-Conflict Divorce: Systematic Desensitization Adapted to Parent-Child Reunification Interventions. Benjamin D. **Garber**, 53 Fam. Ct. Rev. 96 (January 2015).

Presumptions, Burdens, and Best Interests in Relocation Law. Rollie **Thompson**, 53 Fam. Ct. Rev. 40 (January 2015).

A Mentalizing-Based Approach to Family Mediation: Harnessing Our Fundamental Capacity to Resolve Conflict and Building an Evidence-Based Practice for the Field. Jill **Howieson** & Lynn **Priddis**, 53 Fam. Ct. Rev. 79 (January 2015).

Does Level of Intimate Partner Violence and Abuse Predict the Content of Family Mediation Agreements?. Fernanda S. **Rossi**, Amy **Holtzworth-Munroe**, & Amy G. **Applegate**, 53 Fam. Ct. Rev. 134 (January 2015).

Lessons in Negotiation. Kathleen A. **Hogan**, 37-WTR Fam. Advoc. 4 (Winter 2015).

State-by-State Surrogacy Law Across the U.S. Diane S. **Hinson**, 37-WTR Fam. Advoc. 6 (Winter 2015).

Planning for Settlement Negotiations: The Big Picture. Gregg **Herman**, 37-WTR Fam. Advoc. 9 (Winter 2015).

Family Lawyering with Planned Early Negotiation. John **Lande**, 37-WTR Fam. Advoc. 12 (Winter 2015).

Preparing a Client for Settlement. Jennifer A. **Brandt**, 37-WTR Fam. Advoc. 16 (Winter 2015).

Three Logical Arguments for Divorce Settlement. Ronald S. **Granberg**, 37-WTR Fam. Advoc. 20 (Winter 2015).

Time Problems in Family Law Cases. Mark E. **Sullivan**, 37-WTR Fam. Advoc. 24 (Winter 2015).

The Court's Role in Settlement Negotiations. Hugh E. **Starnes** & Sheldon E. **Finman**, 37-WTR Fam. Advoc. 30 (Winter 2015).

Successfully Negotiating with the Self-Represented Party. Joseph W. **Booth**, 37-WTR Fam. Advoc. 36 (Winter 2015).

Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?. Bruce **Smyth**, Richard **Chisholm**, Bryan **Rodgers**, & Vu **Son**, 77 Law & Contemp. Probs. 109 (2014).

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

Responding to Concerns about a Study of Infant Overnight Care Postseparation, with Comments on Consensus: Reply to Warshak (2014). Jennifer E. **McIntosh**, Bruce M. **Smyth**, & Margaret A. **Kelaher**, 21 Psychol. Pub. Pol'y & L. 111 (February 2015).

Foreign and Religious Family Law: Comity, Contract, and the Constitution. Ann Laquer **Estin**, 41 Pepp. L. Rev. 1029 (2014).

In Windsor's Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children. Tanya **Washington**, 48 Ind. L. Rev. 1 (2014).

All that Heaven Will Allow: A Statistical Analysis of the Coexistence of Same-Sex Marriage and Gay Matrimonial Bans, Deirdre M. **Bowen**, 91 Denv. U. L. Rev. 277 (2014).

Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes. Jana B. **Singer**, 77 Law & Contemp. Probs. 177 (2014).

Who Knows What is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart. Kimberly C. **Emery** & Robert E. **Emery**, 77 Law & Contemp. Probs. 151 (2014).

Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard. Elizabeth S. **Scott** & Robert E. **Emery**, 77 Law & Contemp. Probs. 69 (2014).

TEXAS ARTICLES

The Issue of Document Disclosure in General Courts and in Family Courts: A New Model, Yitshak **Cohen**, 37 Hous. J. Int'l L. 43 (Winter 2015).

ASK THE EDITOR

***Dear Editor*:** One of my clients has a final hearing next week on child support and periods of possession. I am afraid that the trial court is going to go outside of the guidelines on both issues. In case this happens, what should I do to protect him on appeal? *In a Quandary in Quanah*

Dear Quandary in Quanah: When a court fails to follow the child support guidelines or the Standard Possession Order, it is very important for you to find out why. Typically, you would do this at the end of the case when you would file a Request for Findings of Fact and Conclusions of Law. Under the Family Code, however, there are special provisions that require you to request these findings in open court at the hearing or in writing within 10 days of the hearing. Specifically, Texas Family Code Section 154.130(a) provides, in rendering an order of child support, the court shall make findings of fact if (1) a party files a written request with the court not later than ten days after the date of the hearing, (2) a party makes an oral request in open court during the hearing, or (3) the amount of child support ordered by the court varies from the amount computed by applying the percentage guidelines under section 154.125 or 154.129, as applicable. Therefore, out of an abundance of caution, you should always timely ask for these findings in case the trial court does not rule within 10 days of the hearing or varies from the guidelines. These findings are particularly helpful should you need to seek a modification in the future because they can easily be found in the judgment. If findings are required as a result of a party's request, the court must make and enter the findings not later than the fifteenth day after the request is made. Tex. Fam. Code § 154.130(a–1). Also, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, on written request made or filed with the court not later than ten days after the date of the hearing or on oral request made in open court during the hearing, the court shall state in the order the specific reasons for the variance from the standard order. Tex. Fam. Code § 153.258.

In the event you forget to ask for these findings as required by the Texas Family Code, the trial court does not have to give them to you when you file a request after the judgment is signed pursuant to Texas Rule of Civil Procedure 296. That does not mean that you should not ask for these findings at that time, it is just no longer mandatory that the trial court make such findings. Without such findings, all facts will be deemed against your client as the appealing party and in support of the portion of the judgment from which he appeals. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987). The appellate court can consider only the evidence most favorable to the implied factual findings and will disregard all opposing or contradictory evidence. *Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 613 (Tex. 1950).

IN BRIEF

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

Child Support: In a pair of child support decisions, the Wyoming Supreme Court (1) affirmed a trial court's decision to impute income to an unemployed surgeon when she had a history of alcohol abuse and repeatedly left well-paid positions "due to her unilateral inability to form working relationships with her colleagues." *Levene v. Levene*, 340 P.3d 270 (Wyo. Dec. 15, 2014); and (2) refused to apply Wyoming's child support "abatement" statute, which relieves a noncustodial parent of 50% of his child support obligation during extended periods of possession, because the reduction, in light of other child-care expenses borne by the custodial parent, would have resulted in a monthly gap between the custodial parent's child support expenses and her child support receipts of nearly $1,000. *Jensen v. Milatzo-Jensen*, 340 P.3d 276 (Wyo. Dec. 17, 2014). A North Dakota trial court correctly imputed income to an obligor using North Dakota, rather than Minnesota, statewide data when the obligor lived in North Dakota but worked in Minnesota. *Grossman v. Lerud*, 857 N.W.2d 92 (N.D. Dec. 18, 2014). In California, derivative Social Security disability payments paid to a custodial parent are not part of the disabled obligor's income for child support purposes and must be

offset against the obligor's child support obligation. *Daugherty v. Daugherty*, 232 Cal. App. 4th 463(Cal. App. Dec. 15, 2014).

Consent to adoption: The consent of a presumed father to a stepfather's adoption is not required in California when, by statute, the presumed father has failed to communicate with the child and pay for the child's care and support for over one year. *Adoption of I.M.*, 232 Cal. App. 4th 40 (Cal. App. Dec. 5, 2014). In Alaska, a father's consent to adoption is not required if he has unjustifiably failed to support a child during the child's first year of life, but this father's failure to support was justified because the father had minimal income, much of which was used to support his other children; the would-be adoptive parents neither needed nor asked for any support from the father; the father testified that he would have paid support if asked; and the father "testified credibly" that he did not know he had a legal obligation to pay support. *Ebert v. Bruce L.*, 340 P3d. 1048 (Alas. Dec. 26, 2014). An Indiana child's grandparents had "lawful custody" of her for most of her first year of life and therefore were entitled to legal notice of and the opportunity to consent to the child's adoption by her stepfather. *In re Adoption of B.C.H.*, 22 N.E.3d 580 (Ind. Dec. 23, 2014).

Defaults: A Montana trial court abused its discretion when it terminated a parent's parental rights "by a default judgment with no hearing, no evidence, and no findings." *In re K.J.B.*, 339 P.3d 824 (Mont. Dec. 9, 2014). A South Dakota trial court abused its discretion because it granted a domestic violence protective order by default, rather than requiring evidence, when the unsubpoenaed respondent did not appear but his attorney did and announced that he was ready to proceed. *Blair-Arch v. Arch*, 857 N.W.2d 874 (S.D. Dec. 23, 2014). A Georgia trial court abused its discretion by granting a default divorce based on service by publication when the husband ignored "obvious channels of information" for locating his wife, including that the wife was living with her boyfriend, the wife had been charged with criminal damage to the husband's property, and the husband did not make inquiry of three people he knew were likely to know of the wife's bouts. *Reynolds v. Reynolds*, ___ S.E.2d ___, 2015 WL 412002 (Ga. Feb. 2, 2015).

Division: Faced with conflicting testimony by tax experts, a Montana trial court did not abuse its discretion when it ordered a husband who held 100% of the shares in a corporation to spin off some of the corporation's property into a new corporation to be owned by the wife, despite the husband's contention that the spin-off would not qualify as a "divisive reorganization" under the Internal Revenue Code and therefore would cause significant tax consequences to the original corporation. *In re Marriage of Edwards*, 340 P.3d 1237 (Mont. Jan. 13, 2015). A Utah wife should have joined her husband's trust, which contained marital property, as a party to the spouses' divorce proceedings because without such joinder, the trial court "lacked the authority to fully and fairly distribute the marital estate." *Dahl v. Dahl*, ___ P.3d ___, 2015 WL 404521 (Utah Jan. 30, 2015). In Kansas, a separation agreement with a lopsided division in the event of divorce (98.87% to disabled wife; 1.13% to attorney husband) was not subject to review as allegedly against public policy (encouraging divorce so that the former husband could begin to acquire assets) because that common-law doctrine had been superseded by a statutory "just and equitable" requirement. *In re Marriage of Traster*, 339 P.3d 778 (Kan. Dec. 19, 2014).

Domestic violence: A Nebraska father did not commit "abuse" within the meaning of Nebraska's domestic abuse statute by repeatedly sending crude, vulgar, disgusting, disturbing and "morally abhorrent" texts to his 16-year-old daughter because there was no evidence that he threatened her with physical injury. *Linda N. v. William N.*, 856 N.W.2d 436 (Nebr. Dec. 5, 2014). A North Dakota trial court misapplied or misinterpreted North Dakota law when it refused to issue a disorderly conduct restraining order against an ex-husband on the reason that, although the ex-husband had been stalking his ex-wife, he was acting with the intent of reconciling with her rather than "hurting her." *George v. George*, 856 N.W.2d 769 (N.D. Dec. 18, 2014).

Jurisdiction: A Montana wife who filed suit for divorce but had not been domiciled in Montana for the requisite ninety days prior to filing cured the jurisdictional defect by filing a supplemental petition after ninety days that alleged she had been domiciled in Montana for more than ninety days. *Buck v. Buck*, 340 P.3d 546 (Mont. Dec. 30, 2014). The South Dakota Supreme Court dismissed a mother's appeal of a termination case because the mother's failure to sign her notice of appeal deprived the court of jurisdiction. *People ex rel. L.R.*

& T.W., 857 N.W.2d 886 (S.D. Dec. 23, 2014). A divided North Dakota Supreme Court ordered a divorce case dismissed for lack of jurisdiction when the trial court dissolved the marriage but had not yet divided the marital estate prior to the wife's death. *Albrecht v. Albrecht*, 856 N.W.2d 755 (N.D. Dec. 18, 2014).

Wages of sin: The United States did not breach a settlement agreement with a male prostitute by agreeing to pay him $2,500 as the value of his property (mostly cash) that the Minneapolis police "lost" after his trial, even though the State of Illinois intercepted the $2,500 and applied it to past-due child support, because the "application of the funds to his child support obligation resulted in a $2,500 financial benefit to him, albeit not the one he seeks in this appeal." *United States v. Bailey*, 775 F.3d 980 (8th Cir. Dec. 29, 2014).

COLUMNS

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

Charles, what do you think about arranged marriages" is something I was recently asked. (If you aren't asked questions like this, perhaps you aren't hanging out at the right gastro pubs.) I think the real intent of the question was, "Do you think arranged marriages are more successful than so-called 'romantic' marriages that are based on love." It was hard to tell, exactly, because my questioner was drunk at the time. And imaginary.

Still, I've given this considerable thought. Like so many of you, I have run across more arranged marriages in my practice than I used to, as I mediate cases from strange, foreign lands, like Tarrant County and Kentucky. I realize that I'm only seeing the arranged marriages that fail, but if I learned anything from all those science classes I took in college, this constitutes a valid sample. I'll call the arranged marriages I don't know about the "control group." (Bear with me if this gets too technical).

Certainly, a marriage arranged by others for the spouses does allow for more planning than you'd get in a more typical modern marriage. If it's the parents doing the planning for their respective children, one of the topics that could be dealt with ahead of time is television compatibility. With so many good shows on these days, plus all the great sports to watch, this is a crucial issue. What if the wife insisted on watching Game of Thrones live while the husband's favorite football team is playing? That would never work, especially if one or the other insisted that they watch together. "My Timmy must watch his Bengals live, so your Becky should DVR her shows while his game is on," Timmy's mother may say. (This is hypothetical, of course; no one watches the Bengals).

Now, I know the topic you're most interested in involves sex, and here, the benefits of an arranged marriage are obvious. I once was involved in a case in which the parties negotiated a contract prior to marriage in which certain duties and obligations were spelled out in advance, including how often the spouses should have sex (presumably with each other). And this was not even an arranged marriage, as such. There was a line item that sex should occur at least twice a week, unless (and here, the opposing party actually interlineated with pen and initialed) one of the spouses was vomiting. I thought this was a reasonable, even thoughtful, clause, and to this day I can't figure out why this couple fell out with each other. There are just some things that shouldn't be left to chance or misunderstanding, like sex while vomiting. You could just pull out the contract and remind your spouse, "Hey, check out Paragraph 14. It says right there I don't have to." I can see where the disappointed spouse might protest that the partner is using such a clause as a loophole by, say, intentionally eating shrimp when she or he knows it causes an

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

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

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allergic reaction, but every contract requires good faith, right? This is something the villagers of the prospective couple could work out in advance.

Back to the negotiating process. In some times and cultures, a bride may have come with a cow and some chickens. In our more progressive times, perhaps some Omaha Steaks and a Chick-Fil-A coupon would suffice. And the men must bring something to the table, too, and not just their boyhood blue M & M collection. At the moment, I can't recall what it is men bring to marriage, but it must be good.

My well-considered conclusion, then, is that as long as the dissolution of arranged marriages, like all other marriages, creates plenty of mediation business, then I'm all for them.

CONSENT FORMS: AN EXPERT'S GAME PLAN?

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

Reviewing the file that underlies a psychological evaluation report is critical when preparing questions for the evaluator's deposition or examination in court. When explaining the bases for their evaluation opinions and recommendations in their reports, mental health experts put their best foot forward. Reviewing the evaluation file, though, provides an "under-the-hood" look at the quality of the support for the expert's opinions and recommendations. For example: When did the interviews take place and what issues were addressed? When did the expert review key records? What efforts did the expert make to talk with relevant collateral persons? When did the expert administer the testing?

Lawyers, however, routinely overlook key documents in the file that may reveal other important information about the evaluation. Among those are the evaluator's informed consent and policy forms. These forms, ostensibly perfunctory and routine, often show the psychologist's unfulfilled intentions for the evaluation and mistaken notions about her responsibilities to the court. When I review an expert's evaluation file, I go to these forms first.

Psychologists, in whatever capacity, must obtain consent from recipients of their services. In a forensic role, a psychologist must inform the examinee "about the nature and parameters of the services to be provided." American Psychological Assn. (APA) *Specialty Guidelines for Forensic Psychology* (Guideline 6); *see also*, APA *Ethical Principles and Code of Conduct* (Standard 3.10(c)). Psychologists are also "encouraged to disclose the potential uses of the data obtained and to inform parties that consent enables disclosure of the evaluation's findings in the context of the forthcoming litigation and in any related proceedings deemed necessary by the court." APA *Guidelines for Child Custody Evaluations in Family Law Proceedings* (Guideline 9). Texas's Psychology Licensing Board (Section 465.18(c)) specifically details the information, including procedures, that a psychologist should provide to an examinee at a forensic evaluation's onset.

Although the informed consent concept seems clear, forensic psychologists vary widely in the content they include in their evaluation consent and policies forms. Some forms are bare-boned, enough to satisfy the requirement—two pages max. Others, several pages long (often boiler-plate documents adapted from a textbook or workshop materials), attempt to anticipate every possible evaluation issue or problem.

Look for provisions in a psychologist's consent and policy forms that describe her intentions for a competent evaluation. Then hold her to those intentions. Usually, the longer the forms, the more numerous the stated intentions.

A few examples:

• When the psychologist clearly defines her role as a neutral forensic evaluator, not a therapist or consultant to the family, does she stray from the forensic role by offering any advice to either party or the lawyers?

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[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs* PSYCHOLOGYLAW PARTNERS, *a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. His second book,* How to Examine Mental Health Experts: A Family Lawyer's Guide to Issues and Strategies, *is newly published by the American Bar Assn. Dr. Zervopoulos is online at* www.psychologylawpartners.com *and can be contacted at 972-458-8007 or at* jzerv@psychologylawpartners.com.

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• When the psychologist notes the importance of interviews to the evaluation, does she only conduct one or two with each party?
• When the psychologist stresses the importance in an evaluation of reviewing important collateral information—records and interviews with relevant persons—to corroborate and supplement the examinee's interview statements, did she take this task seriously? Is the collateral information meaningful, or merely composed of brief statements from friends and family members? Did the psychologist obtain and consider the information early enough during the evaluation for that information to have contributed to her opinions?
• When the psychologist indicates that she will only release test results to another qualified mental health professional following the evaluation rather than with other properly subpoenaed records, is the psychologist correctly interpreting ethical rules regarding the release of test data?
• When the psychologist notes that several weeks are required to write the report, is she actually saying that any data received after she began writing was not considered objectively?—a key bias issue.

When I start my evaluation analysis, I start from the beginning—from the evaluator's game plan. See if the evaluator's consent and policy forms reveal her intentions for competent work.

COMMON RETIREMENT SETBACKS AND CHECKLIST TO PREPARE FOR RETIREMENT

By Christy Adamcik Gammill, CDFA[1]

As many are approaching the years that should be golden, for many unexpected life circumstances have been a factor in meeting retirement funding goals. Common life curveballs for most include at least one of the following:

Early Retirement/Lay off - If you were unexpectedly laid off by your employer as a result of downsizing, outsourcing, technological advances or your employer hiring someone younger for half the cost then you are not alone. Many Americans have been laid off without preparation for the bills to be paid between now and the next pay day, whether it be one week or several years to obtain gainful employment again. As a result, retirement plan dollars may be spent prematurely.

Death or Disability – Being predeceased by a wage earning spouse while still in the accumulation phase can wreak mild to severe financial havoc on a family. If there was not life insurance to make up the difference in funds needed to provide for the lost family income now as well as additional savings to fund retirement goals, life as you know it may be turned upside down very quickly.

Divorce – Divorce is not as sudden of a death that may cause years of extensive grief to the parties involved, both emotionally and financially. If love did not last and happily ever after ended up being anything but bittersweet, you may have been faced with the financial challenges that surround this life changing event. Dividing your retirement dollars, selling your home, sharing your income with your ex- spouse are just a few of the impacts a divorce has on finances.

To add insult to injury, both parties are now older, have less time to save/rebuild and may or may not even have the earning capacity to be self-supporting. Again, premature depletion of retirement savings may serve as a last resort bridge for one or both spouses at this juncture.

College - If life happened and college snuck up on you, you are not alone. Many parents and children end up getting loans and grants to fund college partnered with current cash flow. When this happens, the parents now have incurred a small to significant amount of debt late in life while they are supposed to be on the home stretch saving for their own retirement.

Aging Parents – While we are living longer, and so are our parents. This means more years for retirement plan dollars to be stretched and less income generated for each year. Some parents, who may or may not have adequate resources, are moving in with their children. This works so long as they are healthy but

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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.

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ultimately an outside caretaker is needed in the home or the parent moves to a facility. The cost of long-term care depends on the area you live in as well as the amount and extent of care you need. Retirement funds can go very quickly at a rate of $5,000-$12,000 per month for care.

Market Uncertainty - In the prior decade many retirees lost nearly 37%* in their retirement plans. If there was time to 'recover' the aftermath from these storms was still ugly, but even uglier for many retirees who did not get a second chance. Their plans and dreams were crushed, retirement came prematurely and unexpectedly and the salaries they once had were forever gone. Many stay at home spouses were forced out into the market place doing whatever it takes to make ends meet.

Checklist to Prepare for Retirement

- Get Debt free- payoff your mortgage and any other home equity lines of credit.
- Lifestyle – assess the lifestyle you are living and the one you hope to live. Do you want to travel, play tennis or golf, or take up other leisurely activities? Research the cost and shop around.
- Living Expenses – what are all your non-discretionary (fixed) and discretionary expenses (variable or can take or leave them)? How much income do you need per month - $3,500 or $20,000 or more?
- House – can you afford your current home at retirement? If you do not know, get with an advisor to analyze your overall situation and see if it makes sense to keep your existing home or downsize. The difference in funds saved may pay for an occasional vacation or increased medical care.
- Social Security – understand your benefits and those of your spouse, how they work separately, in tandem, and when the best time to take them is. If you are working and take them early you may permanently reduce your benefits. How much income will you receive monthly from your benefits? There are resources to help you maximize your retirement dollars.
- 401(k)/IRA Accounts – know how much you have, how many years you have until retirement, estimated savings between now and then and an assumed average interest rate. Quick calculation on retirement account balances and what you can live on if you are a Moderately Conservative investor now Age 55 and your goal is to retire at Age 67:
    - Age 55 - $600,000 account balance; at 5%/year Age 67 = $1,077,513
    - Save $2,000 per month for the next 12 years = $396,106
    - Estimated balance at retirement = $1,475,899
    - 4% Withdrawal Rate** = $59,035/year
- Pension – if you have a private pension/annuity – what is your guaranteed income?
- Non-IRA investments – assume a 4% withdrawal rate** from these also
- Oil/gas royalties/other income sources –what amount can be expected from these resources?
- Inheritance – are any monies expected and if so, make sure to get with your financial advisor and/or tax expert to understand how to best structure the assets to pay the least amount of taxes
- Wills/Trusts/Power of Attorney – update every 2-5 years or more with life changing events
- Plan Your Future – update your financial plan annually or more with life changing events

**How much your safe withdrawal rate will depend on your individual underlying securities and personal investment portfolio. No investment is affiliated with these assumptions.

**Individual Account Retirement Plans: An Analysis of the 2010 Survey of Consumer Finances*

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ARTICLES

RELIEF AMIDST THE CHAOS: A LEGISLATIVE OPPORTUNITY TO OFFER TEMPORARY RELIEF TO SAME-SEX COUPLES SEEKING DIVISION OF ASSETS IN TEXAS

By Tovah E. Pentelovitch[1]

"'There must be some kind of way out of here,'
Said the joker to the thief.
'There's too much confusion
I can't get no relief.'"
-Bob Dylan[2]

I. INTRODUCTION

Change is afoot for same-sex marriage in the United States. Beginning with this year's proverbial October surprise, a minority of 19 states allowing same-sex marriage morphed into a majority of 36 states plus the District of Columbia,[3] after the Supreme Court of the United States ("SCOTUS") refused to hear seven pending appeals[4] and the Ninth Circuit Court of Appeals struck down same-sex marriage bans in two states.[5] SCOTUS' abstention left the ultimate fate of same-sex marriage in the hands of the remaining United States Court of Appeals for the Federal Circuit ("circuit courts").[6] Many Supreme Court followers hypothesized that SCOTUS would grant certiorari on the subject once a split occurred among the circuit courts. The Sixth Circuit's November decision to uphold bans on same-sex marriage in four states created that split.[7] Petition for Certiorari from the Sixth Circuit decision was filed on November 14, 2014, and this time around SCOTUS did grant review.[8] With every state having at least one court case pending on the topic of same-sex marriage,[9] change is in the wind, but the wind is swirling every which way. How the wind will blow in Texas remains to be seen as a case challenging Texas' same-sex marriage ban was argued before the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") on January 9, 2015.[10]

As of press time, same-sex couples in Texas cannot marry and cannot divorce, which means they also are not entitled to the benefits and protections that are recognized as components of the marriage relationship, including the benefit of divorce and division of assets and liabilities under the Texas Family Code ("Family Code").[11] Rather, these couples are forced to bring partition suits under the Texas Property Code ("Property Code") to divide their property.[12] As well be discussed below, partition suits do not come with the protections

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[1] Ms. Pentelovitch is scheduled to receive her J.D. and M.S.S.W. from the University of Texas in 2015 and may be reached at tovpent@utexas.edu.
[2] Bob Dylan, *All Along the Watchtower*, *on* JOHN WESLEY HARDING (Columbia Records 1967).
[3] Nat'l Conf. of State Legislatures, *Same-Sex Marriage Laws* (Nov. 20, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.
[4] *Id.* (Appeals from Fourth, Seventh, and Tenth Circuit Courts were denied, allowing the lower court decisions to stand).
[5] *Latta v. Otter*, Nos. 14–35420, 14–35421, 12–17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014)
[6] In *Baker v. Nelson* (1972), SCOTUS dismissed an appeal from a decision by the Minnesota Supreme Court rejecting due process and equal protection challenges to Minnesota's same-sex marriage ban. 409 U.S. 810. SCOTUS dismissed the appeal for want of federal question. *Id.* Subsequent cases have rendered *Baker* void of precedential value. *See* Brief of Appellees at 14-15, *De Leon v. Perry*, No. 14-50196 (5th Cir. Sept. 9, 2014) (available at http://freemarry.3cdn.net/0c93a306d8214db7dc_k0m6ivl5d.pdf) http://freemarry.3cdn.net/0c93a306d8214db7dc_k0m6ivl5d.pdf)
[7] *See DeBoer v. Snyder*, 14-1341, 772 F.3d 388 (6th Cir. Nov. 6, 2014)(Michigan) ; *Obergefell v. Hodges*, 14-3057, 772 F.3d 388 (6th Cir. Nov 6, 2014)(Ohio); *Henry v. Hodges*, 14-3464, 772 F.3d 388 (6th Cir. Nov 6, 2014) (Ohio); *Bourke v. Beshear*, 14-5291, 772 F.3d 388 (6th Cir. Nov 6, 2014) (Kentucky); *Tanco v. Haslam*, 14-5297, 772 F.3d 388 (6th Cir. Nov 6, 2014) (Tennessee); *Love v. Beshear*, 14-5818, 772 F.3d 388 (6th Cir., 2014) (Kentucky).
[8] http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf
[9] *See* Nat'l Conf. of State Legislatures, *supra* note 2.
[10] *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. 2014).
[11] Tex. Fam. Code Ann. § 6.204(c)(2) (West 2013).
[12] Telephone interview with Keith Griffin, Attorney at Law, in Dallas, Tex. (Oct 8, 2014).

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provided by temporary restraining orders and injunctions contained in Texas Family Code Sections 6.501 and 6.502, benefits which are enjoyed almost universally by heterosexual couples in the form of standing orders.[13]

The SCOTUS decision not to decide has left the lives of numerous Americans, including Texans, in limbo. Their lives will remain in limbo at least until SCOTUS hears the appeal from the Sixth Circuit. Indeed, same-sex Texas couples face a chaotic mess only addressable with conjectures. Texas law was already in a state of disorder, with three cases pending before the Texas Supreme Court pertaining to whether a same-sex couple legally married in another state can legally divorce in Texas.[14] Legislative action could provide some much-needed relief until the chaos is sorted out.

While we await same-sex marriage's day before SCOTUS in April[15], and the Texas Supreme Court sits on the divorce question, an opportunity rests at the feet of the Texas Legislature to provide some overdue relief to unmarried same-sex couples who are separating and seeking to divide shared assets. During the upcoming 84th Legislative Session, the legislature can make it easier for courts in same-sex partition cases to grant the same temporary restraining orders and temporary injunctions found under Family Code Sections 6.501 and 6.502 respectively.

II. THE TIMES THEY ARE A CHANGIN'[16]

A. AMERICA: A SEA CHANGE

A look at the headlines on any given day reveals a jumble of court cases addressing same-sex marriage issues pending at various levels across the nation, and an array of headlines and speculations coming from news agencies and research agencies alike. For example, on October 22, 2014, the first three news headlines resulting from a Google search for "same-sex marriage" were:

- *City threatens to arrest minister who refuses to perform same-sex weddings*[17]
- *Puerto Rico's gay marriage ban upheld by federal judge*[18]
- *The race to 50? Same-sex marriage spreads in 'red' states*[19]

The first headline to appear in a Google search on October 28, 2014, read: "*Jimmy Carter Flip-Flops on Nationwide Same-Sex Marriage*."[20] The article quotes former President Carter as saying: "[a]s you see more and more states are deciding on gay marriage every year. If Texas doesn't want to have gay marriage, then I think that's a right for Texas people to decide."[21] Recent history, as discussed below, suggests that a majority of Texans would agree with President Carter.[22]

B. TEXAS: IS A CHANGE GONNA COME?[23]

FIRST COMES THE STATUTE. While progress seems to be the name of the game in many states, in the last decade Texas has waivered between stasis and regress. In 2003, the Texas Legislature passed Senate Bill 7 ("S.B. 7"), cementing the long standing preference for heterosexual marriage by the establishment. The bill

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[13] See fn 57 below.

[14] *In the Matter of the Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App.—Dallas 2010, pet. pending) (supp. op. on denial of rhrng. en banc); *State of Texas v. Naylor and Daly*, 330 S.W.3d 434 (Tex. App.—Austin 2011, pet. pending); *In re State of Texas*, 2014 WL 2742882 (Tex. App.—San Antonio 2014, pet. pending).

[15] Mark Sherman, *Supreme Court will hear case on nationwide same-sex marriage in April*, PBS NewsHour (Jan. 16, 2015), http://www.pbs.org/newshour/rundown/supreme-court-must-act-fast-settle-issue-gay-marriage-june/

[16] Bob Dylan, *The Times They Are A-Changin'*, *on* THE TIMES THEY ARE A-CHANGIN' (Columbia Records 1964).

[17] Todd Starnes, *City threatens to arrest ministers who refuse to perform same-sex weddings*, Fox News (Oct. 20, 2014), http://www.foxnews.com/opinion/2014/10/20/city-threatens-to-arrest-ministers-who-refuse-to-perform-same-sex-weddings/.

[18] Lauren Raab, *Puerto Rico's gay marriage ban upheld by federal judge*, The Los Angeles Times (Oct. 21, 2014, 7:09 PM), http://www.latimes.com/nation/nationnow/la-na-nn-puerto-rico-gay-marriage-20141021-story.html.

[19] Josh Levs, *The race to 50? Sam-sex marriage 'spreads' in red states*, CNN (Oct. 21, 2014, 6:35 PM), http://www.cnn.com/2014/10/21/politics/same-sex-marriage-storify/

[20] Amber Ferguson, *Jimmy Carter Flip-Flops on Nationwide Same-Sex Marriage*, The Huffington Post (Oct. 27, 2014, 2:59 PM), http://www.huffingtonpost.com/2014/10/27/jimmy-carter-gay-marriage_n_6055322.html.

[21] *Id.*

[22] A 2014 University of Texas/Texas Tribune Poll of registered voters found that 47% said same-sex couples should not be allowed to marry, while 42% said they should. *See* Ross Ramsey, *UT/TT Poll: Conditional Support for Same-Sex Unions*, The Texas Tribue (Oct. 29, 2014), https://www.texastribune.org/2014/10/29/uttt-poll-conditional-support-same-sex-unions/.

[23] Sam Cooke, *A Change is Gonna Come*, *on* AIN'T THAT GOOD NEWS (RCA Victor Records, 1964).

outlined Texas' public policy: "[a] marriage between persons of the same-sex or a civil union is contrary to the public policy of this state and is void in this state."[24] This law was codified into Family Code Section 6.204, ensuring that the "legal protections and benefits" of marriage were off-limits to same-sex couples.[25]

> While S.B. 7 was codified, one important provision remains uncodified to this day:
>
> The legislature finds that through the designation of guardians, the appointment of agents, and the use of private contracts persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legally recognized familial relationship between the persons.[26]

This provision of S.B. 7 attempted to provide a pathway for same-sex couples to protect and divide their assets, but in reality it does nothing more than acknowledge that same-sex couples can contract for property, a right that is already provided for by other areas of Texas law including the Property Code. As further addressed below, this provision may be used as the model for providing some temporary relief to same-sex couples.

NEXT COMES THE CONSTITUTIONAL AMENDMENT. In 2005, 76.3% of Texas voters voted to adopt article I section 32 of the Texas Constitution, concretely confirming that marriage may only be between one man and one woman, and prohibiting the creation or recognition of any legal status similar to marriage for same-sex couples, for example, civil unions.[27]

THEN COMES THE LAWSUITS. The current law in Texas pertaining to same-sex marriage is in a state of choreographed limbo. Challenges to Texas' same-sex marriage ban came first in the form of attempts by same-sex couples married in other states to divorce in Texas[28], discussed in detail below. A challenge to the actual ban was sustained on February 26, 2014, in *De Leon v. Perry,* where Orlando L. Garcia, a United States District Judge in San Antonio, ruled Texas' same-sex marriage ban unconstitutional.[29] Judge Garcia issued a preliminary injunction on the enforcement of the constitutional and statutory same-sex marriage bans, but stayed it from taking effect pending appeal by the State of Texas.[30] In essence, nothing was going to change for same-sex couples until Rick Perry could have his say.

And, have his say he did. Rick Perry and Attorney General Greg Abbot swept-in to fight the San Antonio Federal District Court ruling. After the October 6, 2014 SCOTUS decision to leave these matters in the hands of the circuits, the *De Leon* plaintiffs filed a second motion for expedited hearing in the Fifth Circuit, and the motion was granted[31], with oral arguments heard on January 9, 2015.[32] In the meantime, same-sex couples desiring to marry are left planning marriages with contingency plans.

III. TEXAS: WHERE BREAKING-UP IS HARD TO DO… LEGALLY, IF YOU ARE A SAME-SEX COUPLE.

A. DIVORCE? FUHGETTABOUTIT… FOR NOW.

Pending before the Texas Supreme Court for well over a year, are three cases consolidated into *In the Matter of the Marriage of J.B. and H.B.*, wherein same-sex couples legally married in other states, moved to Texas, and subsequently sought a divorce.[33] The 302nd Judicial District Court in Dallas ("District Court") in *J.B. and H.B.*, ostensibly being interested in a "just, fair, equitable and impartial adjudication of the rights of litigants,"[34] granted the divorce. Greg Abbot parachuted-in on behalf of the State of Texas, moving to intervene and block the divorce. He challenged the lower court's subject-matter jurisdiction, essentially arguing

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[24] S.B. 7, 78th Legis., Reg. Sess. (Tx. 2003)
[25] Tex. Fam. Code Ann. § 6.204(c)(2) (West 2013)
[26] Sampson & Tindall's Texas Family Code Annotated ch. 6 (2014), Comment to § 6.204 at 69
[27] TEX. CONST. ART. I, § 32
[28] *In the Matter of the Marriage of J.B. and H.B., supra* note 12.
[29] *De Leon v. Perry* , 975 F.Supp.2d 632 (W.D. Tex. 2014)
[30] Robert T. Garrett, *Federal judge voids Texas' gay marriage ban, though he delays order from taking effect immediately,* The Dallas Morning News (Feb. 26, 2014, 1:20 PM), http://trailblazersblog.dallasnews.com/2014/02/federal-judge-voids-texas-gay-marriage-ban-though-he-delays-order-from-taking-effect-immediately.html/.
[31] American Civil Liberties Union, *Marriage Litigation: Cases in Federal Court* (Oct. 22, 2014), https://www.aclu.org/sites/default/files/assets/marriage_litigation__circuitdivision_10.22.14_public_draftforweb_0.pdfCases?mcode=1202672520878&slreturn=20140914114610
[32] United States Court of Appeals for the Fifth Circuit Calendar (Revised Dec. 4, 2014), https://www.ca5.uscourts.gov/clerk/calendar/1501/22.htm
[33] *In the Matter of the Marriage of J.B. and H.B., supra* note 25.
[34] Tex. R. Civ. P. 1 (West 2013)

that a same-sex couple's marriage is void in Texas, and therefore a same-sex couple is not entitled to the benefits of marriage enjoyed under the Family Code, including the benefit of a divorce.[35]

The trial court blocked the State's intervention, finding that article I section 32 of the Texas Constitution and Section 6.204 of the Family Code in fact violated the Equal Protection and Due Process Clauses of the 14th Amendment of the United States Constitution.[36]

In a confounding argument, Abbott, in his 2010 appellate brief to the state court of appeals, justified the State's interest "in light of limited resources, and consistent with basic principles of limited government, [whereby] society has not seen fit to direct government energy and attention toward the regulation and enforcement of [same-sex relationships]."[37] This argument was made nearly five years ago and reams of motions have been filed since then. In August 2013, the Texas Supreme Court granted petition for review.[38] *J.B. and H.B.* was fully argued before the Texas Supreme Court on November 5, 2013, but there remains no indication of when the Texas Supreme Court may issue an opinion.[39] The State of Texas seems to be directing quite a bit of government energy and attention toward the regulation of same-sex marriage since Attorney General Abbott's 2010 appellate brief was filed to protect the State's limited resources. Some practitioners believe the Texas Supreme Court will sit on this decision for as long as possible, perhaps awaiting a SCOTUS opinion.[40]

B. SO, YOU ARE BREAKING UP BUT YOU CANNOT GET DIVORCED AND YOU HAVE A BUNCH OF SHARED PROPERTY?

Same-sex couples in Texas have few options if they are seeking to separate and want to divide their property and assets. Perhaps by design, none of the options fully compare to the options available for divorce and division of property under the Family Code.[41]

VOIDANCE. If a same-sex couple was married in another state, their marriage is considered void in Texas under Family Code Section 6.204(b). A same-sex partner can seek formal voidance of their out-of-state union by filing suit under Family Code Section 6.307. Voidance affects only "the status of the parties to the purported marriage,"[42] and therefore does nothing to address division of property. For this reason, among others, it is "not possible to obtain the same relief in a voidance proceeding as in a divorce."[43] For example, premarital agreements are unenforceable in voidance proceedings.[44] Greg Abbott has acknowledged the disposition of property in a same-sex voidance proceeding is something less than clear-cut: "[w]hile the Family Code 'does

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[35] *See* Plea to the Jurisdiction, In the Matter of the Marriage of J.B., and H.B., (Tex. Dist. Ct. 2009) (No. DF-09-1074), 2009 WL 3316548 (Plea denied and Intervention Stricken)

[36] *See* *In re J.B.*, 2009 WL 3316580 (Tex. Dist. Ct. 2009), order vacated, 326 S.W.3d 654 (Tex. App. Dallas 2010), review granted (Aug 23, 2013)

[37] Brief for The State of Texas at 17, In the Matter of the Marriage of J.B. and H.B.,(Tex.App.-Dallas 2010) (No. 05-09-01170-CV), 2010 WL 1367402

[38] In re Marriage of J.B., 2013 Tex. LEXIS 608 (Tex. Aug. 23, 2013); Case Events in In the Matter of the Marriage of J.B. and H.B., http://www.search.txcourts.gov/ (Select "Case" toggle; check "Supreme Court"; and, enter "11-0024" in "Case No." field; then, click the "Search" button; on next screen, scroll down to "Case Events" box and find the entry from 08/23/2013 that reads "Petition for Review Granted).

[39] Case Events, *supra* note 35.

[40] Telephone interview with Christine Andresen, Attorney at Law, in Austin, Tex. (Oct. 17, 2014); Telephone interview with Keith Griffin, Attorney at Law, in Dallas, Tex. (Oct 8, 2014).

[41] There are both federal and state tax consequences the transfer of property that occurs when a same-sex couple seeks to divide their property in a partition suit. A divorcing heterosexual couple is protected from taxation on property transferred during the divorce under the Internal Revenue Code (*See* 26 U.S.C.A. §1041). Texas divorce courts have discretion in determining how to distribute tax liability for community property among heterosexual partners (*See* Tex. Fam. Code §7.008). For same-sex couples, the law is less clear. A host of factors must be weighed in determining the tax consequences when a same-sex couple separates including, but not limited to: whether the couple is considered "married" for federal tax purposes (*See* IRS Publication 504 (2013)), whether the couple is seeking voidance under the Family Code or a partition suit under the Property Code, and whether the couple has any community property. This complex area of the law is beyond the scope of this article, and this footnote merely serves to make the reader aware of the unique tax consequences for same-sex couples separating.

[42] Tex. Fam. Code. Ann. § 6.307(West 2013)

[43] Brief for Appellee at 28, In the Matter of the Marriage of J.B. and H.B. (Tex. App.-Dallas 2010) (No. 05-09-01170-CV, No. 05-09-01208-CV), 2010 WL 1367403

[44] *Id.*

not expressly provide any guidance as to the disposition of property remaining after a marriage has been declared void, case law recognizes that, in one way or another, some disposition is required.'"[45] Unfortunately, *Black's Law Dictionary* does not identify the legal definition of "in one way or another."

While the state recognizes that *some* disposition of the property is required in a voidance case (a legitimate option, indeed), whether the disposition must be or even can be equitable hangs in the balance. Parties to void marriages are not entitled to awards of community property,[46] and the court does not have the statutory power to order the "just and right" division of marital assets as is available for heterosexual divorces under Family Code Section 7.001.[47] A court could easily decide to distribute the property in proportion to the value of the labor contributed by each party to the acquisition of the property. A partner who performed household duties and did not earn a paycheck may find himself with no rights to the property.[48] Practitioners have expressed concern about this fact scenario, especially in relationships with larger power imbalances, for example where one partner was both the income-earner and abusive toward the non-income earner.[49]

COHABITATION AGREEMENTS. Same-sex couples residing in Texas who never legally married elsewhere theoretically can create a contractual basis for property rights via cohabitation agreements under Family Code Section 1.108 and the uncodified provision of S.B. 7 discussed earlier. Whether cohabitation agreements are consistently available to same-sex couples in practice remains uncertain.

Case law suggests that same-sex "palimony" may be enforceable with a written agreement.[50] However, if the written agreements are not carefully worded, they may be unenforceable as per Attorney General Opinion JC-0156, where a county clerk was advised not to record "'declarations of domestic partnership,' in which two unmarried persons who reside together declare under oath 'that the two individuals share in each other's lives in a committed relationship and that they agree to be jointly responsible for each other's financial responsibilities.'"[51] Practitioners are advised to carefully avoid drafting cohabitation agreements that "evidenc[e] an intent to create a common law marriage."[52] Some relevant Continuing Legal Education ("CLE") materials advise a practitioner to begin a contract by saying: "[w]hether the state recognizes the marriage of Mr. X and Mr. Y, this agreement is intended to be a contract between the parties."[53]

The practitioner responsible for the CLE materials could not be reached to comment on whether she has had success in enforcing cohabitation agreements that apply such language. However, even if she has been successful in this respect, cohabitation agreements are a luxury of couples who can either afford to hire a drafting attorney, or who are educated enough to draft an agreement themselves. Of course, this is all assuming the couple is sophisticated enough to be aware of this option, and wary enough of the possibility of separation that they decide to forego any pretense of romance in order to enter into a contractual agreement in the first place. In short, the cohabitation agreement is not likely to be an easily accessible option for many same-sex couples. For others who maintain romantic ideals, the cohabitation agreement may be downright undesirable.

SUIT FOR PARTITION OF PROPERTY. Because voidance proceedings merely change a legal status, and cohabitation agreements are neither commonplace nor unquestionably enforceable, attorneys seeking to help same-sex couples divide property most often bring partition suits[54] under Chapter 23 of the Property Code in conjunction with the Texas Rules of Civil Procedure (TRCP).[55] The court is tasked with determining "the

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[45] Brief of the State of Texas at 10, In the Matter of the Marriage of J.B. and H.B., (Tex. App.-Dallas 2010) (No. 05-09-00170-CV), 2010 WL 1367402
[46] Brief for Appellee at 29, *supra* note 40.
[47] *Id.*
[48] *Id.* at 29-30.
[49] Telephone interview Mitchell Katine, Attorney at Law, in Houston, Tex. (Oct 17, 2014).
[50] *Zaremba v. Cliburn*, 949 S.W.2d 822 (Tex. App- Forth Worth 1997, writ denied); *see* *Small v. Harper*, 638 S.W.2d 24 (Tex.Ct.App.1982) (able to set aside lesbian relationship and make determination of property division based on property law); *Ross v. Goldstein*, 203 S.W. 3d 508 (Tex. Ct. App. 2006) (in dicta - no equitable "marriage-like relationship" remedy available to homosexual couples under TX Family Code 6.204 and TX Constitution)
[51] Tex. Att'y Gen. Op. No. JC-0156 (1999) – John Cornyn Administration
[52] 15 Texas Forms Legal & Bus. § 33:1
[53] Katherine A. Kinser and Jonathan A. Bates, *Cohabitation, Domestic Partnership, Premarital & Post-Marital Property Agreements* (2010) at 7, http://www.texasbarcle.com/Materials/Events/9198/120859_01.pdf.
[54] Telephone interview with Keith Griffin, Attorney at Law, in Dallas, Tex. (Oct 8, 2014).
[55] *See* Tex. Prop. Code. Ann. §23.001 (West 2013)

share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise."[56]

While the court does have discretion to consider equity when partitioning property, the partition provisions of the Property Cody and TRCP are devoid of even a nod to the emotional elements of the division of property in the context of the termination of a romantic relationship. A partition suit is well suited to dividing property acquired in a business relationship. A partition suit does not, and was never intended to address the complicated human and emotional aspects of a couple separating. When a same-sex couple's separation is messy and emotional, they are left with very little relief under the Property Code, and no relief under the Family Code.

IV. Disparities in Protection Between Property Code And Family Code

A. Temporary orders

Imagine a contentious heterosexual divorce, which is probably not hard for readers of this publication. At their core, people are people, so it seems likely that the same problems that arise in a heterosexual divorce would also arise when same-sex couples separate. Yet, in Texas, same-sex couples are, by law, not able to benefit from the temporary restraining orders (TROs) and temporary injunctions (together, "temporary orders") available to heterosexual couples both by law under Family Code Sections 6.501 and 6.502, and in many counties, by standing order.[57] These ubiquitous standing orders generally include provisions banning partners from making threatening phone calls, destroying, concealing or using-up assets, incurring debts in connection with the suit, terminating or affecting the service of utilities, and many other prohibitions.[58] Violation of such temporary orders is punishable as contempt of court.[59] Where a heterosexual couple has the protection of such prohibitions during the pendency of a divorce suit almost always by default, a same-sex couple must actively seek out temporary orders under the TRCP. In laywoman's terms, the temporary orders available under the TRCP are shoddy compared to those available under the Family Code.

SAME END-GOAL. The purpose of the temporary orders available under the Family Code is articulated in the Travis County District Court Order Regarding Children, Property and Conduct of Parties: "The District Courts of Travis County have adopted this order because the parties and their children should be protected and their property preserved while the lawsuit is pending before the court."[60] The purpose is simple—protect the parties and preserve property until the lawsuit is finalized.

The purpose of temporary orders available under the TRCP is much the same: "The purpose of a temporary injunction is to preserve the status quo of the subject matter of the suit pending a final trial of the case on its merits. 'Status Quo' is the last actual, peaceable, non-contested status that preceded the pending controversy."[61] While the temporary orders under the Family Code and TRCP have similar purposes, actual access to temporary orders is far more restrictive under the TRCP.

PRESUMPTION AGAINST TEMPORARY ORDERS. Under the TRCP, a temporary injunction is considered "an extraordinary remedy" that does not "issue[] as a matter of right."[62] And, the presumption is against temporary orders in partition suits.[63] Under the TRCP, a party seeking a temporary order must move for one,[64]

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[56] Tex. R. Civ. P. 760

[57] *See* Dallas County (Tex.) Dist. Ct. Standing Order Regarding Children, Pets, Property and Conduct of the Parties (April 1, 2013) available at http://www.dallascounty.org/department/districtclerk/media/04_19_2013_Standing_Family_Order.pdf; *See also* Montgomery County (Tex.) Dist. Ct. and Cty. Ct. at Law Standing Orders Regarding Children, Pets, Property and Conduct of the Parties (March 11, 2009) available at http://www.mctx.org/courts/418th_district_court/docs/standingorder.pdf; *See also* Travis County (Tex.) Dist. Ct. Standing Order Regarding Children, Property and Conduct of the Parties (Jan 1, 2005) available at http://www.co.travis.tx.us/courts/files/documents_forms/civil/forms_civilAssociate/StandingOrder_ChildrenProperty_civilFamilyLaw.pdf

[58] *Id.*

[59] Tex. Fam. Code Ann §6.506 (West 2013)

[60] Travis County (Tex.) Dist. Ct. Standing Order Regarding Children, Property and Conduct of the Parties (Jan 1, 2005) available at http://www.co.travis.tx.us/courts/files/documents_forms/civil/forms_civilAssociate/StandingOrder_ChildrenProperty_civilFamilyLaw.pdf

[61] *Harris Cnty. v. S. Pac. Transp. Co.*, 457 S.W.2d 336, 338 (Tex. Civ. App. 1970)

[62] *Fina Oil & Chem. Co. v. Alonso*, 941 S.W.2d 287, 290 (Tex. App. 1996)

[63] Email from Keith Griffin, Attorney at Law to Tovah Pentelovitch, Law Student (Oct . 14, 2014, 04:12 CST) (on file with author)

and the motion must include an affidavit or verified pleading showing "a probable right and a probable injury."[65] Under the Family Code, standing orders are typically issued from the start and no affidavit or verified pleading of the facts is required.[66]

MORE BARRIERS TO ENTRY. In a partition suit where one party is seeking a TRO, notice must be provided to the adverse party unless the affidavit or verified pleadings clearly show that an "immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon."[67] Under the Family Code, notice to the adverse party is not required for issuance of a TRO.[68,69]

Imagine Hal and Joe have been in a long-term relationship where Hal is the breadwinner and Joe cares for their home. Hal has been unfaithful to Joe for a long time, and Joe finally decides to leave him. When Hal learns of Joe's intention to leave him, he moves all funds out of their joint bank accounts and severs Joe from his work-provided health insurance. Joe, who is attempting to rent an apartment on his own, discovers there is no money left in their bank account. He files a motion for a TRO to prevent Hal from hiding assets. But to receive protection from the court, he must first notify Hal of his motion seeking a TRO. Once on notice of the TRO but before the TRO is issued, Hal may have time to take even further action in hiding assets. Now, if Susan is the one divorcing Hal, she would not have to notify him that she is seeking extra protection, giving her extra time to find and put down a payment on her own apartment.

MORE EXPENSIVE. Under the TRCP, an applicant for temporary orders must execute a bond with "two or more good and sufficient sureties in a sum decided by the court."[70] Under the Family Code, the court may waive a bond in connection with a temporary order brought against one spouse by another.[71] It may be argued that a bond can be waived under the Texas Civil Practice and Remedies Code ("CPRC") if the applicant can prove indigence by affidavit.[72] This would cause further delay, forcing the partners to deal with each other even longer. In reality, if a party to a partition suit actually has property in need of partitioning, chances are they will not meet the definition of indigent.

B. A LEGAL DISTINCTION ATTACHED TO HUMAN EMOTIONS

To say that the separation of a same-sex couple is different than the divorce of a heterosexual couple is a legal fiction. Regardless of the gender of the separating partners, the emotional turbulence stemming from the fact that humans are doing something life changing, difficult, and sad will be the same across the board. Some courts are better positioned to handle these emotions than others.

FAMILY DISTRICT COURTS LARGELY UNAVAILABLE. Sixteen counties across Texas have statutorily designated family district courts.[73] Family district courts in these counties have concurrent jurisdiction with the other district courts of that county.[74] These courts are primarily responsible for hearing family law matters including divorce and marriage annulment.[75] As such, family district court judges are accustomed to handling the messy emotional aspects of divorces and separations and are more likely to provide a touch of empathy in separation proceedings.[76]

Unfortunately, same-sex partition suits are generally not brought under the jurisdiction of the family district court.[77] Instead, they are usually heard in general jurisdiction district courts. Thus, a judge who is most

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[64] *See* Tex. R. Civ. P. 680
[65] *Transp. Co. of Tex. v. Robertson Transports*., Inc. 152 Tex. 551, 556 (1953)
[66] Tex. Fam. Code Ann. §6.503(a)(1) (West 2013)
[67] Tex. R. Civ. P. Ann. 680 (West 2013)
[68] Tex. Fam. Code. Ann. §6.501(a) (West 2013)
[69] *Note that Tex. R. Civ. P. Ann 681 (West 2013) and Tex. Fam. Code Ann. §6.502(a) (West 2013) both require notice before the issuance of a temporary injunction, as differentiated from a temporary restraining order.*
[70] Tex. R. Civ. P. Ann. 684 (West 2013)
[71] Tex. Fam. Code Ann. §6.503(b) (West 2013); Tex. R. Civ. P. Ann. 693(a) (West 2013)
[72] Tex. Civ. Prac. & Rem. Code Ann. §65.043 (West 2013). *Pursuant to Tex. Civ. Prac. & Rem. Code Ann §65.045(a) (West 2013), this provision controls to the extent it conflicts with Tex. R. Civ. P.*
[73] Brazoria County, Dallas County, Galveston County, Gregg County, Harris County, Hutchinson County, Jefferson County, Midland County, Nueces County, Potter County, Smith County, Tarrant County, Taylor County, El Paso County, Wharton County and Cameron County. Tex. Gov't Code Ann §§24.608-§24.640 (West 2013)
[74] Tex. Gov't Code Ann. §24.601 (West 2013)
[75] *Id.* at §24.601(b)(3)
[76] Telephone interview with Keith Griffin, Attorney at Law, in Dallas, Tex. (Oct 8, 2014).
[77] Email from Keith Griffin, Attorney at Law to Tovah Pentelovitch, Law Student (Oct . 15, 2014, 03:55 CST) (on file with author)

accustomed to hearing non-marital property disputes or breach of contract disputes may be presiding over what is, legal definitions aside, a divorce proceeding.[78]

The only time a same-sex separation suit may be heard in a family district court is if it involves a child custody dispute.[79] In such a case, in a county where a statutory family district court exists, a child custody case could be brought under the Family Code in the family district court, followed by a second partition suit in the civil district court. Then, the attorney could file a motion to consolidate the two cases. If the motion to consolidate is granted, the newer partition case would be consolidated into the older child custody suit and it would all be heard in the family district court.

While having the partition suit heard in family district court would be beneficial in that the judge may be more accustomed to handling the emotions of separation and divorce, it involves filing two suits, paying two filing fees, and potentially trying suits in two different courts if the motion to consolidate is not granted. Furthermore, the property would still be divided under the Property Code and the temporary orders would still have to be moved for under the TRCP.[80]

NO PROVISION FOR COURT-ORDERED COUNSELING. Setting aside concerns about self-determination, under the Family Code a judge can direct parties to counseling to determine if there is a "reasonable expectation of the parties' reconciliation."[81] No such provision is available under the Property Code for partition suits. This omission reveals yet another way same-sex separation is treated as legally distinct from heterosexual divorce without any recognition of the universal emotional aspect.

V. TEXAS: A SOMEWHAT PREDICTABLE WILDCARD

The risk of this paper becoming irrelevant grows greater each morning. As previously discussed, the laws are rapidly changing nationwide when it comes to the legal rights of same-sex couples to marry and be treated just as heterosexual couples under the law. However, Texas tends to fight progressive change.[82] On the issue of same-sex marriage, the Lone Star State seems to be staying its steady course. Predictions can be made, but no outcome is guaranteed.

In less than a decade, the Texas Legislature and its voting public laid the groundwork for what has turned out to be a long, messy battle to legalize or forbid same-sex marriage. Recall in 2003 the legislature codified the definition of marriage as being "between a man and a woman."[83] That was insufficient to satisfy both the legislature and the general public, however. In 2005, over 76% of Texas voters elected to adopt Article I § 32 of the Texas Constitution, reaffirming what was codified two years prior.[84]

In 2015, the battle is fully underway, but it is a slow and frustrating one. *De Leon* oral arguments were heard before the Fifth Circuit in January[85] and it remains to be seen when the Fifth Circuit, "one of the most . . . staunchly conservative and important appellate courts in the country,"[86] will issue an opinion. Perhaps the Fifth Circuit will await a cue from SCOTUS. So, Texas waits.

J.B. and H.B. has gone nowhere relatively slowly. Oral arguments were heard on November 5, 2013[87]

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[78] *Id.*

[79] Under Tex. Fam. Code Section 6.406, where minor children are involved, a suit for dissolution of marriage (for heterosexual couples) must include a suit affecting the parent-child relationship (SAPCR). Same-sex couples are not held to this same requirement.

[80] Email from Keith Griffin, *supra* note 74.

[81] Tex. Fam. Code Ann. §6.505(d) (West 2013)

[82] *See* Robert T Garrett, *Study: Refusing to expand Medicaid is costing Texas Billions*, Dallas News, Dec. 4, 2013, http://www.dallasnews.com/news/politics/headlines/20131204-study-refusal-to-expand-medicaid-is-costing-texas-billions.ece (discussing the human impact of Texas' refusal to expand Medicaid, an expansion that would provide healthcare to over 1 million low-income Texans); *See also* Laura Bassett, *Greg Abbott: Abortion Clinic Closures Are Manageable 'Inconvenience' For Women*, Huffington Post, Oct. 9, 2014, http://www.huffingtonpost.com/2014/10/09/texas-officials-abortion-_n_5960480.html (Discussing the impact of shutting down 80% of Texas abortion clinics)

[83] S.B. 7, *supra* note 21.

[84] Texas Legislative Council, *Amendments to the Texas Constitution Since 1876* (May 2014) at 7, http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf.

[85] *See DeLeon v. Perry, supra note* 9.

[86] Mark Curriden, *Meet the chief judge of the nation's most divisive, controversial and conservative appeals court*, ABA Journal, Feb. 1, 2014, http://www.abajournal.com/magazine/article/meet_the_chief_judge_of_the_nations_most_divisive_controversial/

[87] Case Events, *supra* note 35.

and the Texas Supreme Court gives no indication of when it will render judgment. Some practitioners believe the Texas Supreme Court will sit on this decision for as long as possible, perhaps awaiting the Fifth Circuit decision in *De Leon*, or more likely SCOTUS's opinion.[88]

As predicted, the 2014 elections pushed the Texas Senate even farther to the right.[89] Post-election it seemed a safe bet that the 84th Legislative Session would bring proposals for further protections of Texas' ban on same-sex marriage, and the legislature has delivered with House Bill 623 entitled, "The Preservation of Sovereignty and Marriage Act."[90] Given all of the hurdles in place, SCOTUS's much awaited opinion may be the key to the legalization of same-sex marriage in Texas.

VI. WITH ALL THIS CONFUSION, HOW ABOUT SOME RELIEF?

Counter-intuitively, in the 78th Legislative Session, while the Texas DOMA (SB 7) was being pushed through the legislature, closing the door on same-sex marriages, a door (perhaps) inadvertently was opened. Section 2 of S.B. 7, although uncodified, recites a legislative 'finding' that same-sex couples can attain equivalent rights as heterosexual couples via private contract in the areas of property, guardianships, rights relating to hospital visitation, property and entitlement to life insurance proceeds. The legislature during the current 84th Legislative Session could include a provision a la Section 2 of S.B. 7 that states a legislative finding recognizing that the same temporary orders available under Family Code Sections 6.501 and 6.502 are available to same-sex couples in partition suits under the Property Code.

Such a legislative finding would create actionable law whereby courts hearing partition suits could enter standing orders for temporary restraining orders and injunctions. At the same time, the naysayers could sleep soundly knowing that the law would not be codified and could easily be removed in a subsequent session.[91] The author has received opinions in no uncertain terms from practitioners and professors that this will never happen. But, far crazier legislation has been known to pass through the Texas legislature.[92] A little nod by the legislature could provide a tiny sliver of relief to a population that could use some relief from chaos – past, present, and likely future.

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[88] Telephone interview with Christine Andresen, Attorney at Law, in Austin, Tex. (Oct. 17, 2014); Telephone interview with Keith Griffin, Attorney at Law, in Dallas, Tex. (Oct 8, 2014).

[89] *See* Terrence Stutz and Gromer Jeffers Jr., *Dallas-area candidates expected to swing Texas further right*, Dallas News, Oct. 18, 2014, http://www.dallasnews.com/news/politics/headlines/20141018-dallas-area-candidates-expected-to-swing-texas-senate-further-right.ece; *See also* Ross Ramsey, *Analysis: Blue Hopes Drowned by a Sea of Red*, The Texas Tribune, Nov. 4, 2014, https://www.texastribune.org/2014/11/04/analysis-politics-texas-remains-emphatically-red/.

[90] http://www.capitol.state.tx.us/Search/DocViewer.aspx?ID=84RHB006231B&QueryText=%22Same-Sex%22&DocType=B

[91] Telephone interview with staff at the Texas Legislative Council, Austin, Tex. (Oct 7. 2014).

[92] *In 1971 Representative Tom Moore, Jr., believing that many of his fellow Texas legislators did not read bills and resolutions before voting, decided to play an April Fool's Joke. He sponsored a resolution commending Albert De Salvo, the Boston strangler, for his service to America by employing "unconventional techniques involving population control…" The resolution passed unanimously.*

See The Ayes of Texas, http://www.snopes.com/legal/desalvo.asp (last visited Oct. 29, 2014); *See also* Texas Legislators: Past & Present: Tom Moore, http://www.lrl.state.tx.us/ (In "Site" search box type "Tom Moore Jr." and click "go"; then click on "Texas Legislators: Past & Present profile of Tom Moore, Jr. " hyperlink; finally, scroll down to Other Resources" section); *See also Texas Legislature Opens the 'Big Top'*, The Washington Post, Jan 13. 1985, *available at* Proquest.com

A Practitioner's Guide to Digital and Virtual Assets
By James Nichols[93]

Glossary of Terms[94]

App

An application, especially as downloaded by a user to a mobile device.

Example: Many individuals download apps on their phone to make work easier.

Avatar (computing)

An Icon or figure representing a particular person in computer games, internet forums, etc.

Example: In the game Pacman, the yellow circle being controlled) is an avatar.

Bitcoins

A type of digital currency that is created and stored electronically and functions independently of a central bank.[95]

Example: Currently, merchants such as Expedia noted the growth of bitcoins and allow customers to pay with their bitcoins.

Destiny (game)

An online shooting video game released in 2014. The game is aimed to be a 10-year on-going game with new expansions to be released over the next decade.[96]

Example: The game Destiny will allow players to use their original avatar during future expansions to the game.

Digital Currency

A form of currency or medium of exchange that is electronically created and stored (i.e., distinct from physical currentcy, such as banknotes and coins).[97]

Example: Many owners of the digital currency bitcoins store their bitcoins on their smart-phone.

Digital Assets

Intangibles that only exist in a digital form (i.e. data in the form of binary digits).[98]

Example: A photograph a person takes and stores on their computer is a digital asset where they have ownership of, but the music stored on the computer, while still a digital asset, may be leased through "Itunes."

MMORPG

An online role-playing video game in which a very large number of people participate simultaneously. The acronym means massive multiplayer online role-playing game.

Example: The video game World of Warcraft is an MMORPG that has millions of players that pay a monthly fee in order to access the game.

Second Life

An online virtual world created in 2003 with over a million regular users. This virtual world allows players to purchase virtual land and build virtual homes.[99]

Example: Second Life does not have a story like a video game, but instead revolves around player interactions and creations in the virtual world.

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[94] Unless otherwise noted, all definitions came from: *Oxford English Dictionary Online*. 2014. http://www.oxforddictionaries.com/ (last visited Dec. 27, 2014).

[95] Raghu Kumar, *Bitcoin Explained in Layman's Terms*, NDTV Profit (Dec. 27, 2013, 10:10 PM), http://profit.ndtv.com/news/your-money/article-bitcoin-explained-in-laymans-terms-376029.

[96] Bungie, http://www.destinythegame.com/ (last visited Dec. 27, 2014).

[97] Andrew Wagner, *Digital vs. Virtual Currencies*, Bitcoin Magazine (Aug. 22, 2014), http://bitcoinmagazine.com/15862/digital-vs-virtual-currencies/.

[98] Chris Meuse, *Digital and Virtual Assets in Divorce*, Docket Call: 16:2 Collin County Young Lawyers (2014).

[99] Linden Research, Inc., http://secondlife.com/ (last visited Dec. 27, 2014).

Virtual Asset

Intangible items used in virtual worlds or MMORPGs. These assets range from virtual pets; avatars, accessories for those avatars (clothing, weapons, etc.); prizes; virtual real estate; to virtual currency.[100]

Example: In MMORPG games, in-game items such as armor can be bought, traded, or are rewarded to players for completing missions in the game. Once these items are acquired, they become virtual assets.

Virtual Currency

A representation of currency or a defined medium of exchange that has value in, and is regulated by, a specific environment – primarily in a video game.[101]

Example: Each game has its own unique currency, which only derives value in that virtual world. For example, many video games use gold coins whereas others such as Zelda used Rupees.

World of Warcraft

An online game played through a computer and is often referred to as "WoW". WoW is an MMORPG, which was created in 2004 and is still growing in players today. Players have to pay a monthly fee to access the game and play as a custom avatar, which the player creates and uses throughout the entirety of the online experience.[102]

Example: Many college students play WoW in their free time, but some professors have been playing WoW since it was created in 2004.

Abstract

Society is in an advanced age of technology and as a result individuals now have personal belongings of tangible value stored in the digital realm.[103] A college student could easily have an impressive collection of electronic textbooks, a robust digital music library, an avatar on an online game such as World of Warcraft, and digital currency such as bitcoins. While these digital assets usually pose no concern for a college bachelor, issues can start to arise in cases of divorce where virtual assets have been comingled or purchased with community funds. The purpose of this article is to give practical advice for divorce attorneys in Texas on the breadth of virtual and digital assets and a guide on how to properly deal with such assets in a way to avoid potential conflicts.

The Breadth of Digital and Virtual Goods

In 2011, a study was conducted that examined how consumers valued their digital and virtual assets.[104] Owners in the U.S. on average valued their digital and virtual assets at nearly $55,000.[105] This number is likely to grow as new generations are becoming more invested in the technologically saturated world. The increased use of technology with each generation is made clear by the fact that children now receive their first cell phone, which has access to a digital app store, between the ages of eight and ten.[106] This means that individuals begin to build their digital libraries at a younger and younger age. While many corporeal possessions from childhood are often discarded, digital assets usually stand the test of time. These assets take up little to no space as they are stored on phones, cloud storage, or flash drives. As a result, it is likely that the size of digital libraries will continue to increase with each new generation.

The increase of digital assets is matched by the increase in virtual assets. Currently, millions of individuals subscribe to online virtual games yearly, which has created a multi-billion dollar industry as well as a

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[100] Chris Meuse, *supra* note 5.
[101] Andrew Wagner, *supra* note 4.
[102] Gamertag Gaming, http://moviepilot.com/posts/2014/11/12/world-of-warcraft-a-10-year-history-and-we-have-what-s-in-store-for-the-future-2430378?lt_source=external,manual (last visited Dec. 27, 2014).
[103] Joyce Baptist & Katherine Allen, *A Family's Coming Out Process: Systemic Change and Multiple Realities*, 30 Contemporary Family Therapy. 92, 94-97 (2008).
[104] McAfee for Business, http://www.mcafee.com/us/about/news/2011/q3/20110927-01.aspx (last visited December 26, 2014).
[105] *Id.*
[106] H.H.A. Cooper & Sarn Freiner, *New Age Communication: Style, Substance, and Possibilities*, 5 Journal of Applied Communication Research. 438, 439-450 (2010).

stand-alone economy based on the game.[107] In fact, the prominence of virtual assets has led to a recent debate on the tax consequences such virtual assets may have in the near future.[108]

Digital vs. Virtual

Many writers, scholars included, often use the terms digital and virtual interchangeably. This, specifically when dealing with currency, is incorrect and the difference between the two can be quite important.[109]

Digital Currency: Digital currency must be stored electronically and can be transferred electronically as well.[110] It exists as a string of 1s and 0s.[111] While an argument can be made that bank accounts or PayPal meet this definition, the common use of the term applies only to assets whose value derives from their digital presence.[112] For example, the value of a bank account transfer derives from the representation of the physical currency (i.e. dollars, pesos, etc.) that is associated with the transfer. As such, the value derives from the physical dollar and is not a digital currency.[113] In contrast, bitcoins are intangible and exist as digital codes in which the value truly lies.[114] As such, the value comes from the owning of the digital codes and not a corporeal bitcoin and therefore qualifies as a digital currency. A more in-depth look at bitcoins is included below.

Digital Assets: Digital assets are also non-corporeal possessions that exist as a set of codes in a digital form.[115] For example, digital photographs on Facebook and electronic books accessible through an application such as Kindle are digital assets.[116] Following this reasoning, all digital currencies are digital assets (such as bitcoins), but not all digital assets are digital currencies (such as iTunes music or a website domain name).

The common thread between digital assets and digital currencies is that they exist in this specific version of the real world. That is to say that a digital photograph is viewable and can even be printed, a digital musical library can be accessed, heard, and even reproduced. A digital website can be accessed, modified, and expanded or contracted. The same is true of digital currencies as they can be withdrawn and deposited in the real world through outlets that accept such currencies. These digital goods exist in and derive their value from this corporeal world. This is the distinction between digital and virtual goods.

Virtual Currency & Assets: Virtual currencies are those which are used in virtual or online worlds.[117] For example, a person playing the popular video game Destiny created by Bungie may have 5,500 "glimmer."[118] This virtual currency can then be exchanged in the game for a virtual asset in that particular virtual world/game such as a new in-game weapon.[119] As such, a player may spend 3,000 "glimmer" in the game destiny and buy a new virtual firearm that can only be accessed and used in the video game Destiny. While virtual currencies are usually constrained to the virtual world in which they originate, they can expand into larger virtual profiles. For example, Steam is an online gaming platform where users can create a profile and play a variety of games that are for purchase through Steam. As a result, virtual assets (such as an in-game weapon) received in a game hosted through Steam can be sold to other players for a virtual currency that can

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[107] Jenna Pitcher, *World of Warcraft Subscribers Hit 7.4 Million Ahead of Expansion: Pre-expansion patch The Iron Tide rolls out today*, IGN News (Oct. 14, 2014), http://www.ign.com/articles/2014/10/15/world-of-warcraft-subscribers-hit-74-million-ahead-of-expansion.; Chris Meuse, *supra* note 5 ("In 2009, 3.8 billion dollars were spent on MMORPGs, with over $100 million going towards virtual assets in these online communities.").

[108] Scott Wisniewski, *Taxation of Virtual Assets*, 2008 Duke L. & Tech. Rev. 0005, http://dltr.law.duke.edu/2008/05/10/taxation-of-virtual-assets/.

[109] Andrew Wagner, *supra* note 4.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Joel Weber, *What's a Bitcoin Look Like? The Story Behind This Popular Photograph*, Bloomberg (Sep. 29, 2014, 11:00 PM), http://www.bloomberg.com/news/2014-09-30/what-s-a-bitcoin-look-like-popular-photograph-has-story.html (while physical bitcoins exist, these are considered collectibles since the value of bitcoins derive from their digital code and not any corporeal existence).

[115] Chris Meuse, *supra* note 5.

[116] *Id.*

[117] *Id.*

[118] Ryan Cox, *Destiny Currency Breakdown*, Beyond Entertainment (Sep. 14, 2014), http://teambeyond.net/destiny-currency-breakdown/.

[119] *Id.*

then be exchanged by Steam for credit on your virtual Steam profile.[120] Virtual money on your virtual profile can then be used to purchase other games from Steam.[121] Of course, real world money can be used to purchase these games as well. By allowing players to use virtual currency, from games created by Steam, the developer is hoping to keep gamers invested in their virtual profiles and continue to purchase Steam products.

Steam is not alone in this expansion. Currently Sony Online Entertainment (SOE) has a virtual currency titled 'Station Cash', which can be used in any SOE title; however, this currency is still virtual and as such cannot be transferred, refunded, or traded.[122] This can best be equated to cashing in reward points or paying real world currency at a store for a gift card. That gift card becomes redeemable only at that store (Steam, SOE, etc.) and is intended not to be sold for real world currency.

While it has been stated above, it is important to remember that while these virtual currencies and virtual assets are stored in a digital format, they are not digital currencies or digital assets. This is because virtual currency and virtual assets are constrained to the virtual world in which they originate – which will impact the real world value, if any, the virtual currency or asset will have. An individual may use digital currency to purchase an in-game gift card that then becomes virtual currency or a person may use real world money to purchase an in-game item or extra lives that then become classified as virtual assets. This is seen in many games found on cellphones. For example, many games can be downloaded onto cellphones. One such game is called Candy Crush, which is a puzzle game that only allows players a certain number of turns or lives each day; however, extra lives can be purchased on Candy Crush for real world money, which allow users to continue playing.[123] That real world currency is exchanged and those extra lives then become a virtual asset because they are constrained to the virtual world of Candy Crush.

These distinctions, though trite, could have a major impact on the value of the asset or currency in question and could open the door to possible reimbursement claims. As such, it is crucial to be able to distinguish between virtual assets and digital assets.

The Transaction Test: Of course, defining one asset as digital or virtual can be a difficult process. After all, the main distinction relies on an understanding of the two types of assets as well as a philosophical point of whether the asset "exists of the world." For this reason, I have included a few tips and a test that should help define assets as either digital or virtual. Tips:

- Bitcoins are always a digital currency.
- Any type of currency used in a video game is a virtual currency.
- Avatars or in-game profiles are always a virtual asset.

The above tips will likely aid in the defining of the majority of digital and virtual assets; however, it is plausible that certain items could seem to fall between the two definitions of virtual and digital. If this is to occur, a test would be helpful in defining the asset as either digital or virtual. This test will be referred as the Transaction Test.

Step One: Imagine a basic in-person transaction between your client with the asset and a buyer with money in hand. The buyer wishes to buy the currently under-review asset.

Step Two: Ask the question–can the transaction be completed (i.e. ownership transferred) without the internet?

Step Three: If yes, it is likely a digital asset.

Step Four: If no, it is likely a virtual asset.

For example, your client has (and assuming full ownership for this hypothetical) 200 MP3s (songs) on his computer. First, we imagine someone offering to buy all of the songs and the client agrees. Step two, we ask the question. Can this asset be transferred without the internet? Of course, the client can store the music on a flash-drive and hand the physical drive over to the buyer who then hands over the money. The transaction is complete, and the answer was yes. Therefore, the asset in question is a digital asset.

Even more complex scenarios are still applicable to the Transaction Test. Imagine your client is a computer programmer and the asset in question is a design and instructions on how to create a virtual building in the video game Second Life. Step one, imagine a transaction where someone is offering to buy the design and

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[120] Mitch Bowman, *The Hidden Word of Steam Trading*, Polygon (May 22, 2014 11:30 AM), http://www.polygon.com/features/2014/5/22/5590070/steam-valve-item-trading.
[121] *Id.*
[122] Sony Online Entertainment, https://www.soe.com/stationcash-faq#05 (last visited December 26, 2014).
[123] Alexis Klienman, *Use This Candy Crush Cheat to Get Unlimited Lives*, Huffington Post (Aug. 06, 2013 10:55 AM), http://www.huffingtonpost.com/2013/08/06/candy-crush-cheat_n_3712493.html.

instructions for the in-game building. Step two, can this asset be transferred without the internet? Of course, the design and instructions once again could be stored on a flash-drive. The answer is yes even though the asset was about an in-game item and is a digital asset. For the sake of clarity, let us take this example one step further and imagine the buyer of this asset is now our client. Once he gets home from purchasing the design and the guide he gets on his computer and follows all of the steps. At the end of the guide he has a new building in the game of Second Life. Now we apply the test to both the design and guide as well as the virtual building itself (as the client now owns both). The design and guide will still qualify as a digital asset as it can be stored in a drive and sold without being connected to the internet. The building however, is a different story. The client is unable to store the building on a flash drive because it is now inside the video game Second Life (the same would be true of all video games). The client can hand over the design and guide but the building in question is not impacted. The only means of a transfer is for the client to be in the video game to transfer over the asset to the buyer. Since the transaction could only be completed with the internet (all MMORPGs require internet to play), the asset is virtual.

The Biggest Digital Currency—Bitcoins

Bitcoins

Bitcoin Origins: "The core elements to the bitcoin story seem as if they belong more to a movie than to reality."[124] The identity of the creator of bitcoins remains a mystery to this day. Originally, they were a central part of a booming online drug trade, and have been linked to scandals of various sizes.[125] These flashy issues aside, bitcoins still remain a digital asset that may change the future of currency.[126]

What is a Bitcoin: At the most basic level, bitcoins are a digital currency that currently can be sold for real world currency, purchased, or exchanged for goods and services.[127] The unique factor of bitcoins is that it is a currency that has no centralized authority and is created outside of governmental control.[128] Bitcoins are created by complicated software that creates complex algorithms and rewards the solver(s) with bitcoins.[129] As time elapses, solving the algorithms becomes increasingly difficult and the reward lessens.[130] This is a fail-safe to cap out the total amount of bitcoins to be in circulation at around 21 million.[131]

This software also links all computers trying to solve the algorithm that in return creates a network allowing the entire system to run without any central hub.[132] In addition, this network details each and every bitcoin that is received through solving an algorithm and any bitcoin transaction that has or ever will take place.[133] While this record of every transaction is public, as each rewarded or transferred bitcoin requires verification by the collective network, personal information that can identify the parties involved is not needed. This is one of the biggest attractions of bitcoins – anonymity.[134]

Value of a Bitcoin: Both defenders and critics of bitcoins will testify to the volatility of the market.[135] The value of this currency has varied from a single bitcoin worth over $1,200 to a single bitcoin worth less than $2.00.[136] The current market value price of bitcoins can be found through using the Bitcoin Price Index and at the time of writing this article (12/29/2014) the value of a single bitcoin was $313.60 US dollars.[137] Despite this fluctuation, various merchants accept the currency. Merchants who regularly accept bitcoins in-

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[124] Nick Wenker, *Bitcoin Pandemonium*, 1, (1st ed. 2014).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 2.
[129] *Id.* at 11-12.
[130] *Id.* at 18.
[131] *Id.* at 17.
[132] *Id.* at 11.
[133] *Id.* at 12.
[134] *Id.* at 12 and 51.
[135] *Id.* at 37.
[136] Jenna Greene, *Businessman Operated Bitcoin Ponzi Scheme, Judge Says*, The National Law Journal (Sep.19, 2014, 3:00 PM), http://www.nationallawjournal.com/legaltimes/id=1202670770699/Businessman-Operated-Bitcoin-Ponzi-Scheme-Judge-Says?slreturn=20141126125937.
[137] CoinDesk, http://www.coindesk.com/price/.

clude Expedia, Overstock.com, Dell, and Dish Network to name a few with many other retailers announcing they are looking into accepting the digital currency in the near future.[138] The increased acceptance of bitcoins by general merchants has resulted in a recent expansion for bitcoin users. Currently, applications are being created on various phones to store bitcoins - 'Bitcoin Wallets' and political committees are allowed to accept bitcoin donations thanks to a recent decision from the Federal Election Commission.[139] The growing popularity of bitcoins is clear as some universities accept the digital currency, independent companies are sprouting to mine new bitcoins on an organized scale or store them, and millions of dollars a year are being invested in bitcoin-related start-up companies.[140]

Where to get a Bitcoin: As noted above, bitcoins are created through solving complex algorithms, which has come to require multiple computers and operators joining their power to solve.[141] This process has been dubbed "mining."[142] Of course, a currency would fail if it was limited to such a small (or minor) population. As a result, over a dozen different manufacturers have put out bitcoin ATMs that are in use all over Europe, the United States, and Canada.[143] These ATMS allow users to insert cash to buy bitcoins or to sell bitcoins for cash then dispensed by the machine.

What this Means: While it is too early to determine whether bitcoins will become a widespread currency in the coming years, the potential value and growth of this currency requires practitioners to incorporate bitcoins in any divorce proceeding. Failing to do so could leave thousands of dollars on the table for the other party and opens attorneys up to malpractice suits. This coupled with the fact that legislators have yet to set forth comprehensive regulation, only strengthen the need for a peer-reviewed incorporation of a digital and virtual asset section to inventory and appraisement forms.[144] A sample of each section and proposed additions are included below.

Common Digital Assets

While bitcoins are still considered fairly uncommon, there are various other digital assets that nearly every adult possesses. These include digital photographs, digital music, downloaded applications on cellphones, airline miles, reward points, and Facebook profiles. These assets usually hold only sentimental value and are constrained by user agreements that are agreed to prior to taking possession of the digital asset.[145] As it stands, most of the digital assets listed above do not have much value to the outside world as they are user specific. For this reason, common digital assets will not be fully expounded upon in this article; however, they are applicable to the suggested addition to inventory and appraisement forms.

Defining Different Virtual Assets

Virtual Currency & Assets: Virtual currencies go by various names. They are defined by their limitation to the virtual world from which they originate.[146] Gold in the game World of Warcraft is only redeemable in the game World of Warcraft. This virtual currency is used in the game to purchase virtual assets. For example, a character could spend 200 gold (a virtual currency) in the game of World of Warcraft on a sword (virtual asset). This virtual currency works the same way as regular currency but is limited to the virtual world in which it originates. The differentiating factor between digital and virtual currency is that a digital currency such as a bitcoin is accepted by real world retailers and even has a value to be derived at ATMs whereas virtual currencies only have value in the videogame or virtual world from which they originate.[147] However,

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[138] Prableen Bajpai, *Stores Where you Can buy Things with Bitcoins,* (Nov. 05, 2014), http://www.investopedia.com/articles/investing/110514/stores-where-you-can-buy-things-bitcoins.asp.; Mathew Frankel, *Bitcoin and Retailers; Who Accepts the Virtual Currency?*, (Oct. 15, 2014), http://www.fool.com/investing/general/2014/10/15/bitcoin-and-retailers-who-accepts-the-virtual-curr.aspx.

[139] Steven Witzel, *Bitcoin and Virtual Currency Regulation*, New York Law Journal (Sep. 4, 2014), http://www.newyorklawjournal.com/id=1202668742780/Bitcoin-and-Virtual-Currency-Regulation?slreturn=20141126130536.

[140] Nick Wenker, *supra* note 31, at 20, 43-47.

[141] *Id.* at 58.

[142] *Id.*at 11.

[143] CoinDesk, http://www.coindesk.com/bitcoin-atm-map/ (last visited Dec. 26, 2014).

[144] Nick Wenker, *supra* note 31, at 59-121.

[145] For a more in depth discussion of common digital assets and their respective classification in a community property state please read: Eric Gutierrez, *Classification of Virtual Assets under the Texas Community Property Regime*, 3 Section Report Family Law 12-25 (2014).

[146] Chris Meuse, *supra* note 5.

[147] *Id;* Nick Wenker, *supra* note 31, at 17 and 37.

some games such as Second Life, which boasts over 20 million players, have a virtual currency that can be converted into U.S. dollars.[148] This is done through Second Life's sanctioned in-game currency exchange. This, coupled with players in the virtual world retaining ownership of the creation, has resulted in a virtual economy that mimics that of real world economies. Individuals in Second Life buy and sell clothes, land, and vehicles with the in-game currency "Linden", which can later be converted into U.S. dollars.[149]

Sanctioned Expansion and Sale: While virtual currency and virtual assets are limited to the virtual world in which they originate, it is still possible for such virtual possessions to result in real world value. For example, until earlier this year players of the popular computer game Diablo III could list items for sale in an auction house for real money that would be deducted from the purchaser's Paypal account and transferred to the seller's Paypal account.[150] The game producer, Blizzard, for organizing and sanctioning the transaction, received a hefty 15% commission on each sale.[151] This auction house became so successful that a miniature economy developed. Success stories range from earning a couple dollars to tens of thousands of dollars.[152] Certain items, such as a rare helmet (a virtual asset) could sell for $50.00.[153] As a result, this real money auction house became a career for many players. This auction house soon began to detract many players from the fun side of gaming and Blizzard decided to shut it down.[154]

Diablo III is not alone in the attempt to create a sanctioned mode of selling virtual items. Sony launched an auction platform titled Station Exchange in early 2000 for their popular game EverQuest II that facilitated over $180,000 in transactions within the first month of operation.[155] Like the auction house in Diablo III, this too was eventually shut down. Many games have yet to take such a leap for sanctioned selling of goods and some, such as Blizzard's World of Warcraft, forbid selling virtual currency or virtual assets for real world money.[156] These bans have done little to slow down the trade and sell of virtual goods.

Unsanctioned Expansion and Sale: While many games have yet to even attempt a real money auction house such as Diablo III's attempt, selling virtual currency or virtual assets for money is quite common. Historically, eBay served as a hub for buying and selling virtual currency and assets; however, in 2007 eBay started to remove the majority of virtual items listed for sale and made selling many virtual items prohibited.[157] The reason behind this ban is that the majority of games have terms and conditions that retain intellectual property rights to all in-game items.[158] As a result, it would violate eBay's policy to allow the selling of goods by an individual lacking such property rights.[159] As a result, some companies have released statements that virtual items made by players are considered property of the creating player and not the company. A common example of this would be the game Second Life.[160] In fact, a class action lawsuit was recently certi-

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[148] *See generally* Anita Ramasastry, *Second Life Bans Cyber Banks and Unregulated Financial Institutions*, Findlaw (January 24, 2008), http:// writ.lp.findlaw.com/ramasastry/20080124.html.

[149] Grace Wong, *How Real Money Works in Second Life: CFO of Linden Lab Talks About What It's Like to Operate the LindeX Currency Exchange, A Real Market in the Virtual World*, CNN Money (Dec. 8, 2006, 12:15 PM), http://money.cnn.com/2006/12/08/technology/sl_lindex/.: Michael S. Rosenwald, *Second Life's Virtual Money Can Become Real-Life Cash*, The Washington Post (Mar. 8, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/07/AR2010030703524.html.

[150] John Gaudiosi, *Blizzard's Diablo III Success Is Pulling Gamers Away From World of Warcraft, League of Legends*, Forbes (May 29, 2012, 3:01 PM), http://www.forbes.com/sites/johngaudiosi/2012/05/29/blizzards-diablo-iii-success-is-pulling-gamers-away-from-world-of-warcraft-league-of-legends/.

[151] *Id.*

[152] Dan Crawley, *Meet the Gamers Who earned Big In the Now-Closed diablo III Real-Money Auction House*, Venture Beat (March 19, 2014, 8:30 AM), http://venturebeat.com/2014/03/19/meet-the-gamers-who-earned-big-in-the-now-closed-diablo-iii-real-money-auction-house/.

[153] *Id.*

[154] *Id.*

[155] Daniel Terdiman, *Sony Scores with Station Exchange*, CNET (Aug. 25, 2005, 4:00 AM), http://news.cnet.com/Sony-scores-with-Station-Exchange/2100-1043_3-5842791.html.

[156] Jennifer Miller, *The Battle over "Bots": Anti-Circumvention, the Dmca, and "Cheating" at World of Warcraft*, 80 U. Cin. L. Rev. 653, 654 (2011).

[157] Norwood Trading Company, *Buying and Selling Virtual Items on eBay*, ebay (Oct. 27, 2007), http://www.ebay.com/gds/Buying-and-Selling-Virtual-Items-on-eBay-/10000000004609906/g.html.

[158] *Id.*

[159] *Id.*

[160] Juliet M. Moringiello, *What Virtual Worlds Can Do for Property Law*, 62 Fla. L. Rev. 159, 163 (2010).

fied against the company who created Second Life for conversion because certain player's virtual property was seized by the company.[161] This class action likely resulted from an earlier settlement between Second Life and another player whose virtual in-game land was seized by the game company.[162] This settlement prevented the court from answering whether the players in the game own the virtual land in fee simple.[163]

Even with the door closing at eBay, selling of virtual goods is still common. Websites such as "www.Guyforgame.com", "www.ige.com", and a number of others have been spawned to sell, trade, and buy virtual assets and virtual currency. Certain items and characters are valued at hundreds if not thousands of dollars. In total, some estimate virtual goods trafficking is an $880 million dollar a year industry.[164] The expansion of virtual worlds and virtual currency has even resulted in a push in the United States for the Bank Secrecy Act to cover virtual worlds.[165]

What This Means: While virtual currency and virtual assets do not have any tangible form, they can still result in significant gains or losses to clients. As a result, it would be prudent to successfully catalogue all virtual property and review any terms and conditions tied to them. Even if the virtual currency or assets do not have a sanctioned means of sale, it would be wise to know of them in order to safeguard them. Oftentimes divorces get messy and the separating spouses become locked in what can only be called a scorched earth battle. It would not be far-fetched for an ex-spouse to sell the other's virtual goods in an unsanctioned way or to simply delete the other's virtual profile.[166] Without having a completed list of these assets as well as the value they hold, a judge may find it difficult to find in favor of the disadvantaged party. As a lawyer, one must take all steps to safeguard a client – in today's society, that means taking into account digital and virtual goods.

The Inventory and Appraisement Process

Whether mandated by the court or done informally, a critical part of most divorce proceedings is the sworn inventory and appraisement form.[167] This is supposed to be an accurate representation and value of all assets on the table between the divorcing parties. After all, these forms often qualify as judicial admissions meaning the filing party may not offer contrary evidence.[168] These forms allow for the court to identify, characterize, and put a value on each asset in order to award a just and right division of the estate. Failing to submit a full and accurate form can lead to sanctions, being held in contempt, or a disadvantage during litigation.[169] As such, an inventory and appraisement form should be a complete and accurate representation of the substantial, if not all, assets in the marital estate. Yet, despite the importance this form has, the standard form currently utilized by Texas attorneys is lacking sections dedicated to digital currency, digital assets, virtual currency, and virtual assets.[170] By overlooking these assets, "attorneys and parties could be leaving real, not virtual, dollars on the table."[171] This rings true for estate planning as well because during probate a personal representative is required to submit a comparable form to the court detailing the assets of the deceased which are now under her/his control.[172]

Discussion of Inventory and Appraisement: Each item listed in the inventory and appraisement requires the value of an asset to be determined under a willing buyer/willing seller test.[173] If the separating couple can agree to a property settlement, an inventory and appriasement may not be required by the court.[174] It should be noted that if the separating couple is unable to reach a property settlement or to agree collectively about the

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[161] Evans v. Linden Research, Inc., No. C 11-01078 DMR, 2012 WL 5877579 (N.D. Cal. Nov. 20, 2012).
[162] Juliet M. Moringiello, *supra* note 67, at 165-167.
[163] *Id.*
[164] Daniel Terdiman, *supra* note 62.
[165] Kevin W. Saunders, *Acti Rei: Real and Virtual*, 44 Tex. Tech L. Rev. 165, 173 (2011).
[166] Mari Yamaguchi, *Angry Online Divorcee 'Kills' Virtual Ex-hubby*, NBC News, (Oct.23, 2008), http://www.nbcnews.com/id/27337812/ns/technology_and_science-games/t/angry-online-divorcee-kills-virtual-ex-hubby/#.VE_alfnF_g8 (woman logged onto virtual ex-husband's profile and killed his avatar as revenge for online divorce.).
[167] § 19:21. Use of inventory and appraisal, 3 Tex. Fam. L. Serv. § 19:21.
[168] Arena v. Arena, 822 S.W.2d 645 (Tex. App. Fort Worth, 1991) (appellant's appraisal of firearms being worth $5,000 was upheld on appeal despite later testimony by the appellant that the guns, awarded to his ex-spouse, were in fact worth $30,000).
[169] § 5:33. Inventory and appraisement, 1 Tex. Fam. L. Serv. § 5:33.
[170] *See generally* Benouis Law Firm, http://benouislaw.com/wp-content/uploads/2012/12/Inventory_and_Appraisement.pdf (last visited Dec. 27, 2014).
[171] Chris Meuse, *supra* note 5.
[172] Tex. Estates Code Ann. § 309.051 (West, Westlaw through 2013 Sess.).
[173] 1 Texas Legal Practice Forms § 14:32 (2d ed.).
[174] 6 Tex. Jur. Pl & Pr. Forms § 98:60 (2d ed.).

value of major property, experts are often called in to testify about the value of the disputed item.[175] Since expert testimony is the most persuasive towards determining value, and digital/virtual assets of significant worth are becoming increasingly common, it will soon be necessary one day to call upon an expert to determine the value of digital and virtual assets.[176]

Who Qualifies as a Digital or Virtual Asset Expert: Often times law offices have a list of contacts whom they can rely on for the valuation process for common property such as residences, vehicles, and businesses. Because digital and virtual assets are relatively new, it is likely that many practitioners are not only lacking in a ready expert, but also ill-prepared to find such an expert. While courts have been reluctant to set formal requirements to testify as an expert, the base requirement is that the witness must have a greater level of knowledge and expertise than the fact finder.[177] The level of training and past experience of valuing property comparable to the object at issue, once over the initial hurdle, goes to the weight of the testimony.[178] While digital and virtual assets are a relatively young area, several experts exist and many can be found here in Texas.

Bitcoin Expert: Austin local and University of Texas School of Law student Nick Wenker would likely qualify as an expert able to assist in the valuation of digital currencies, specifically bitcoins. Mr. Wenker is the author of the book *Bitcoin Pandemonium*.

Digital Assets: Currently a number of digital asset management companies exist throughout the United States. Many of these companies would have employees with expertise in the valuation of digital assets which may also have intellectual property issues attached to them.

Virtual Assets: Texas is filled with a number of universities which boast impressive faculty in the area of video game development.

It is important to note that digital and virtual assets are broad terms. Each asset within these categories is unique and may require a distinct expert to testify to the value. An individual who has experience with virtual currencies may not have experience with a client whose virtual currency is held in a different virtual world than the expert is familiar with. Of course, it should be noted that websites listed above can serve as a baseline for the value of many virtual assets as they provide a market price which willing buyers are liable to pay. The same can be said for the current price a bitcoin ATM would be willing to purchase a seller's bitcoin for. As such, an expert able to testify to the nature of the item and to the legitimate nature of a market place for such an item may suffice.

Suggested Addition to the Inventory and Appraisement

Currently, the standard inventory and appraisement does not have any questions dedicated to digital or virtual assets. Below are sample additions to the current inventory and appraisement forms.

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30. Digital Currencies (includes bitcoins, ripple, litecoin, bitsharesX, dodgecoin, nxt, peercoin, namecoin, darkcoin, counterparty, and all other digital currencies)

30.1. Name of the Currency:
Amount:
Date of acquisition:
Method of Acquisition:
In Possession of:
Current Storage Location:
Interest from Storage Location:
Value at time of Acquisition:
Current Market Value: $[**amount**]

[175] § 5:33. Inventory and appraisement, 1 Tex. Fam. L. Serv. § 5:33.
[176] 2 Equit. Distrib. of Property, 3d § 7:15.
[177] *Id.*
[178] *Id.*

31. Virtual Assets (include World of Warcraft accounts, Second Life accounts, and all other games which you have invested money and time into)

31.1. Name of Virtual World/Game:
Methods of Accessing Game: [Computer, cellphone, video game console, etc]
Name on Account, (if any):
Account Information:
Who all Can Access Account:
Date Account Created:
Monthly Cost to Play:
Payment Method:
Estimated Time Spent Playing:

31.1.1 Description of Virtual Asset: [Avatars, virtual currency, virtual land, valuable virtual items]
Do you have Copyright Possession: [Yes, No, Unsure]
Date of Acquisition:
Method of Acquisition:
Value [in virtual currency] at time of Acquisition:
Market Value: $[**amount**]

Why those Questions: A form is only useful if it elicits all pertinent information, and if the reader knows the importance of that information. The sample form above has been carefully crafted to fit the unique needs of digital and virtual assets.

Digital Currencies

30.1. Name of the Currency: This is to help identify which digital currency is in question as each digital currency will have a different value, different experts, and different limitations.[179] It should be noted that the focus of this paper is on the most prominent and valuable digital currency to date – bitcoins.
Amount: This is a standard question to determine the amount of digital currency the client has.
Date of acquisition: This will help determine or verify the value of the digital currency at the time of acquisition. This will also help determine if the currency should be classified as community property or separate property.
Method of Acquisition: The method of acquisition will help a lawyer identify a number of potential issues. If the client reports mining the bitcoins, the other spouse may have a reimbursement claim if community funds were used on the high tech computer the client needed to build to 'mine' the bitcoins. Alternatively, the bitcoins could have been purchased with separate funds or received as a gift which would qualify them as separate property.[180]
In Possession of/access to: Since bitcoins are acquired and transferred anonymously, they are a high targets for theft.[181] As such, this question is to determine who all has access to the bitcoins. This may indicate that both spouses are in possession of or have access to the bitcoins. If this is the case, both parties should agree to put the bitcoins in third party storage and any petitions for the freezing of property should specifically note the bitcoin amount.[182] Otherwise, the client is left vulnerable. The anonymous nature of bitcoin ownership and bitcoin transactions coupled with the lack of governmental oversight, ensure there is little to no recourse for stolen bitcoins.[183] This threat is amplified by a history of hackers stealing almost $500,000,000 of bitcoins in one attack without ever being caught.[184]

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[179] Javier Espinoza, *Is it Time to Invest in Bitcoin: Cryptocurrencies are Highly Volatile, but Some Say They are Worth It*, Wall St. J. (Sep. 22, 2014), http://online.wsj.com/articles/how-to-decipher-cryptocurrencies-1411333011.
[180] Gerald B. Treacy, *Planning to Preserve the Advantages of Community Property*, 23:1 Estate Planning, (1996).
[181] Nick Wenker, *supra* note 31, at 51.
[182] Johnson v. Couturier, 572 F.3d 1067, 1085 (9th Cir. 2009) (an asset freeze requires a showing a likelihood that the property will be dissipated or an inability to recover monetary damages if relief is not granted).
[183] Nick Wenker, *supra* note 31, at 59-75.
[184] *Id.* at 51.

Current Storage Location: While bitcoins are digital and many users store them on their computers, on their cell phones, or on cloud storage – many individuals have begun to store their digital currency in third parties better able to protect the currency.[185] For example, Falcon Global Capital will allow bitcoin investments of millions of dollars and in return takes care of all exchanges and storage issues to prevent hacking.[186]

Interest from Storage Location: Some bitcoin banks are beginning to offer an interest rate on stored bitcoin accounts.[187] Any interest accrued will need to be incorporated in the inventory and appraisement form because issues may arise from comingled funds, determination of the value, or in a petition to freeze the property.

Value at time of Acquisition: Since bitcoins and other digital currencies are often a volatile market, it would be wise to know the amount spent on the bitcoins at the time of acquisition.[188] This information will indicate whether the value has increased or decreased since the time of purchase which may impact the valuation process.

Current Market Value: This is where an expert may be needed to determine the current market value.

Virtual Assets

31.1. Name of Virtual World/Game: This is necessary to identify the game so an attorney can find the terms and agreements the user likely had to sign to play. These terms and conditions will be crucial in valuation as some give explicit ownership rights (Second Life) while others maintain rights and are just leasing access to the game (World of Warcraft).[189]

Methods of Accessing Game: [Computer, cellphone, video game console, etc] This question will help in identifying value as well. Many times games are confined to a specific device such as a game downloaded on a phone or on a video game console. While many of these games have processes where it can be transferred to different devices, these transfers are often lengthy and complex. As a result, the value of the hardware itself may increase due to the virtual asset being stored on it.

Name on Account, (if any): Many video games allow for multiple profiles to be created on one account. This is to allow for players to create different characters and play the game in different ways. As a result, it is not uncommon for spouses to use the same account to play different characters. It is also possible for a couple to share a character under one account. These accounts, created at the time the game is being registered by the purchaser, are often officially limited to one individual owner and one payment type (such as a single credit card). This information will be necessary to see who, under the terms of the game's user agreement, has ownership or leasing rights to the virtual assets. This could also be used as means for reimbursement depending on who put in the time to increase the value of the virtual asset and who paid the monthly fees to access the game.[190] Of course, this will leave the door open for a reimbursement claim to be offset for enjoyment because under the Texas Family Code, reimbursement claims may be offset by the use and enjoyment of the property by the marital estate.[191]

Account Information: This is basic information for identification of the asset and verification of ownership.

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[185] John Villasenor, *Secure Bitcoin Storage: A Q&A with Three Bitcoin Company CEOs* (Apr. 26, 2014, 12:36 PM), http://www.forbes.com/sites/johnvillasenor/2014/04/26/secure-bitcoin-storage-a-qa-with-three-bitcoin-company-ceos/.

[186] Nick Wenker, *supra* note 31, at 129.

[187] The Coin Front, http://thecoinfront.com/the-first-bitcoin-bank-account-with-guaranteed-interest/ (last visited Dec. 27, 2014).; BitBond Banking, https://www.bitbond.net/ (last visited Dec. 27, 2014).

[188] Nick Wenker, *supra* note 31, at 37 (some experts note that the Bitcoin market is over seven times more volatile than gold).

[189] Juliet M. Moringiello, *supra* note 67, at 171.: Blizzard Entertainment, http://us.blizzard.com/en-us/company/legal/wow_eula.html (last visited Dec. 27, 2014).

[190] 39A Tex. Jur. 3d Family Law § 763 (a court is bound to look at all facts and circumstances during reimbursement claims as it is an equitable remedy).

[191] Tex. Fam. Code Ann. § 3.402 (West, Westlaw through 2013 Sess.) ("Benefits for the use and enjoyment of property may be offset against a claim for reimbursement for expenditures to benefit a marital estate.").

Who Can Access Account: This will help identify individuals who can access the virtual assets. Anyone with access has the ability, in most games, to change the account information or alter the virtual asset itself. This includes deleting, hiding, or selling the assets. There have been stories of scorned lovers accessing their spouse's games to delete their profile or kill their avatar (often resulting in a loss of virtual assets).[192] It is important to note this is not a criminal assault on a corporeal individual or property. Instead, it usually involves a scorned lover logging into someone else's video game or virtual profile and taking steps which cause that individual to lose their virtual assets associated with their virtual profile or video game.

Date Account Created: This will help in the classification of the asset as community property or separate property.[193] It will also impact any potential reimbursement claims if the game has a monthly fee to play.

Monthly Cost to Play: Many games have a monthly fee in order to play. As a result, this might impact potential reimbursement claims.

Payment Method: This is to help validate that the payment was from community property funds or separate property funds.

31.1.1 Description of Virtual Asset: [Avatars, virtual currency, virtual land, valuable virtual items] This information will help determine the value of the virtual asset.

Do you have Copyright Possession: [Yes, No, Unsure] This will determine whether the client has the ability to sell the virtual asset or if it is 'leased'. Even if the virtual asset is leased according to the user agreement, it is still important to classify these assets to prevent injury to your client. For example, having the asset classified and valued could aid your client in separate charges if the ex-spouse deletes or alters the asset. Alternatively, this could indicate that you client needs to take heightened precautions with regards to the asset such as changing the account and payment information.

Date of Acquisition: This is necessary information to identify and classify the asset.

Method of Acquisition: This question follows the same reasoning pointed out in the 'Method of Acquisition' section of digital currencies.

Value [in virtual currency] at time of Acquisition: This will help in the determination of market value.

Market Value: This is where an expert may be needed to determine the current market value. Websites such as "www.Guyforgame.com" and "www.ige.com" can also help in the valuation of the virtual asset.

Additional Concerns

It is well known that inventory and appraisement forms are not the beginning and end of discovery in divorce proceedings. Attorneys still need to file requests for production, draft written interrogatories, take depositions, issue subpoenas, and so on. With the evolution and incorporation of digital and virtual assets, it will soon be necessary for all parts of discovery to incorporate sections involving such non-corporeal goods. This is becoming increasingly true as many speculate bitcoins will soon be the most common way to hide assets during divorce.[194] While the focus of this article was inventory and appraisement forms, small additions to standard requests for productions or interrogatories can ensure the court is well informed of all assets open for division in your client's divorce proceeding. A small sample of suggestions is included below.

Additional Requests for Production

X. All accounts reflecting funds, including mutual funds, on deposit with banks, brokerage firms, or other financial institutions, including—

a. statements of account reflecting account balances;
b. originals or true and correct copies, front and back, of all canceled checks;
c. carbon copies of all checks written;

[192] Mari Yamaguchi, *supra* note 73.
[193] *See generally* Eric Gutierrez, *supra* note 52.
[194] Jane Croft, *Bitcoin Could be Used to Hide Assets In Divorces, Warn Lawyers*, The Financial Times (June 2, 2014 2:15 PM), http://www.ft.com/intl/cms/s/0/d1131630-9005-11e3-8029-00144feab7de.html#axzz3S2zTkX22.

d. all deposit slips;
e. all withdrawal slips;
f. all documents evidencing transfers into or withdrawals from the account;
g. all check registers; and
h. printouts from all desktop wallets, mobile wallets, online wallets, hardware wallets, ledger USB wallets, or any other medium storing bitcoins and/or other digital currencies.[195]

Y. All documents relating to membership, ownership, and intellectual property rights by you or your spouse in any online game or community including any accrued virtual assets of monetary value.

Additional Definitions for Requests for Production & Written Interrogatories

"Digital Currency" *means currencies or mediums of exchange that are electronically created and stored. This includes, but is not limited to, bitcoins, ripple, litecoin, bitsharesX, dodgecoin, nxt, peercoin, namecoin, darkcoin, and counterparty.*

"Virtual Assets of Monetary Value" *means intangible items used in virtual worlds or MMORPGS which the player has the legal right to sell or trade and of which a market exists to sell such goods.*

Conclusion

It is still too early to determine what impact certain digital currencies and assets such as bitcoins will have on society. As it stands today, these digital assets can be of substantial value as is true for virtual assets. Unfortunately, the law in Texas lags behind the evolution of technology. There remain countless unanswered questions about digital and virtual assets in relation to banking regulation, criminal law, property rights, and more. As such, it falls into the hands of current practitioners to guide clients in the protection of these assets in proceedings such as divorce. Currently, these assets are often overlooked or handled haphazardly. This opens the door to fraud and could be leaving thousands of dollars on the table which could have aided a client during the just and equitable division of the estate. While there are still many unanswered questions to such assets, it should become common practice to at least identify and put a value to these assets. This precaution may take minimal to significant effort, but may safeguard thousands of dollars of often overlooked assets.

PERSONALITY DISORDERS IN DIVORCE

By Jim Dolan[196]

"My husband never, EVER has the kids at the drop off on time. Never. He simply wants me to know who is still in charge," said Ellen, my client.

"She'll call at 2 o'clock in the morning, and then hang up, over and over. It always says 'caller ID blocked', but I know who it is. She just can't stand knowing I'm free," said Stuart, a thirty-five year old accountant.

In my work as a therapist, a good bit of what I do is walking together through the wasteland of divorce/post-divorce with the client who came for help with the failing marriage. As the marriage progresses from 'failing' to 'crash and burn', I often learn that my primary client, the one who initiated the relationship, has married and had children with someone who has a severe personality disorder.

The system's prevailing notion in the termination of marriage is that both sides are equally at fault. This is debilitating, infuriating, and magnifies the already intense suffering of going through divorce. I believe that an otherwise well put together person will go as crazy as they will ever be while going through divorce. And

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[195] While it is true that bitcoins are largely an anonymous currency, a lawyer or court will likely be able to determine if an individual is in possession of the digital currency. The casual bitcoin owner (or an individual looking to quickly hide assets prior to a divorce) is likely to have acquired the digital currency through bitcoin ATMs or major companies selling bitcoins online. As such, transfers of funds to such companies by the indivdual will likely exist and, if under court order, such companies are likely to have records of their own linking the individual to a specific amount of bitcoins.

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this while dealing with a spouse who plays somewhat fair. When dealing with a personality disordered spouse, the suffering intensifies greatly.

I believe it vitally necessary for judges and domestic/family lawyers, or trial lawyers, to have a clear understanding of personality disorder. There are relationships that fail when both sides did their best, but couldn't succeed; or fail because the partners just weren't right for each other. And then, there are those that were never right from the beginning because one member was not who he/she seemed to be. There are more than a half dozen PDs identified by psychiatrists, but here I will limit myself to the Big Three: the Narcissist, the Borderline, and the Antisocial.

The Narcissist is typically male. His deep seated, unconscious self-loathing leads him to strong negative reactions to criticism, but he is also charming and beautiful in a 'bad boy' kind of way. He is extremely self-centered and manipulative. He is preoccupied with fantasies of grandeur, of moving to L.A. and becoming a model/actor, a 'star.' He has difficulty with work, feels little or no empathy, but reacts with rage if a partner tries to get out from under his spell. When a partner awakens, she recognizes she's been used, was little more than a stage prop. But the narcissist needs to exact revenge for the partner's wishes to leave, and makes everything about the settlement as difficult and complicated as possible. Depending on the severity of the narcissist's illness, he can become dangerous during the period of dissolution.

As often as the Narcissist is male, the Borderline is a woman. Feminists have critiqued this, but there's not the space for it here. Frequently, the Narcissist and the Borderline pair up, their illnesses uniquely complementary and drawn to one another while at the same time setting the stage for an explosive, abusive relationship. The Borderline female likely came from a chaotic, disorganized family with parental abandonment and/or drug and alcohol abuse. She is quite likely the victim of the incredibly common crime of child sex abuse. In adult life, she will see relationships as mutually exploitive and as her part of the bargain will impulsively offer intense sexuality in return for what she hopes will be a secure and loving relationship. However, her choice of partners is deeply flawed, and she chooses men as ill as she is. If she has not chosen a Narcissistic male, then she has found a man with a naïve grasp of human intimacy, who confuses hot sex with lasting love.

Think about the Michael Douglas character in *Fatal Attraction.* He played a typical white, mildly narcissistic, successful male who accepted Alex's impulsive, wild sexuality, and then went through a period of intoxication with her. When he awakened from her Aphroditic spell, he tried to free himself from her, but was unable to. I have dealt with many, many men over the years who, in varying degrees, have made the same error the Michael Douglas character did-confusing sex and love- and were now facing the minefield of separation and divorce from an Alex-like person.

The Anti-social is far more often a man. He may have been heavily abused in childhood. More than likely he had an alcoholic parent, and may have been the object of ridicule by them. Some people equate the Anti-social with psychopath. Others think of psychopath as having a more severe version of the disorder. He was likely to have had a conduct disorder in childhood, i.e. violence against peers and animals, fire starting, ongoing vandalism, etc.

In adult life, he can be witty, charming, funny. He exudes power and control and is very often the leader of an organization (recent research has shown that many CEOs exhibit Anti-social characteristics, or even more fascinating, begin to show them after having been CEO for a number of years- http://www.dailyfinance.com/2011/07/21/youve-gotta-be-crazy-to-be-a-ceo-literally/). A woman looking for a partner who will 'take care of' her is often drawn to the Anti-social. It is only after she has begun to suffer from his needs for control, lack of empathy, propensity for violence, drug and alcohol abuse, which are always masked through the 'charm' phase that sees the need to free herself from him.

In each case, the person who has 'awakened' and declared that enough is enough faces years, sometimes decades (when there are children involved) of dealing day in/day out with an ex- who has no intention of playing by the rules of collaboration. The dysfunctional marriage becomes the dysfunctional divorce, the disfigured corpse of human love. The system must take into account the difficulty faced by the divorcing partners of personality disordered individuals. A normal person does not leave victims in his or her wake, but the personality disordered one does.

Until there is a cure for chaos, abandonment, cruelty, addiction, crime, violence, exploitation of the young, and we stop producing the PDs, courts and mediators should take a more thoughtful stance regarding personality disorder in marriage, let go of the assumption that both sides are at fault, and grasp that sometimes, one side is the victim of the other.

Guest Editors this month include Jimmy Verner (*J.V.*) and Rebecca Tillery (*R.T.*)

DIVORCE
COMMON-LAW MARRIAGE

BECAUSE HUSBAND FAILED TO ARGUE AT TRIAL THAT THE PARTIES NEVER RESIDED TOGETHER IN TEXAS, FATHER FAILED TO PRESERVE HIS COMPLAINT THAT NO COMMON-LAW MARRIAGE EXISTED.

¶15-2-01. ***Farrell v. Farrell,*** ___ S.W.3d ___, 2015 WL 364093, 08-13-00021-CV (Tex. App.—El Paso 2015, no pet. h.) (01-28-15).

Facts: Husband and Wife divorced in New Mexico. Later, Wife moved to Texas with the couple's children, where Husband visited them regularly. Eventually, the couple decided to "get back together," but they did not officially remarry. At that time, Husband was living in North Carolina, where he was participating in a four-month Border Patrol training program. When Wife's Texas lease expired, she moved back to New Mexico, where the couple began living together.

A few years later, the parties separated, and about six months after that, Wife filed for divorce in Texas, alleging a common law marriage. Husband filed a counter-petition disputing the date that the parties were married. The parties stipulated to dividing equally Husband's retirement benefits from the date of the common-law marriage through the date of the second divorce. The trial court determined the date of marriage and divided Husband's retirement benefits based on that date.

For the first time on appeal, Husband argued that there had been no common-law marriage because the parties had not lived together *in Texas* after agreeing to be married.

Holding: Affirmed

Opinion: Per Texas Family Code Section § 2.401, to prove the existence of an informal marriage, the couple must agree to be married, cohabitate in Texas after agreeing to be married, and represent to others that they are married. All three elements must be met at the same time. Here, the parties did not live in Texas after agreeing to be married. Further, although neither party introduced evidence of New Mexico law, New Mexico does not recognize common law marriages.

However, despite the trial court's erroneous ruling that a common-law marriage existed, Husband failed to preserve his error for appellate review. To preserve error, Husband was required to raise the complaint by making a timely request, objection, or motion stating the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context. Here, the only context in which the common-law marriage was disputed was regarding the date of the marriage. Thus, the trial court was not put on notice of a complaint that the parties did not cohabitate in Texas.

Editor's comment: *Appellant's counsel argued at a hearing on a motion for new trial that "common-law marriage, under Texas law, does not exist until all of the requirements have been met." The El Paso court found this argument insufficiently specific to raise the issue that the parties did not cohabit in Texas after their agreement to be married. The court also noted that counsel did not yet have a copy of the reporter's record at the time of the motion hearing. It is important – although often not possible - to obtain a copy of the reporter's record quickly when considering an appeal. J.V.*

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Editor's comment: *The three elements for a common law marriage seem so simple, yet there always seems to be reported cases grappling with it. In this case, instead of grappling with a factual analysis, the focus is on a nuance of the cohabitation element – that you must be living together IN TEXAS. Too bad that the husband didn't hire an appellate lawyer sooner to preserve his complaint for appeal. R.T.*

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

TEX. FAM. CODE § 6.602 DOES NOT REQUIRE A TRIAL COURT TO ENTER A JUDGMENT ON AN OTHERWISE COMPLIANT MSA THAT WAS PROCURED BY FRAUD, DURESS, COERCION, OR OTHER DISHONEST MEANS; WIFE FAILED TO PROVE MSA WAS PROCURED BY FRAUD.

¶15-2-02. *In re Hanson*, No. 12-14-00015-CV, 2015 WL [Not on WL yet] (Tex. App.—Tyler 2015, orig. proceeding) (mem. op.) (02-27-15).

Facts: Husband and Wife attended mediation during their divorce proceedings and entered into an MSA that satisfied the requirements of Tex. Fam. Code § 6.602. In their agreement, Husband was obligated to pay the first $5000 of the parties' taxes, and the parties were to be jointly responsible for any tax liability in excess of $5000. However, after the MSA was signed, property not disclosed during mediation was discovered, and the parties' tax liability was calculated to be greater than $100,000. Wife filed a motion to set aside the MSA for alleged willful non-disclosure, misrepresentation, and fraud. The trial court granted Wife's motion and set aside the MSA. Husband filed a petition for writ of mandamus. Husband argued that *In re Lee* required that any MSA satisfying the requirements of Tex. Fam. Code § 6.602 is binding, irrevocable, and enforceable immediately by judgment not withstanding Rule 11 of another rule of law, including common law fraud.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Tex. Fam. Code § 6.602 provides that a party is entitled to judgment on a compliant MSA notwithstanding Rule 11 or another rule of law. Some courts have held that this language precludes setting aside an MSA based on common law fraud, duress, coercion, or other dishonest means. This court of appeals noted that in *In re Lee*, the sole issue before the court was "whether a trial court presented with a request for entry of judgment on a validly executed MSA may deny a motion to enter judgment based on a best interest [of the child] inquiry." Further, in *In re Lee*, the Texas Supreme Court explicitly did not address the question of whether the Texas Family Code mandates entry of a complaint MSA under any and all circumstances, even where the agreement was procured by fraud, duress, coercion, or other dishonest means. Moreover, the concurrence in *In re Lee* commented, "[t]hough we have yet to decide the issue, our courts of appeals have observed that MSA's are contracts and courts may not enforce them if they are illegal."

Nevertheless, although this court of appeals held that an MSA could potentially be set aside on the basis of fraud, here, Wife failed to establish fraud. Wife showed that Husband made some material misrepresentations to the other about assets of the community estate. However, Wife failed to produce any evidence that she relied on those statements when entering into the MSA. In addition to evidence that Wife also failed to disclose material assets to Husband prior to the mediation, there was evidence that Wife had the ability to discover, through accounts and statement to which she had access, much of the information not disclosed by Husband.

DIVORCE
DIVISION OF PROPERTY

HUSBAND FAILED TO SHOW THAT TRIAL COURT'S CHARACTERIZATION ERROR HAD MORE THAN A DE MINIMUS IMPACT ON A JUST AND RIGHT DIVISION.

¶15-2-03. *Paleaz v. Juarez*, No. 04-14-00022-CV, 2014 WL 7183483 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (12-17-14).

Facts: Husband and Wife disputed the character of a house during their divorce proceedings. Wife had an adult son from a previous relation. During Husband's and Wife's marriage, Wife's son wanted to buy a house. The son's credit was bad, so Wife applied for a loan on his behalf. The son made all the payments on the loan, including the down payment. However, title to the house was in Wife's name. During the divorce proceedings, Husband asked the trial court to order that the house be sold and that the proceeds be split equally between Husband and Wife. The trial court awarded the house to Wife as her separate property on the condition that she "execute any proper legal documentation to reflect the true owner [her son]." Husband appealed, arguing the trial court erred in awarding Wife as separate property the house acquired during the marriage.

Holding: Affirmed

Opinion: When reviewing a characterization error, a two-prong test is applied: First, whether the court's finding of separate property was supported by clear and convincing evidence; and second, whether the characterization error caused the trial court to abuse its discretion in the overall division of the community estate.

Here, the house was obtained during marriage by wife, and no evidence was presented to show that Wife purchased the house with separate funds. However, Husband failed to demonstrate that the trial court's erroneous characterization had more than a de minimus impact on a just and right division of the community estate. Husband failed to conduct a harm analysis, and the COA may not presume harm in this instance.

Editor's comment: *The husband testified that he lent the wife "about $700 so that she could make the mortgage payment on the Nubes property, and that he made some improvements on the property." The wife denied paying any money toward the house. J.V.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

TRIAL COURT ABUSED DISCRETION IN AWARDING WIFE A MONEY JUDGMENT AFTER HUSBAND WAS UNABLE TO OBTAIN LIFE INSURANCE AS CONTEMPLATED IN FINAL DIVORCE DECREE.

¶15-2-04. *Carroll v. Castanon*, No. 04-13-00231-CV, 2014 WL 7354637 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (12-10-14).

Facts: In Husband and Wife's divorce decree, Husband was ordered to designate Wife as a "former spouse beneficiary" under his Survivor Benefit Plan ("SBP"), and Wife was ordered to pay the necessary premiums to maintain the SBP. When Husband retired from the military, he applied for SBP and designated Wife the

beneficiary. However, the application was denied. Subsequently, the trial court signed a clarifying order requiring Husband to deliver the application(s) required to obtain a $1,000,000 life insurance policy on his life, naming Wife as owner of the policy or policies. Wife was ordered to pay any necessary premiums. Husband delivered the applications; however, he was unable to obtain life insurance due to health issues. Wife filed a motion for finalization of enforcement. After hearing the evidence, the trial court awarded Wife a $1,000,000 money judgment because Husband failed to deliver a $1,000,000 life insurance policy to Wife. Husband appealed.

Holding: Reversed and Remanded

Opinion: TFC 9.010(a) permits a court to render a money judgment for a party's failure to deliver property as ordered in a decree of divorce or annulment. Here, Husband was ordered to deliver to Wife completed application(s) in order to obtain $1,000,000 death benefits coverage and naming Wife as owner of the policy or policies. Husband delivered the applications to Wife. He directly applied for three different policies and indirectly applied for nine others, but he was denied coverage on all twelve applications. Despite the denied coverage, Husband did not "fail to comply" with the order. Moreover, other cases in which TFC 9.010(a) has been applied involved delivery of tangible property, such as a house, a car, furniture, or livestock.

Editor's comment: *The former husband also pointed out the windfall his ex-wife would receive - if she died first. J.V.*

HUSBAND REQUIRED TO EXERCISE STOCK OPTIONS UPON WIFE'S DEMAND BECAUSE FINAL DECREE AWARDED HER "EQUITABLE OWNERSHIP" OF THE OPTIONS

¶15-2-05. ***Messier v. Messier,*** ___ S.W.3d ___, 2015 WL 452171, 14-13-00572-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (01-27-15).

Facts: When Husband and Wife divorced, the final decree awarded Wife a portion of the community's share of stock options earned by Husband through his employment during the marriage. After the divorce, Mother asked Husband to exercise her share of the options and deliver to her the proceeds as ordered in the decree. When Husband refused, Wife filed a suit for enforcement, damages for breach of fiduciary duty, contempt, an accounting, and a declaratory judgment setting forth Husband's obligations relating to the options. In the alternative, Wife sought clarification of the decree. Husband contested that he believed that he had a duty a constructive trustee to use his discretion in deciding when to exercise the options so as to maximize the benefit for Wife.

The trial court signed an order enforcing the final decree and clarifying the property division. The trial court held that Husband breached his fiduciary duty as constructive trustee by failing to exercise the options upon her request. In addition, the trial court awarded Wife attorney's fees and cost, expert witness fees, and unconditional appellate fees due the day after a notice of appeal was filed. Husband appealed, arguing the trial court erred in (1) finding that he was required to exercise the options at Wife's demand, (2) "clarifying" the decree by adding detailed orders for Husband's performance and consequences for failure to do so, (3) finding that he had breached his fiduciary duty, and (4) awarding Wife her attorney's fees.

Holding: Vacated in Part; Modified in Part; and Affirmed in Part

Opinion: The court cannot decide moot issues. During oral argument, Husband acknowledged that he had exercised all of the stock options subject to this action and delivered the proceeds to Wife. Thus, Husband's issues concerning the trial court's clarification order and its finding that Husband breached his fiduciary duty were both moot. However, the issue concerning the trial court's award of attorney's fees was still a live issue. Therefore, the underlying issue of which party had the right to determine when to exercise the stock options was also still a live issue.

Although Husband argued that the decree did not expressly require him to exercise the options upon Wife's demand, the decree also did not expressly authorize Husband to use his own discretion. Husband

acknowledged that Wife's options could be executed separate from his own. The trial court described Wife's ownership of the options as "equitable ownership," which is commonly defined as "the present right to compel legal title." Moreover, when imposing a constructive trust, the court may determine the scope and application of that trust. There was no language in the decree indicating that the trial court gave Husband, as constructive trustee, the discretion to determine when the options were to be exercised. The trial court clearly intended to give Wife the right to direct when the options would be exercised.

A trial court is permitted to award attorney's fees in an enforcement action. In its award of attorney's fees, the trial court did not state the basis for its decision, but it did state that the award was warranted in part for the delay caused by Husband's refusal to exercise the options upon Wife's request. Because Wife was required to file suit to enforce the final decree, the award of attorney's fees was within the trial court's discretion.

During trial, Husband stipulated to Wife's attorney's testimony regarding attorney's fees. Although it was unclear how broad that stipulation was, Husband did not cross-examine Wife's attorney, object to any evidence offered regarding's Wife's attorney's fees, or present any opposing evidence regarding fees. Moreover, the trial court found that Wife's attorney's fees were reasonable. In addition, Wife's attorney testified that the admitted billing statements for attorney's fees only included those fees for the enforcement action. Thus, Husband could not argue on appeal that Wife failed to segregate the recoverable fees incurred in the enforcement action from the non-recoverable fees related to Wife breach of fiduciary duty claim.

The fee of an expert witness constitutes an incidental expense in preparation for trial and is not recoverable as costs unless explicitly authorized by statute. The Texas Family Code Section governing enforcement actions only authorizes the award of attorney's fees and costs, not expenses. Thus Wife was not entitled to an award for her expert fees.

An award for appellate fees must be conditioned on the receiving party's success on appeal. Thus, Wife's unconditional award of appellate fees was improper. In addition, because an award for appellate fees must be conditioned on the outcome of the appeal, the fees should not have been due and interest should not have begun accruing until after the appellate court issued its judgment.

Editor's comment: *A great read for issues surrounding the award of both trial and appellate attorney's fees. Remember – appellate attorney's fees must ALWAYS be conditional upon success on appeal (except see In re Jafarzadeh, below?!?). it's also interesting to see the Court quote some of the stock option language that was used, and see how they interpreted it. It makes me want to go tweak the language I typically use in my stock option sections. R.T.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

HUSBAND'S SPOUSAL MAINTENANCE OBLIGATION WAS NOT CHAPTER 8 COURT-ORDERED MAINTENANCE BECAUSE THE OBLIGATION DID NOT MEET ALL THE STATUTORY REQUIREMENTS OF CHAPTER 8, THUS THE OBLIGATION DID NOT TERMINATE UPON WIFE'S COHABITATION.

¶15-2-06. *Lee v. Lee*, No. 02-14-00064-CV, 2015 WL 601054 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (02-12-15).

Facts: In their divorce proceedings, Wife signed a waiver of service and did not appear at the final hearing. The trial court signed an Agreed Final Decree that was signed by both Husband and Wife, who each indicated that they agreed to the terms of the decree. No record was made by agreement of the parties. The agreed decree included a provision for spousal maintenance, which provided that "THE COURT ORDERS…" Hus-

band to pay to Wife $2000 per month for 60 months and that "[t]he obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance."

Less than 15 months later, Husband filed a motion to terminate his maintenance obligation under Chapter 8 of the Texas Family Code because Wife was cohabitating with a man with whom she had a dating or romantic relationship. Wife filed a motion for summary judgment, arguing that the maintenance was not Chapter 8 court-ordered maintenance, but rather a contractual agreement to spousal maintenance. Thus, Wife argued, because the decree did not provide for termination on the basis of Wife's cohabitation with another man, she was entitled to summary judgment. The trial court agreed, and Husband appealed.

Holding: Affirmed

Opinion: Chapter 8 of the Texas Family Code provides certain prerequisites for and limitation on an award for spousal maintenance. Here, although the agreed maintenance had some common elements with Chapter 8 maintenance, there was no indication in the record that the trial court considered all of the statutory factors in determining maintenance. The record did not establish that Wife overcame the presumption against maintenance. The trial court did not indicate that the time limit placed on the maintenance was based on the statutory requirement to limit the duration to the shortest reasonable period. Finally, the fact that the award was part of the decree and not in an agreement incident to divorce was not relevant to the court of appeal's treatment of the decree as a binding contract.

The agreed decree provided only two ways to terminate the agreed spousal maintenance obligation: death and remarriage. There was no provision concerning Wife's cohabitation with another man.

Editor's comment: *By stating that the record (there was no reporter's record) did not indicate that "the trial court considered all of the statutory factors in determining maintenance" (emphasis original), that the wife did not overcome the presumption against maintenance and that the award covered the "shortest reasonable period" for maintenance, the court implies that counsel must thoroughly elicit this testimony in agreed prove-ups on pain of the award not being considered maintenance. J.V.*

SAPCR
STANDING AND PROCEDURE

MOTHER'S EX-GIRLFRIEND UNABLE TO ESTABLISH THIRD-PARTY STANDING BECAUSE MOTHER HAD NEVER ABDICATED HER PARENTAL DUTIES TO EX-GIRLFRIEND DURING THEIR RELATIONSHIP.

¶15-2-07. *In re S.D.*, No. 02-14-00102-CV, 2014 WL 6997169 (Tex. App.—Fort Worth 2014, no pet. h.) (mem. op.) (12-11-14).

Facts: Girlfriend and Mother were in a same-sex relationship. During the relationship, Mother gave birth to the Child through artificial insemination. During the relationship Girlfriend was the sole provider for the family, and Mother stayed at home with the Child. Girlfriend testified that the couple had plans for Girlfriend to legally adopt the Child. After Mother and Girlfriend separated, Girlfriend filed a suit seeking JMC of the Child and based her claim to standing on Texas Family Code Section 102.003(a)(9). The trial court granted Mother's motion to dismiss the suit for lack of standing.

Holding: Affirmed

Opinion: This COA has held that grandparents lack standing under Texas Family Code Section if the actual parents had not abdicated their parental duties to the grandparents. For example, in one case, although the children had lived with the grandparents for an extended period, the children's mother also lived there. Although there had been evidence that the grandparents had performed day-to-day caretaking duties, there was

no evidence that the mother did not also care for the children.

Here, although Girlfriend and Mother lived together up until a month before these proceedings, and Girlfriend provided care for the Child, there was no evidence that Mother ever relinquished or abdicated her permanent care, control and possession of the Child to Girlfriend.

Editor's comment: *The split continues. If you are a nonparent seeking conservatorship under the 'actual care, control and possession' part of section 102.003, do your homework and know how your court of appeals interprets this! Some courts say it has to be exclusive to the parent (i.e., this court, the Fort Worth court of appeals) and some do not (i.e., the Dallas court of appeals). R.T.*

TRIAL COURT ERRED IN MODIFYING EXISTING ORDERS FOR CONSERVATORSHIP, POSSESSION, AND CHILD SUPPORT, AND IN CHANGING THE PERSON WITH THE RIGHT TO DETERMINE THE CHILDREN'S RESIDENCE, WITHOUT PROPER NOTICE TO FATHER AND HOLDING A FULL EVIDENTIARY HEARING.

¶15-2-08. *In re Bustos*, No. 04-14-00755-CV, 2014 WL 7339259 (Tex. App.—San Antonio 2014, orig. proceeding) (mem. op.) (12-23-14).

Facts: Mother and Father divorced, and a final decree was entered providing for possession access and conservatorship of their two Children. Subsequently, a modification order was entered continuing the parents as JMCs and designating Father as the parent with the exclusive right to designate the Children's primary residence. In addition, Mother was ordered to pay child support and was granted possession per a standard possession order.

About three years later, Mother did not return the Children after one of her periods of possession. After unsuccessfully attempting to locate mother, Father filed an application for writ of attachment to have the Children returned and a motion to modify to appoint him SMC and to limit Mother's access to the Children. The trial court signed an ex parte restraining order and an order directing the clerk to issue a writ of attachment, which also set a hearing on the writ of attachment and Father's request for temporary orders.

Mother appeared at the hearing with the Children, who were interviewed by the judge and an amicus attorney outside the presence of the parents. Over Father's attorney's objection that Mother had no pleadings on file, the trial court denied Father's request for SMC, ordered the Children to be placed with Mother and granted her the exclusive right to designate the Children's primary residence. The trial court also appointed an amicus attorney and ordered supervised visitation for Father. Finally, the trial court suspended Mother's child support obligation and ordered Father to begin paying child support. Father filed a petition for writ of mandamus, arguing the trial court erred when it sua sponte modified the prior order when there were no pleadings on file requesting such relief.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Temporary orders may not have the effect of changing the party with the right to designate the primary residence of a child, except in limited circumstances. Here, because the challenged order modified an existing order for conservatorship, access, and support, Father was entitled to notice and a full evidentiary hearing. The only matters set for hearing were Father's application for writ of attachment and his motion for temporary orders seeking to limit Mother's access and possession. Mother had not filed or served any pleadings. Without proper notice, Father had no reason to be prepared to present evidence in his defense or to rebut Mother's testimony.

The COA noted that while Mother had claimed that she could not return the Children to Father because of fears of abuse, there must be pleadings to support such an order. Further, Mother could have contacted the proper authorities to report suspected abuse or neglect.

Editor's comment: *This case is a nice change from that old saw, "Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children." E.g., Leithold v. Plass, 413 SW 2d 698, 701 (Tex. 1967). J.V.*

SAPCR
CHILD SUPPORT

CHILD SUPPORT OBLIGATION INCORRECTLY APPLIED TO FATHER'S GROSS MONTHLY INCOME INSTEAD OF HIS NET MONTHLY RESOURCES

¶15-2-09. ***Grotewold v. Meyer,*** ___ S.W.3d ___, 2015 WL 162075, 01-13-00875-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (01-13-15).

Facts: Mother and Father had one Child before they divorced. In the final decree, Father was ordered to pay child support. Subsequently, both parents filed motions to modify Father's child support obligation. After a hearing, the trial court entered an order modifying Father's child support obligation and identified one variance from the guidelines: Father's annual salary was based on a three-year average. The trial court set Father's child support obligation at 20% of his gross monthly income based on that average. Father appealed, arguing that the trial court miscalculated his child support obligation.

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

Opinion: When applying the child support guidelines to an obligor's income, certain deductions are made from the obligor's gross income, and the amount of monthly child support is based on the obligor's net monthly income. If the court deviates from the child support guidelines, the court must specific findings justifying the variance.

Here, the only variance from the guidelines acknowledged by the trial court was the method for calculating Father's gross annual income, which Father did not dispute on appeal. However, the trial court ordered Father to pay child support equal to 20% of *gross* monthly income. The trial court did not identify any justification for deviating from the child support guidelines. Thus, the COA reversed and rendered Father's child support obligation at 20% of his *net* monthly income (over a $300 monthly difference).

★★★TEXAS SUPREME COURT★★★

TRIAL COURT LACKED AUTHORITY TO ORDER OAG TO REMOVE FAMILY VIOLENCE INDICATOR FROM FATHER'S FILE AND THE OAG'S SYSTEM.

¶15-2-10. ***In re OAG,*** ___ S.W.3d ___, 2015 WL 392969 (Tex. 2015) (01-30-15).

Facts: The OAG filed suit to establish Father's paternity and compel him to pay child support. After a hearing, the trial court adopted the associate judge's order establishing the parent-child relationship, ordering Father to pay child support, denying the OAG's request to prevent disclosure of certain identifying information of Father and the Child, and ordering the OAG to remove the family violence indicator from Father's file and the OAG system. The OAG filed a petition for writ of mandamus regarding the order to remove the family violence indicator.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Texas Family Code § 105.006(a) requires certain identifying information of the parties be included in a final order. However, under certain circumstances, a trial court may waive that requirement. Texas Family Code § 105.006(c) provides:

> (c) If a court finds after notice and hearing that requiring a party to provide the information required by this section to another party is likely to cause the child or a conservator harassment, abuse, serious harm, or injury, the court may:
>
> (1) order the information not to be disclosed to another party; or
>
> (2) render any other order the court considers necessary.

Under Part D of Title IV of the Social Security Act, states participating in the federal child support enforcement program must maintain a "family violence indicator" in the states' support enforcement systems. As Texas' designated Title IV-D agency, the OAG must collect, store, and maintain federally required information, including the family violence indicator.

A trial court may consider family violence when determining whether to disclose protected information, but the authority to assign a family violence indicator rests with the OAG. The Legislature chose to give the OAG discretion to designate the family violence indicator and has not chosen to allow the trial court to intervene, except to weigh the designation in considering a request for disclosure.

Further, the "any other order" language in Texas Family Code § 105.006(c)(2) is limited to that subsection and does not give the trial court carte blanche to do as it pleases.

Editor's comment: *This case seemed frightening until the Court pointed out that the "family violence indicator" is part of the OAG's internal files "as a signal that family violence may have occurred and that precautions may therefore be appropriate." J.V.*

SAPCR
ENFORCEMENT OF CHILD SUPPORT

ORDER TO CONFINE MOTHER FOR FAILURE TO PAY CHILD SUPPORT WAS A CRIMINAL CONTEMPT JUDGMENT AND DID NOT NEED TO INCLUDE LANGUAGE SPECIFYING HOW MOTHER COULD PURGE HERSELF OF CONTEMPT IF CONFINED; FINES FOR CONTEMPT COULD NOT EXCEED $500.

¶15-2-11. *In re Thompson*, No. 01-14-00235-CV, 2014 WL 6792031 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (mem. op.) (12-02-14).

Facts: Mother was ordered to pay child support and medical support for her and Father's two Children. Subsequently, Father filed a motion to enforce the support payments and asked the trial court to hold Mother in contempt. After a hearing, the trial court held Mother in contempt for 4 failures to pay, found her in arrears for $1809.35, and ordered her confined for 90 days for each violation, with the periods to run concurrently. However, the trial court suspended her confinement on condition of monthly payments as detailed in the order. In addition, the trial court assessed a fine of $1809.35 for each violation. Mother filed a petition for writ of mandamus, contending the contempt order was void because (1) it did not specify an amount to pay to purge herself of confinement; and (2) it assessed fines greater than the maximum allowed by statute. Father argued that because Mother was never actually confined, the order did not need to specify how Mother could get out of jail, and that the $1809.35 was for arrearages, not fines.

Holding: Writ of Mandamus Conditionally Granted in Part

Opinion: A contempt judgment may be either civil or criminal. A civil contempt judgment provides that a contemnor is committed unless or until she performs an affirmative act, while a criminal contempt judgment is punitive and not conditioned on future performance. Here, the contempt order found Mother in contempt for four separate violations, and a punishment was assessed for each violation. Therefore, the order was not required to include any language specifying how Mother was to purge herself of contempt if confined.

Tex. Gov't Code 21.002(b) provides a maximum fine for contempt of $500. Here, the order provided "that punishment for each separate violation is assessed at a fine of $1,809.35…." Thus, the portion of the order assessing fines was void.

WIFE COULD NOT CIRCUMVENT THE TEXAS FAMILY CODE BY FILING PETITION UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT TO OBTAIN AN AWARD FOR ATTORNEY'S FEES AGAINST OAG.

¶15-2-12. *OAG v. De Leon*, No. 04-13-00501-CV, 2014 WL 7441464 (Tex. App.—San Antonio 2014, no pet. h.) (mem. op.) (12-31-14).

Facts: Husband had child support obligations from a previous relationship. After Husband and Wife married, Wife used proceeds from a personal injury settlement to purchase several pieces of real property. Because the property was listed in both Husband's and Wife's name, the OAG put liens on the properties. Wife insisted the properties were her separate property, so she filed a petition under the Uniform Declaratory Judgments Act (UDJA). In addition to seeking a declaration that the property was her separate and the liens should be released, Wife sought attorney's fees under the UDJA. The trial court granted Wife's requested relief, including attorney's fees. The OAG appealed, arguing the trial court was not permitted to award attorney's fees.

Holding: Reversed and Rendered

Opinion: Texas Family Code § 157.326 permits an obligor's spouse to have a court determine the extent of the obligor's interest in property subject to a child support lien. Texas Family Code § 231.211 provides that in a Title IV-D case, a court may not assess attorney's fees against the Title IV-D agency. A party cannot use the UDJA to circumvent the TFC to obtain otherwise impermissible attorney's fees. Here's Wife's UDJA claims for relief were incidental to her claims under the TFC, and thus, she was not entitled to attorney's fees.

Editor's comment: *Although you can't get an award of attorney's fees against the OAG, you can get sanctions. But that didn't work here, either. J.V.*

LOUISIANA CHILD SUPPORT ORDER WAS REGISTERED WHEN FATHER FILED THE ORDER WITH THE COURT IN COMPLIANCE WITH TEXAS FAMILY CODE CHAPTER 159; NO MOTION WAS REQUIRED TO REQUEST REGISTRATION.

¶15-2-13. *In re T.F.*, No. 09-14-00064-CV, 2015 WL 216396 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (01-15-15).

Facts: While Mother and Father lived in Louisiana, two separate orders were entered affecting custody and support of their Child. Mother had been ordered to pay child support and medical support for the Children. Father and the Children moved to Texas. Subsequently, Father filed a motion in Texas for enforcement and determination of support arrears. A week later, he filed an amended motion that also included a notice of filing of the Louisiana judgment. Father attached both of the Louisiana orders to the motion. Father also filed a "proof of mailing," in which he stated that he mailed copies of the judgments to Mother's last known mailing address.

Just over a month after Father filed the amended petition and five days before the hearing on Father's motion for enforcement, Mother filed her answer. Mother argued that the Louisiana order was incapable of enforcement because it was ambiguous and not clear and specific enough in its terms. Mother sought a hear-

ing to contest the registration of the Louisiana order, and the trial court set Mother's hearing on the same date as Father's enforcement hearing. The parties subsequently agreed to reset the hearing for a later date.

Mother and her attorney appeared at the hearing, but Father and his attorney did not. At the hearing, Mother argued that Father failed to file a motion to have the foreign order registered and that the trial court lacked jurisdiction over the case. The trial court orally granted Mother's contest to the registration of the order and dismissed the case for lack of jurisdiction. The order of dismissal stated "[t]he Court finds that there is no motion to register the order; therefore, the court has no jurisdiction over this matter." Father appealed, arguing that the orders had been properly registered with the court, that no evidence supported Mother's claim that the orders had not been registered, and that the trial court abused its discretion in dismissing the case.

Holding: Reversed and Remanded

Opinion: The Uniform Interstate Family Support Act is codified in Chapter 159 of the Texas Family Code and provides that a party may register an out-of-state support order or income-withholding order in Texas for enforcement. Tex. Fam. Code § 159.602 provides the procedure to register such an order. Nothing in the section requires the party to file a motion to have the out-of-state order registered, rather, per Tex. Fam. Code § 159.603(a), the order is "registered when the order is filed in the registering tribunal of this state." After the order is registered, the tribunal must notify the non-registering party and provide certain information, including the 20-day deadline for contesting the order. Per Tex. Fam. Code § 159.604, there are eight statutory defenses that can be raised to contest the validity or enforceability of the order.

Here, Father filed an amended pleading entitled "1st Amended Motion for Enforcement and to Determine Cumulative Child Support Arrears and *Notice of Filing of Foreign Judgment*." Father filed all the documents and information required by Tex. Fam. Code § 159.602. Although there was no evidence that the tribunal sent the required notice to Mother, she appeared, filed an answer, agreed to resetting the hearing, and appeared at the hearing. Mother claimed she was harmed because she did not receive the statutory notice; however, Mother failed to enumerate any particular complaints, other than alleging that Father failed to "actually ask for the order to be registered." The court of appeals noted that in one of her pleadings, Mother judicially admitted that the order had been registered.

TRIAL COURT ERRED IN REMOVING OAG'S LIEN ON FATHER'S ACCOUNTS WHEN FATHER'S ARREARAGES REMAINED DUE AND OWING; TRIAL COURT LACKED JURISDICTION TO ENJOIN OAG FROM PLACING FUTURE LIENS ON FATHER'S ACCOUNTS.

¶15-2-14. ***In re C.D.E.,*** ___ S.W.3d ___, 2015 WL 452195, 14-14-00086-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (01-27-15).

Facts: When Mother and Father divorced, Father was ordered to pay $400 a month in child support for their only Child. Almost ten years later, in 2011, the trial court signed an order that raised Father's child support obligation to $1000 and found Father in arrears for over $100,000. The trial court signed an agreed order requiring Father to pay the child support obligation plus $200 a month until his child support obligation ended and, thereafter, pay $1200 a month until his arrearages were paid off.

After the Child turned 19, Father filed a motion to terminate his child support obligation, which the trial court granted. Because Father's total arrearages still exceeded $100,000, the OAG issued a lien on several of Father's bank accounts. Father filed a petition for a declaratory judgment to set aside the lien. Father asked the trial court to declare that his arrearages no longer existed, or if they did exist, that the lien should be set aside because he had been making regular payments as defined in the 2011 order.

During the hearing, Father acknowledged that he owed arrears and asked that any funds removed from his accounts be credited towards his child support obligation. However, no evidence was admitted to show whether or when any funds had been removed, transferred to the OAG, or distributed to Mother. After the hearing, the trial court issued an order vacating and terminating the OAG's lien and enjoining the OAG from

instituting any further child support liens unless Father fell behind on future payments. In addition, the trial court ordered the Child Support Disbursement Unit to apply any and all funds levied from Father's accounts to the child support account for the purpose of reducing interest owed by Father. The OAG appealed, arguing that the trial court erred in terminating the child support liens and that the trial court lacked jurisdiction to enjoin the OAG.

Holding: Reversed and Remanded

Opinion: The Texas Family Code authorizes the OAG to enforce child support orders and to collect and distribute support payments. The OAG is expressly authorized to file a statutorily prescribed lien to collect all amounts of child support due and owing. Texas Family Code § 157.322(c) provides certain actions a court may take in a proceeding to determine arrearages. The statute does not authorize the trial court to terminate or vacate a lien when arrearages are due and owing.

Here, the 2011 agreed order informed Father that the order did not preclude or limit the use of any other means to enforce the judgment, that the judgment was not an installment debt, that the entire judgment was "now due and owing," and that the OAG was permitted to take whatever enforcement remedies deemed necessary even if Father made regular periodic payments. Thus, the trial court's order terminating the lien was contrary to the Texas Family Code and the OAG's authority.

Texas Government Code § 22.002(c) provides that only the Supreme Court of Texas may issue a writ of mandamus or injunction to a constitutionally designated executive officer, such as the Attorney General to compel performance of a discretionary act that the officer is authorized to perform. Because the OAG was entitled to enforce the child support obligation by issuing a lien until the child support arrearages were either paid or released, the trial court lacked jurisdiction to issue the injunctions.

The COA noted that Texas courts may issue a mandatory order to the OAG when the OAG is a party to litigation. For example, a court may set aside a default judgment if the obligor is not properly served with process. In addition, the court has limited discretion to determine the amount of arrearages, provided that sufficient evidence is before the court. Here, however, the trial court had little or no evidence before it to determine what, if any, funds had been levied from Father's account or whether any funds had been applied towards Father's arrearages.

TRIAL COURT PROPERLY CONSIDERED MOTHER'S 42-YEAR DELAY IN FILING WHEN IT DETERMINED FATHER'S TESTIMONY WAS MORE RELIABLE; AWARD OF INTEREST ON PRE-SEPTEMBER 1991 CHILD SUPPORT ARREARAGES WAS MANDATORY

¶15-2-15. *Babbitt v. Below*, No. 04-13-00759-CV, 2015 WL 505097 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (02-04-15).

Facts: Mother and Father divorced in 1971, and Father was ordered to pay child support directly to Mother. Over 40 years later, in 2013, Mother filed an application for judicial writ of withholding, alleging Father owed nearly $100,000 in child support arrearages, including interest. Father filed a timely motion to stay, contesting the amount of arrearages, and asserting equitable estoppel as an affirmative defense to the payment of interest. At the subsequent hearing, Mother testified that Father had only paid $1000 of his child support obligation. Father, on the other hand, testified that he had paid all but $2,820 and that his last payment was made in November 1984 because Mother moved, changed her name, and did not provide Father with her new address.

The trial court noted that the case was a classic case of "he said, she said." The trial court determined that, based on the fact that Mother waited 42 years to make a child support claim, a reasonable person would infer that child support payments were being made during that time. Thus, the trial court found that Father's arrearages were $2,820 and concluded that interest began accruing in September 1991. Mother appealed, arguing the trial court improperly considered her 42-year delay in assessing arrearages and in not awarding her interest for the period between Father's last payment in November 1984 and September 1991.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: While the Texas Family Code's time-limitation provision regarding child support does not apply to an application for a writ of withholding, a trial court may consider a forty-year delay in filing when making a creditability determination. As fact-finder, when determining the credibility of the Parents' conflicting testimony, the trial court was free to consider the fact that Mother had waited over forty years to file her application.

In September 1991, the Texas Legislature mandated the award of interest on unpaid child support. Prior to September 1991, prejudgment interest accrued on unpaid child support. In addition, interest on unpaid child support cannot be reduced on the basis of equitable estoppel. Thus, because no legal basis was presented for reducing the interest on Father's unpaid child support, the trial court erred in awarding no interest on the unpaid child support prior to September 1991.

Editor's comment: *Sometimes we are told, "You can't get there from here." But applying for a judicial writ of withholding can get you to where you need to be when confirmation of child support arrearages to obtain a money judgment is time-barred. J.V.*

PROVISION OF AGREED DIVORCE DECREE OBLIGATING FATHER TO PAY CHILD SUPPORT AFTER THE CHILD GRADUATED FROM HIGH SCHOOL WAS NOT ENFORCEABLE BY CONTEMPT.

¶15-2-16. ***In re D.B.J.,*** ___ S.W.3d ___, 2015 WL 781502, 14-14-00285-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (02-24-15).

Facts: In Mother's and Father's agreed divorce decree, Father was ordered to pay monthly child support that would continue for 4 years after their Child graduated from high school. About a year and half after the Child graduated from high school, Mother filed a motion for enforcement, alleging Father had stopped paying child support, and she sought enforcement by contempt. The trial court denied her motion stating that the provision was not enforceable by contempt because it accrued after the Child had turned 18 and graduated from high school. Mother appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 154.124 provides that "parties may enter into a written agreement containing provision for support of the child" and "[t]erms of the agreement pertaining to child support in the order may be enforced by all remedies available for enforcement of a judgment, including contempt." However, the Texas Constitution provides "[n]o person shall ever be imprisoned for a debt." The Texas Supreme Court has held that obligations *which the law imposes* on spouses to support one another or their children is not considered a "debt" but a legal duty. When spouses contract to support one another or their children, and that obligation *exceeds* one's legal duty, the obligation is a debt. Further, the Texas Supreme Court has addressed the analogous issue of an agreement to pay spousal maintenance and held that the obligation is only enforceable by contempt if the agreement meets the Texas Family Code's other requirements for spousal maintenance.

Tex. Fam. Code §§ 154.001 and 154.002 prohibit courts from ordering support for nondisabled children who are at least 18 years old and have graduated from high school. Thus, because the Parent's agreement did not meet the Texas Family Code's other requirements for child support, it was not enforceable by contempt.

SAPCR
MODIFICATION

BECAUSE THE GEORGIA DIVORCE DECREE DID NOT DESIGNATE A PERSON WITH THE EXCLUSIVE RIGHT TO DETERMINE THE CHILDREN'S PRIMARY RESIDENCE, FATHER WAS NOT REQUIRED TO ATTACH A SUPPORTING AFFIDAVIT TO HIS SAPCR SEEKING TO DESIGNATE SUCH A PERSON LESS THAN ONE YEAR AFTER THE RENDITION OF THE GEORGIA DECREE.

¶15-2-17. ***In re C.R.A.,*** ___ S.W.3d ___, 2014 WL 7473768, 02-12-00498-CV (Tex. App.—Fort Worth 2014, no pet. h.) (12-31-14).

Facts: Mother and Father had two Children. When the Parents separated, they were living in Georgia. Father returned to his home town in Hood County, while Mother and the Children remained in Georgia. Mother filed for divorce in Georgia. However, after temporary orders gave Father primary custody, Mother moved to Texas. The divorce was finalized in Georgia, and the final decree provided that the Parents were to share joint legal custody of the Children. In addition, the decree required the Children to remain in their current school for the 2010–2011 school year and to be enrolled in the school district where they resided for 2011–2012. However, the decree was silent as to residency after the 2011–2012 school year.

Soon after the divorce, Mother married a man who lived in North Carolina, and the couple maintained a long-distance relationship. Mother notified Father that she intended to move after the 2011–2012 school year to North Carolina to live with her new husband. Mother planned to look for a job after the move. Father filed a SAPCR, seeking the exclusive right to designate the Children's primary residence, or in the alternative, to restrict the Children's residence to Hood County. Mother filed a motion to dismiss because Father's motion had been filed within one year of the Georgia decree, and he had not attached an affidavit as required by Texas Family Code § 156.102. Father argued that because the Georgia decree did not comply with Texas law, Texas Family Code § 156.102 did not apply. The trial court denied Mother's motion to dismiss, and after a bench trial, it designated Mother as the parent with the exclusive right to designate the Children's primary residence within Hood County. Mother appealed.

Holding: Affirmed

Opinion: Texas Family Code § 156.102 applies to suits that modify the designation of the person with the exclusive right to determine the primary residence of a child. Further, Texas Family Code § 153.134 requires a decree to either apply a geographical restriction to the child's residence or explicitly determine that a geographical restriction is unnecessary.

Here, the Georgia decree did not grant either Parent the exclusive right to determine the Children's primary residence. Further, the Georgia decree only restricted the Children's residence through the end of the 2011–2012 school year. Texas law does not provide for a geographical restriction's automatic expiration; under the TFC, a geographical restriction can only be modified by court order. Therefore, Father's suit sought the first designation of a person with the right to determine the primary residence of the Children, and Texas Family Code § 156.102 did not apply.

SAPCR
CHANGE OF NAME—CHILD

EXISTENCE OF HALF-SIBLING WITH FATHER'S LAST NAME WAS INSUFFICIENT REASON TO CHANGE CHILD'S LAST NAME FROM MOTHER'S.

¶15-2-18. ***In re A.E.M.,*** S.W.3d ,2014 WL 7182562, 2014 WL 7183222, 01-14-00123-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (12-16-14).

Facts: Mother and Father had a Child and met with the OAG to reach an agreement for a child support and custody order. The parents were able to agree on all issues except the name of the Child. Mother wanted the Child's last name to remain the same as hers, while Father wanted to change the Child's last name to his. Father testified that he had another child with his last name, and he wanted the two children to share a last name. Mother testified that her name was respected in the community because her father had run a business there for 33 years. The issue was presented to the trial court, which ordered the name be changed to include Father's surname. Mother appealed, arguing that the evidence was legally and factually insufficient to change the Child's name.

Holding: Reversed and Rendered

Majority Opinion: (J. Higley, J. Sharp) Tex. Fam. Code Section 45.004 provides that a child's name may be changed if the change is in the child's best interest. Once a child is named, the name should only be changed when the substantial welfare of the child requires it. The interests of the parents are not relevant. The factors to consider include: (1) the name that would best avoid anxiety, embarrassment, inconvenience, confusion, or disruption for the child, which may include consideration of parental misconduct and the degree of community respect (or disrespect) associated with the name; (2) the name that would best help the child's associational identity within a family unit, which may include whether a change in name would positively or negatively affect the bond between the child and either parent or the parents' families; (3) assurances by the parent whose surname the child will bear that the parent will not change his or her surname at a later time; (4) the length of time the child has used one surname and the level of identity the child has with the surname; (5) the child's preference, along with the age and maturity of the child; and (6) whether either parent is motivated by concerns other than the child's best interest—for example, an attempt to alienate the child from the other parent.

Here, while most of the factors were neutral, in that, they did not favor Mother or Father, one factor weighed *slightly* in Father's favor. Father had another child who shared his last name. However, Father only had periodic visitation of both children, and no evidence was presented regarding how often either child visited Father or even whether those periods would overlap. Mother and Father did not live in the same town or in surrounding towns. Father presented no evidence as to where his other child lived or the age of the other child.

The dissent's criticism was misplaced because the majority did not place any reliance on Mother's testimony. Rather, it considered the evidentiary significance of Father's testimony. Father provided little or no information about the other sibling, and a name change should be granted reluctantly and only where the substantial welfare of the child requires it.

Dissenting Opinion: (J. Bland) The relative importance factors listed in the majority opinion depend on the unique facts and circumstances of each case. The number of factors favoring the trial court's ruling should not control, rather, the logical force of each should. All but one of the factors in this case were subjective in nature and thus, were uniquely within the trial court's purview. The one subjective piece of evidence was the

Child's sibling relationship with Father's other child. Father testified that he wanted the children to get to know each other and develop a relationship. The majority rejected this testimony in favor of Mother's, where such a determination was within the trial court's discretion. Further, the majority dismissed the notion of the importance of a child's sibling relationship with another child.

Editor's comment: *It's unusual to get a decision going into detail on a child's name change, it's even more unusual to see one reversing the trial court's decision to change the child's last name. Most family law questions are reviewed under an abuse of discretion standard (like this one) and, as such, can be a difficult burden to overturn on appeal. This decision includes a well-reasoned dissenting opinion. R.T.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

MOTHER'S POOR CHOICES, INCLUDING DRUG USE, DATING ABUSIVE MEN, AND LEAVING HER CHILDREN WITH INAPPROPRIATE CAREGIVERS, SUPPORTED TERMINATION; FATHER'S PHYSICAL ABUSE OF MOTHER'S OLDER CHILD SUPPORTED TERMINATION OF FATHER'S YOUNGER CHILD.

The following two cases were companion cases. The opinions were issued separately and were nearly identical.

¶15-2-19. ***C.B. v. TDFPS,*** ___ S.W.3d ___, 2014 WL 6961525, 08-14-00224-CV (Tex. App.—El Paso 2014, no pet. h.) (12-09-14).

¶15-2-20. ***P.A.G v. TDFPS,*** ___ S.W.3d ___, 2014 WL 6961758, 08-14-00231-CV (Tex. App.—El Paso 2014, no pet. h.) (12-09-14).

Facts: Before Mother met Father, she had five other children. The oldest were 18-year old twins, and the youngest was an infant girl, who will be referred to as the Daughter. TDFPS had been involved with Mother's four oldest children before she met Father. According to reports, Mother lacked patience and developmental understanding of their needs. Mother would get angry when the children were hungry. The children were removed more than once by TDFPS but were returned to Mother each time. Mother had a history of drug abuse, dating abusive men, and leaving her children with inappropriate caregivers. Mother was advised to keep her children away from a "drug addict barn" where they lived, but Mother did not move. Mother had attempted drug rehabilitation five times. She was able to stop using heroin, but she continued to use marijuana and crack cocaine.

Mother moved in with Father after only knowing him about a month. While the Daughter was still an infant, she suffered severe injuries, for which Father was charged with injury to a child, a second degree felony enhanced to a first degree felony. The Daughter suffered a skull fracture, shaken baby syndrome, and a stroke. After extensive medical intervention, she remained partially paralyzed and blind in one eye, and she suffered from seizures and other neurological conditions. When Father was arrested, he tested positive for marijuana, cocaine, and meth. Father admitted to using marijuana and cocaine but denied using meth. Father blamed Mother for the Daughter's injuries because Mother attacked him while he was holding the Daughter.

Mother and Father had a Son (Mother's 6th child). Father testified that Mother continued using drugs while pregnant with the Son. Father was not permitted contact with any of the children, due to the Daughter's injuries. Father had only seen the Son once. However, Mother continued to see Father without the children. One day, Mother left the younger two children with the twins, so she could meet with Father. The twins threatened to call CPS if Mother left, and they followed through on the threat. When the police arrived, the twins and the Mother were not home, and the Son and the Daughter were alone in the apartment unsupervised. TDFPS was appointed temporary MC of the two young children. TDFPS sought to terminate Mother's

parental rights to the Daughter and the Son and to terminate Father's parental rights to the Son. The Daughter's father had voluntarily relinquished his parental rights.

By the time of trial, the two young children had been placed in foster care with the Daughter's cousin, who was a registered nurse. Both children were thriving in foster care and the Daughter was getting the regular medical treatment she needed. The foster family wanted to adopt both children.

After the bench trial, Mother's and Father's rights were terminated. Both parents appealed, arguing the evidence was legally and factually insufficient to support termination. Father further argued that the trial court erred in denying him a jury trial.

Holding: Affirmed

Opinion: *Right to a Jury Trial*: A proper request for a jury trial must be timely made and be accompanied by a timely payment of the jury fee. Here, no formal request for a jury was filed. The COA noted that a motion was filed, which was entitled Motion for Continuance of Jury Trial and Extending Placement of Children. However, even if this motion were to be construed as a jury demand, no jury fee was paid.

Termination: TFC 161.001 permits termination of a parent's parental rights after clear and convincing evidence establishes that the parent committed one of the enumerated acts or omissions of Texas Family Code 161.001(1) and that termination is in the child's best interest. Texas Family Code 161.001(1)(E) permits termination when a parent engages in conduct or knowingly places a child with persons who engage conduct that endangers the physical or emotional well-being of the child. When considering whether termination is in a child's best interest, a court should consider the *Holley* factors.

Termination of Mother's Parental Rights: Mother's conduct demonstrated her inability to ascertain or prevent danger to her children. Mother routinely left the children with inappropriate caregivers while she pursued her own pleasures. Every time TDFPS removed the children, Mother promised to do better. However, after the children were returned to her, the cycle of drugs, domestic violence, pregnancy, and TDFPS involvement began anew. Mother continued to see Father despite knowing that doing so was a violation of her family service plan. Mother never put her children first. The trial court could have reasonably formed a firm belief or conviction that Mother engaged in conduct pursuant to TFC 161.001(1)(E).

Further, although Mother completed her program services, her behavior did not change. Mother went from abusive partner to abusive partner. She continued to use drugs. She and her infant Daughter moved in with Father after only knowing Father for a month. Mother testified that she had a support group, but no one testified on her behalf. Mother testified that her boss would alter her work schedule to allow her more time with the Children, but he did not testify. Mother did not testify about her plans for the Daughter's continuing medical treatment. In fact, Mother complained that the foster family's trips to the doctor for the Daughter interfered with Mother's visitation. The foster home was stable and loving, while Mother's home was abusive and chaotic. Mother continued to have an inappropriate relationship with Father. The evidence supported a finding that termination was in the two Children's best interest.

Termination of Father's Parental Rights: Even taking Father's testimony as true, on the day of the Daughter's injuries, Mother went home to check on the Daughter because Father said she had vomited. Mother returned home to find the Daughter with "her face pushed in" and in a "different odd state" with her eyeballs rolling back. Mother picked up the Daughter, and Father took the Daughter from Mother. Shortly thereafter, Mother attacked Father. Whether or not Mother's attack worsened the Daughter's injuries, the testimony was sufficient to show that the Daughter had sustained injuries before Mother returned home. Father's past conduct "bodes poorly for the future." The trial court could have reasonably formed a firm belief or conviction that Father engaged in conduct pursuant to TFC 161.001(1)(E).

Further, no evidence was presented regarding Father's parenting abilities. Father had not completed the required services ordered by TDFPS. Father blamed the Daughter's injuries and the chaotic conditions of Mother's home on Mother and her older children. Father denied domestic violence, despite evidence of his stalking and violating a protective order. The evidence supported a finding that termination was in the Son's best interest.

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FATHER ENTITLED TO NEW TRIAL AFTER APPOINTED COUNSEL FAILED TO APPEAR AND FAILED TO MAKE ARRANGEMENTS FOR FATHER TO APPEAR AT FINAL TRIAL.

¶15-2-21. ***In re J.M.O.,*** ___ S.W.3d ___, 2014 WL 6979661, 04-14-00427-CV (Tex. App.—San Antonio 2014, no pet. h.) (12-10-14).

Facts: The Child's mother had been murdered, and his Father was incarcerated in a state-jail facility for robbery and drug possession and distribution. The State sought to terminate Father's parental rights, and Father was appointed counsel. Neither Father nor his attorney appeared at the final trial. The trial judge asked the clerk if attempts had been made to reach Father's counsel. The clerk responded that Father's counsel had not answered his phone, and a voice mail was left for him. The trial court went forward with trial. The caseworker was the only witness to testify. She stated that the Child had been living with his great-aunt for over six months, and the great-aunt intended to adopt the Child. Father was to remain in jail for another year. Father had not completed his required service plan. The caseworker also testified that there were "concerns" that Father had been involved in Mother's murder. The trial court terminated Father's parental rights.

The next day, Father's appointed counsel filed a motion for reconsideration. He explained that he failed to make arrangements with the state-jail facility to have Father appear by video. He further explained that he was in juvenile court at the same time as Father's termination hearing, and he had notified the trial court of the conflict prior to the hearing and had indicated that he would be late. However, Father accepted responsibility for the failure to appear and did not blame the trial court for proceeding without him. The trial court denied the motion for reconsideration. Father appealed, arguing that he was deprived effective assistance of counsel at trial. The State argued that Father failed to show that his attorney's decision not to appear was not a strategic decision or that Father's defense was prejudiced.

Holding: Reversed and Remanded

Opinion: An indigent parent in a parental rights termination proceeding is entitled to effective counsel. A party claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) that counsel's errors were so serious as to deprive the defendant of a fair trial. When a parent is denied counsel at a "critical stage" of litigation, a presumption of prejudice may be warranted.

Here, Father's counsel accepted fault for his failure to appear and for his failure to arrange Father's appearance through the state-jail facility. Further, there was no plausible strategic reason for Father's attorney not to appear at the final trial, a critical stage of the proceedings. Therefore, Father established that his counsel's performance was deficient. Moreover, a presumption of prejudice was warranted because Father was denied counsel at a critical state of the litigation.

MOTHER WAIVED APPELLATE REVIEW OF HER INTERPRETER'S COMPETENCE BY FAILING TO RAISE AN OBJECTION AT TRIAL.

¶15-2-22. ***M.M.V. v. TDFPS,*** ___ S.W.3d ___, 2014 WL 6998085, 01-14-00495-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (12-11-14).

Facts: Mother and Father had three young Children. Mother was from Guatemala and spoke K'iche, which is a Mayan indigenous language. Mother's youngest Child drowned in a bathtub while Mother was in the kitchen cooking and listening to the radio. Mother suspected that one of the older Children had turned on the faucet. TDFPS had been involved with the family twice before the drowning incident. The first occurred after Mother was found walking in the street intoxicated while carrying one of the Children. The second time, the middle Child was wandering outside the apartment unsupervised and was almost hit by an ambulance. When the youngest Child died, TDFPS removed the other two Children and created a service plan for Mother. Mother only completed the required parenting class but did not complete any other required services. At trial Mother was provided with an interpreter. She repeatedly testified that she did "everything" or "almost everything" required of her. However, when asked about completing her psychosocial assessment, she refused to

answer. "I wouldn't—I don't want to say nothing. No. I don't want to say anything." Mother's attorney argued in closing that Mother did not fully understand what was required of her and that "the Agency [did not] meet [its] burden" in this case. Father's attorney argued that "the Agency could have done more to try to work with this family." At the conclusion of the trial, both parent's rights were terminated. Mother appealed, arguing that her interpreter was constitutionally inadequate, thereby denying her a fair trial.

Holding: Affirmed

Opinion: Litigants in civil proceedings to terminate parental rights have a constitutional right to an interpreter to ensure a litigant is able to understand and participate at trial. When an attack is made regarding the competency of an interpreter, the ultimate question is whether any inadequacy made the trial "fundamentally unfair."

However, constitutional claims not raised with the trial court are not preserved for appellate review. To allow otherwise would undermine the Legislature's intent that cases terminating parental rights be expeditiously resolved, thus promoting a child's interest in a final decision.

Mother's interpreter was present throughout the pendency of the TDFPS investigation and accompanied Mother to all but one hearing and all TDFPS meetings. Mother was asked to confirm whether she understood the questions being asked of her and the "purpose of this hearing." Mother indicated she did. At no point did Mother object to the interpreter's competence.

NO EVIDENCE WAS INTRODUCED TO ESTABLISH THAT TERMINATION OF MOTHER'S PARENTAL RIGHTS WAS IN THE BEST INTEREST OF THE CHILDREN.

¶15-2-23. ***In re B.R.,*** ___ S.W.3d ___, 2015 WL 82892, 04-14-00599-CV (Tex. App.—San Antonio 2015, no pet. h.) (01-07-15).

Facts: Mother and Father and one of their four Children were in a parked car when they were approached by police. The police found drugs in the car, and TDFPS was notified. The Children were placed with their maternal grandmother. Father voluntarily relinquished his parental rights, and TDFPS sought to terminate Mother's parental rights. At the final termination hearing, a TDFPS supervisor was the only witness to testify. The TDFPS supervisor testified that she believed Mother's behavior endangered the well-being of the Child who was in the car when drugs were found. However, the TDFPS supervisor was not asked whether Mother's behavior endangered the well-being of the other three Children. After the hearing, the trial court terminated Mother's rights to all four Children. Mother appealed, contesting the sufficiency of the evidence to support a best interest finding.

Holding: Reversed and Rendered in Part; Affirmed in Part

Opinion: A trial court may terminate a parent's parental rights only after clear and convincing evidence establishes that the parent committed one or more of the acts or omissions enumerated in Texas Family Code § 161.001(1) and that termination is the child's best interest. While evidence proving one of the statutory grounds can also constitute evidence that termination is in the child's best interest, such evidence does not relieve the State's burden to prove best interest. In making a best interest determination, the court should consider the factors listed in Texas Family Code Section § 263.307(b) and in *Holley v. Adams*.

Testimony was introduced that one Child was in Father's lap when drugs were found in Father's car. No evidence was introduced regarding the other Children's whereabouts during this incident. A TDFPS supervisor was the only witness to testify at the final hearing, and she admitted to having had no contact with Mother. The TDFPS supervisor testified that Mother was a passenger in the car when the drugs were found, that Mother failed to appear for drug tests, and that the TDFPS supervisor believed, based on Mother's Facebook page, that Mother was in a relationship with an individual who smoked marijuana and had guns.

However, there was no evidence of the physical or mental vulnerabilities of the Children or the frequency or nature of out-of-home placements prior to TDFPS's involvement. There was evidence that one Child was sitting on his Father's lap in the car when the drugs were found. However, there was no mention in the record of the other three Children, other than their names and birth dates. No evidence was presented regarding the magnitude, frequency, and circumstances of any harm to the Children. There was no evidence regarding whether Children, their grandmother, or other family members had undergone psychiatric, psychological, or developmental evaluations. There was no evidence of abusive or assaultive conduct by the Children's family or others who had access to the Children's home.

The Children had been in the grandmother's possession for less than two months. Although the TDFPS supervisor testified that the Children remaining in the grandmother's possession would be in the Children's best interest, the TDFPS supervisor provided no evidence to support her conclusion. There was no evidence of any willingness or ability of the Children's family to effect positive changes or that the grandmother demonstrated adequate parenting skills. The TDFPS supervisor testified that she was not concerned about the grandmother's "history" with TDFPS but did not testify about what that "history" was.

There was no evidence of the emotional or physical needs of the Children, any emotional or physical danger to the Children, the parental abilities of the grandmother, programs available to assist the grandmother, the grandmother's plans for the Children, or the grandmother's home. Other than evidence that Mother was in the car when drugs were discovered, was believed to be in a relationship with an inappropriate individual, and had missed some visitations, there was no evidence of any acts or omissions by Mother or excuses for any acts or omissions by Mother.

BECAUSE TERMINATION HEARING DID NOT COMMENCE BEFORE MANDATORY DISMISSAL DATE, TRIAL COURT ERRED IN DENYING FATHER'S MOTION TO DISMISS

¶15-2-24. ***In re D.S.,*** ___ S.W.3d ___, 2015 WL 167244, 07-14-00357-CV (Tex. App.—Amarillo 2015, no pet. h.) (01-13-15).

Facts: TDFPS filed a petition to terminate Mother's and Father's parental rights to their only Child. About a month before the Monday following the first anniversary of the filing of the case (the original dismissal date), the trial court extended the dismissal date 180 days and set a final hearing about two weeks before the new dismissal date. On the day of the final hearing, TDFPS sought a continuance, and the final hearing was reset to two days before the new dismissal date. On the date of the reset final hearing, the parties and counsel appeared. The trial court asked the parties how long they expected the hearing to last. Counsel responded that it would last about half a day. The trial court then immediately recessed the case and asked the parties to set a new date with the court coordinator. The hearing was reset for about one month after the new dismissal date. After the new dismissal date passed, Father filed a motion to dismiss. At the scheduled hearing, the trial court dismissed Father's motion, and both parents' parental rights were terminated. Father appealed, arguing the trial court abused its discretion in denying his motion to dismiss.

Holding: Reversed and Rendered

Opinion: Tex. Fam. Code § 263.401 provides specific deadlines by which a termination case must either be commenced or dismissed. The principle behind this requirement is that children need permanence and stability in their lives.

Other cases have held that a trial has commenced when the parties announce ready or when substantive facts are presented to the factfinder. Here, the trial court merely asked how long the case would take and then took an immediate recess. At a minimum, the parties should be called upon to make their respective announcements, and the trial court should ascertain whether there are any preliminary matters to be taken up. To allow the trial court to use the method set forth in the record here would complete dismember the statute and make it worthless.

MOTHER'S FAILURE TO PROTECT THE CHILDREN FROM FATHER'S PRODUCTION OF METHAMPHETAMINE, ALONG WITH MOTHER'S HISTORY OF DRUG ABUSE AND HER PLACEMENT OF DRUGS AND HER RELATIONSHIP WITH FATHER ABOVE THE NEEDS OF THE CHILDREN, SUPPORTED TERMINATION OF HER PARENTAL RIGHTS.

¶15-2-25. ***In re Z.M.,*** ___ S.W.3d ___, 2015 WL 293395, 06-14-00068-CV (Tex. App.—Texarkana 2015, no pet. h.) (01-23-15).

Facts: Mother, Father, and their three Children lived in a trailer that was parked next to Mother's mother's trailer. Mother and Father had purchased the stolen trailer for $500, and, for electricity, they ran an extension cord into Mother's mother's trailer. Father provided for the family by making methamphetamine ("meth"). Both Mother and Father had abused meth for the prior three or four years. TDFPS had been involved with the family twice before: once for family violence when Father had beaten Mother in the presence of the oldest Child, and a second time when Mother tested positive for meth after giving birth to the youngest Child.

One day, while Father was making meth, the middle Child was severely injured. The parents' stories for how the accident occurred were different, but it was clear that the Child was injured by chemicals either currently being used or about to be used to make meth. When the Child was injured, Mother called 911 to report that her Child had allegedly poured drain-cleaning chemicals on himself and was suffering from burns. The jury heard the 911 call, which included the "haunting" screams of the Child in the background. The Child suffered second and third degree burns over 27% of his body. He was treated at Parkland, and the doctor testified that the Child would be physically scarred for life.

The day after the incident, the police searched the family's trailer and found it in deplorable conditions with open food containers and a toilet full of feces. Additionally, many dangerous items, such as razor blades, chemicals, and a loaded gun, were found and were accessible to the Children. The youngest Child slept in a bassinet, while the other four family members slept in the same, dirty, full-sized bed without sheets. Father was arrested at the trailer, and Mother was arrested elsewhere on an outstanding drug-related warrant. Father was sentenced to fifteen years' imprisonment.

The Children were removed. The middle Child was placed in a therapeutic home, while the other two Children were placed with a foster family. After a jury trial, both parents' parental rights were terminated. Mother appealed, arguing that the evidence was insufficient to support the termination and that the court erred in admitting the investigator's notes.

Holding: Affirmed

Opinion: A court may terminate a parent's parental rights if clear and convincing evidence supports the findings that the parent committed an act or omission enumerated in Tex. Fam. Code § 161.001(1) and that termination is in the child's best interest. Tex. Fam. Code § 161.001(1) (E) permits termination when a parent engages in conduct or knowingly places the child with person's who engage in conduct which endangers the physical or emotional well-being of the child.

Here, despite knowing about Father's propensity for violence and drug use, Mother continued to leave the Children in Father's care. Mother also used drugs, including methamphetamine, marijuana, and K2 (synthetic marijuana) while the Children were in her care. Further, Mother admitted to being high on K2 when the middle Child was injured and that he was hurt by chemicals that were either being used or about to be used to make methamphetamine. Mother had a history of making poor decisions, including leaving the Children in her sister's care despite knowing of her sister's drug use. The family's home was far from childproof. There were supplies to make methamphetamine, razor blades, a loaded gun, drugs, and other dangerous items that were accessible to the Children. Moreover, the home was kept in deplorable conditions and smelled of rotten food and feces. The oldest Child had speech problems and had not learned about letters and numbers. The younger two Children were withdrawn and were behind on their immunizations. Based on this evidence, the jury could have reached a firm conviction that Mother's engaged in conduct or knowingly placed the Children

with person's who engaged in conduct which endangered the physical or emotional well-being of the Children.

In determining that a jury could have reasonably concluded that termination was in the Children's best interest, the court of appeals considered the following *Holley* factors:

The emotional and physical needs of the Children now and in the future: The middle Child's injuries were so severe that he will need the application of lotion to his scars three times daily for the rest of his life. The oldest Child was developmentally behind for a five-year-old. The youngest Child was found with dermatitis and conjunctivitis and needed to be kept clean and free from a dirty environment. The deplorable, roach infested trailer was not suitable for the Children's needs. In addition, Mother was facing jail time and had no income, transportation, or suitable home.

The emotional and physical danger to the Children now and in the future: Even after the middle Child was injured, Mother indicated that she wished to reunite with Father. Mother had a history of victimization, drug addiction, and making poor choices. In addition, she was unable to provide a clean stable home indicate for the Children.

The parental abilities of the individuals seeking custody: The conditions of the trailer were deplorable. The Children were behind on their immunizations. Mother had not paid attention to the sores on the youngest Child caused by dermatitis. The oldest Child was not prepared to enter kindergarten. The CASA worker testified that she was concerned about Mother's parental abilities.

The plans for the Children by these individuals or by the agency seeking custody: Mother had no plans if the Children were returned to her, despite acknowledging that the conditions of the trailer were deplorable. On the other hand, the foster family caring for the youngest and oldest Children had plans to adopt the Children.

Finally, the admission of the investigator's notes, if error, was harmless. Mother claimed that the most damaging portion of the notes was a recording of a statement of Mother indicating that she was aware that Father was making meth at the time of the middle Child's injuries. However, at trial, Mother testified that she knew Father was making meth at that time. In addition, the TDFPS caseworker testified, without objection, of Mother's awareness that Father was making meth when the Child was injured. Thus, even if the investigator's notes were inadmissible hearsay, the evidence was cumulative of other testimony and was harmless.

FATHER'S RIGHTS TERMINATED BECAUSE EVIDENCE ESTABLISHED TERMINATION WAS IN THE CHILDREN'S BEST INTEREST, AND IN PLEADING THE FIFTH, FATHER PRESENTED NO EVIDENCE TO CONTRADICT THAT EVIDENCE.

¶15-2-26. ***In re S.A.P.,*** ___ S.W.3d ___, 2015 WL 631010, 08-14-00312-CV (Tex. App.—El Paso 2015, no pet. h.) (02-13-15).

Facts: Mother and Father had three Children. Mother abandoned the family and started a new family. Father and the Children lived with Father's parents. TDFPS became involved after allegations of physical and sexual abuse. The oldest Child made an outcry that the grandfather often threatened the Children with a knife to get them to behave and not talk to CPS. The oldest Child also stated that the grandfather would often masturbate or fondle himself. The middle Child also made an outcry regarding the knife. The middle Child further stated that the grandfather was abusive to the grandmother. When the TDFPS investigator spoke with the grandmother about the allegations, she blamed the oldest Child, stating he had been acting out and needed medication. A TDFPS conservatorship worker testified that the grandmother failed to protect the Children from abuse. Although the grandmother was initially appointed a joint managing conservator of the Children, the trial court ultimately removed her from that role.

The family was provided with family counseling sessions. The counselor testified that Father and the grandmother each showed genuine love for the Children. However, the grandmother seemed unable to understand the Children's concerns or to see the danger that the grandfather presented to the Children. The grandmother witnessed Father's and the grandfather's bad behavior, and her method of dealing with the situation was to attempt to distract the Children with books or cartoons. The grandmother stated that she could ensure that the Children did not have contact with Father or the grandfather, "but it's not fair for my husband to be caught in the middle of it."

Although the grandmother and Father regularly took advantage of opportunities to call the Children, neither of them finished their ordered service plans.

Father was a paranoid schizophrenic with a long criminal history. He had been declared legally incompetent. At the time of trial he was an inmate at a state hospital.

The grandmother testified to a number of neurological disorders suffered by the Children. However, while in foster care, the Children had been re-evaluated, and several of the disorders had been ruled out. A CASA volunteer testified that she believed the Children's outcries and that the Children should remain in foster care. The Children expressed a desire to remain in foster care. The foster mother testified as to the positive changes in the Children and stated that she and her husband wished to adopt the Children.

After a hearing, the trial court terminated both mother's and father's parental rights to the Children, and TDFPS was appointed managing conservator. The Father appealed, contesting the trial court's best interest finding. The Father argued that TDFPS provided little evidence of his inability to parent once released from the state hospital and presented no evidence that the Children were afraid of him. Father argued that the danger to the Children was their grandfather.

Holding: Affirmed

Opinion: A parent's parental rights may be terminated after clear and convincing evidence establishes that the parent committed one or more of the statutory acts or omissions enumerated in Tex. Fam. Code § 161.001(1) and that termination is in the child's best interest.

Here, there was ample evidence regarding the inappropriate behavior of the grandfather and the inadequate protection offered by the grandmother. However, there was also sufficient evidence of Father's actions to show that termination of Father's parental rights was in the best interest of the Children. The grandmother testified that the Children told her that Father had threatened them. Further, the grandmother testified that she had never seen the grandfather threaten the Children with a weapon, but she had seen Father do so. The grandmother had not kicked Father out of the house due to his threats against the family. The grandmother had observed violence between Father and the grandfather, which she claimed was always started by Father. Father and the grandfather fought each other with knives. Father was verbally abusive to both parents, and he would parade around the house naked, making sexual gestures to the Children. Father was arrested for trying "to do away" with the grandmother. Father turned on the gas and threatened to burn the house down. Father threatened arson and murder in front of the Children.

Father refused to testify under the Fifth Amendment. While that was his right, in civil cases, a fact-finder is permitted to draw inferences on a refusal to testify.

Father had expressed no plans regarding the Children after his release from the state hospital. The counselor was concerned that the grandmother would be unable to protect the Children if Father returned to the home, and there was no evidence that the grandmother would be able to prevent Father from returning. Father had impulse control problems affected by his medication, and the counselor was not sure whether Father would ever fully recover.

Holley factors: The Children wished to remain with their foster family. The violence and emotional abuse in the household presented a danger to the Children now and in the future. Father lacked judgment with respect to parenting abilities. Although programs were made available to Father, Father failed to show progress or recovery. Based on the evidence, the likely plans for the future amounted to a return to previous conditions. The home environment was unstable. The record was replete with evidence of Father's acts and omissions showing the parent-child relationship was improper. Father's mental illness showed no signs of improvement. Moreover, Father chose not to testify regarding his medication, psychiatric treatment, progress, goals, and plans for the Children.

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FATHER'S PARENTAL RIGHTS TERMINATED DUE TO HIS HISTORY OF DRUG ABUSE, DEVASTATING DECISIONS WHILE UNDER THE INFLUENCE, AND HIS FAILURE TO STOP USING DRUGS DESPITE EFFORTS TO DO SO.

¶15-2-27. ***In re C.A.J.,*** ___ S.W.3d ___, 2015 WL 832211, 06-14-00089-CV (Tex. App.—Texarkana 2015, no pet. h.) (02-27-15).

Facts: Father was a drug addict and had abused methamphetamine ("meth") and marijuana. Father tried to quit many times, but always returned to drugs. Father had frequently been incarcerated during his lifetime. While he was in prison, Mother gave birth to their Child. Father was released when the Child was about a year-and-a-half old. When he was released, Father resumed his relationship with Mother, their Child, and Mother's two older children by another man. Mother and Father married, and so long as he was sober, Father was a good and loving parent to the Children.

At Mother's request, Father took the three Children on a camping trip. During the trip, Father used meth and molested the oldest child while she was sleeping. Mother arrived the next day and found Father socializing with old friends in the parking lot, while the Children were swimming in the lake unsupervised. Mother took the Children home. The oldest child made no outcry. Father did not see the Children after the camping trip and made no effort to do so.

Mother and Father divorced. Shortly after the divorce, Father attempted to commit suicide by overdose. When the attempt failed, he confessed to Mother what he had done to the oldest child because he was overcome with guilt and wanted to make sure the child received the care she needed. Mother reported the crime, Father pled no contest, and he was sentenced to three years' imprisonment. While he was in prison, Mother filed a petition to terminate Father's parental rights. After a bench trial, the trial court terminated Father's parental rights, finding that termination was in the Child's best interest and that the evidence supported termination under Tex. Fam. Code § 161.001(1)(D), (E), and (L)(iv). Father appealed, arguing that the evidence was insufficient to support the trial court's findings. Father argued that Subsection (L)(iv) required evidence that the child-victim had sustained a serious injury as a result of his crime and that there was no evidence to support such a finding.

Holding: Affirmed

Opinion: A court may terminate a parent's parental rights after clear and convincing evidence establishes that the parent committed one of the enumerated acts or omissions of Tex. Fam. Code § 161.001(1) and that termination is in the child's best interest.

Only one predicate finding is required. If multiple grounds are found by the trial court, a court of appeals will affirm based on any one ground. Here, rather than addressing whether Tex. Fam. Code § 161.001(1)(L)(iv) (indecency with a child) requires a finding of serious injury to a child, the court of appeals reviewed whether the evidence was sufficient to support termination under Tex. Fam. Code § 161.001(1)(E). Subsection (E) supports termination when a parent has engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child. Subsection (E) does not require that actual harm resulted, but the evidence supporting a finding under this section must be based on a course of conduct, as opposed to a single act or omission.

Father had a long history of drug abuse and incarceration. Although he sought assistance several times, he always returned to the drug addiction. Father was incarcerated for the first year-and-a-half of the Child's life and was incarcerated again at the time of trial. Although Father claimed that he remained drug free while married to Mother, she claimed she had kicked him out several times for using drugs. After Father and Mother separated, Father continued to socialize with drug-using friends. When the Child was five-years-old, Father committed a heinous crime against the Child's older sister while Father was under the influence of meth. Based on the evidence, the trial court could have readily reached a firm conviction or belief that Father engaged in a course of conduct that endangered the Child's physical or emotional well-being.

In determining whether termination is in a Child's best interest, the court will consider the *Holley* factors.

Emotional and physical needs of the Child now and in the future: Father had no income and no suitable home. Father had not paid child support in two years.

Emotional and physical danger to the Child now and in the Future; Parental abilities of Father: Although Father attempted to be a good father, he admitted to smoking meth while the Child was in his care. He had a history of drug abuse and bad decisions while under the influence of drugs. Father failed to remain drug free when he attempted to do so.

Programs available to assist Father in promoting the best interest of the Child: Although Father attended drug education classes and treatment programs, Father repeatedly failed to beat his drug addiction, even when faced with termination of his parental rights.

Father's plans for the Child: Father was incarcerated at the time of the hearing and provided no testimony regarding his plans for the Child. Father's brother testified that Father should not be left alone with the Children.

Acts or omissions of Father indicating that the existing parent-child relationship is not proper: Father chose to use drugs while the Child was in his care. Father committed a heinous crime against the Child's older sister. Father was absent from the Child's life for long periods of time due to incarcerations.

Any excuse for Father's acts or omissions: Father offered his drug addiction as an excuse for his acts.

Based on the evidence, the trial court could have reasonably formed a firm belief or conviction that termination was in the Child's best interest.

MISCELLANEOUS

FATHER FAILED TO PRODUCE ANY EVIDENCE CONTROVERTING MOTHER'S TESTIMONY AND DOCUMENTARY EVIDENCE.

¶15-2-28. ***Reyes v. Reyes,*** ___ S.W.3d ___, 2014 WL 6982243, 08-13-00070-CV (Tex. App.—El Paso 2014, no pet. h.) (12-10-14).

Facts: Mother and Father were married with 3 Children. No discovery was conducted prior to trial, and neither party filed a sworn I&A. The trial court did not issue findings of facts and conclusions of law. Mother testified about family violence and the value of certain assets. She testified that although Father had not been involved in the Children's lives, more involvement would be in the Children's best interest. Father's counsel did not ask Mother any questions. After Mother's attorney rested, Father's attorney also rested without calling any witnesses. The trial court divided the community estate and appointed the parents JMC, with Mother being awarded the exclusive right to determine the Children's primary residence. Father was granted a standard possession schedule and was ordered to pay child support, medical support, and 50% of unreimbursed medical expenses. Father appealed, contesting the sufficiency of the evidence to support the conservatorship appointment, child support, the division of the marital estate, and "reimbursement" to Mother.

Holding: Affirmed

Opinion: There is a presumption that appointing parents as JMC of a child is in the child's best interest. If a party seeks SMC, that party must introduce evidence to rebut the JMC presumption. Although Father requested "full custody" on the stand, he did not plead for that relief. Further, he offered no evidence to rebut the JMC presumption. In fact, Father testified that because he worked two jobs, he was currently unable to care for the Children, and Father's future plans, if he were to be awarded "full custody," were speculative at best. Moreover, the parties' divorce was granted on the grounds of Father's cruelty against Mother.

Mother entered a tax return that indicated the amount of Father's income, which Father did not controvert. The child support award was within the TFC guidelines based on that information.

An appellant who does not provide property values to the trial court cannot complain on appeal of the trial court's lack of complete information. Father presented no evidence to contradict Mother's values. More-

over, based on the values provided, the trial court divided the estate equally. Both parties testified that the parties' house could not be sold in its current condition. Thus, the trial court could have reasonably found the value of the house was $0 and did not err in awarding it to Mother.

Father complained that the trial court improperly "reimbursed" Mother for health insurance coverage and the parties' tax refund. However, the tax refund was community property, which the trial court divided equally. Further, the order requiring Father to pay health insurance was within the mandates of the TFC.

Editor's comment: *This case includes an important nugget: "An appellant who does not provide property values to the trial court cannot complain on appeal of the trial court's lack of complete information." In other words, a prerequisite to appealing a valuation finding is offering contrary evidence of value. J.V.*

TRIAL COURT REQUIRED TO ABATE DIVORCE SUIT IN DEFERENCE TO FIRST-FILED INTERPLEADER SUIT WITH DOMINANT JURISDICTION

¶15-2-29. *In re Benavides*, No. 04-14-00718-CV, 2014 WL 6979438 (Tex. App.—San Antonio 2014, orig. proceeding) (mem. op.) (12-10-14).

Facts: A guardian of the person ("GOP") and a guardian of the estate ("GOE") had been appointed to Husband in a separate proceeding. A bank filed an interpleader action to interplead funds from assets belonging to Husband and Wife due to competing claims made to the same funds by Wife and the GOE in district court. Subsequently, the GOP filed for divorce on Husband's behalf in the county court. Wife filed a cross-claim against the GOE in the interpleader action for breach of contract, tortious interference, money had and received, and under the Texas Theft Liability Act. Wife also filed a plea of abatement in the divorce proceedings (county court), asserting that the court in which the interpleader action (district court) was filed had dominant jurisdiction over the parties' marital assets. The plea in abatement was denied and the trial court set the divorce for trial. Wife filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: As a general rule, when cases involving the same subject matter are brought in different courts, the first-filed case has dominant jurisdiction, and the other case should be abated. To succeed on a motion to abate a second-filed suit, the movant most show (1) a suit in another court was commenced first; (2) the first-filed suit remains pending; (3) the first-filed suit includes or could be amended to include all the parties; and (4) the controversies are the same or the first-filed suit could be amended to include all of the claims.

Here, the GOP and the GOE did not dispute that all the above requirements were satisfied. Rather, they argued that because the second-filed divorce was not a compulsory counterclaim to an interpleader action, the rule of dominant jurisdiction should not apply. However, while a compulsory counter-claim is a type of claim that should be abated, it is not the only type subject to abatement.

Additionally, the GOP and GOE argued that Wife could not "manufacture" dominant jurisdiction through her cross-claims in the first-filed suit. However, the interrelation between the two suits existed, at least in part, prior to Wife's cross-claims. The fact that her cross-claims expanded the number of issues of overlap did not preclude her from seeking to abate the second-filed suit.

Finally, if a second court issues orders that actively interferes with the jurisdiction of the court with dominant jurisdiction, mandamus relief is available. Here, the second court set the divorce for trial. Thus, Wife was entitled to mandamus relief.

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FATHER'S MOTIONS TO RECUSE TRIAL COURT JUDGE FAILED TO ESTABLISH THAT ANY BIAS, PREJUDICE, OR PARTIALITY AROSE FROM EVENTS OUTSIDE OF JUDICIAL PROCEEDINGS

¶15-2-30. ***Fox v. Alberto,*** ___ S.W.3d ___, 2014 WL 6998094, 14-13-00007-CV (Tex. App.—Houston [14th Dist.] 2014, no pet. h.) (12-11-14).

Facts: Father, an attorney, filed a suit to establish his paternity and adjudicate his parental rights to his twin boys. Just before a scheduled hearing, the trial court Judge ordered the bailiff to take away Father's cellphone while he was in the courtroom. Father refused, and the Judge ordered the bailiff to place Father in a jail cell within the same building. While being dragged to the jail cell, Father shouted that he demanded his right as a licensed attorney to be released on his own recognizance and for a hearing before a different judge. The Judge denied Father's demand. Father remained in a jail cell for about twenty minutes, during which time, according to Father's allegations, opposing counsel stole motions from Father's file in the trial courtroom. When Father returned to the courtroom, he saw the motions in the opposing counsel's stack of papers and retrieved them. When the scheduled hearing began, Father demanded a court reporter, but the Judge denied the request because it was a temporary orders hearing. When Father was called to testify, he presented to the Judge a one-sentence, hand-written motion, which read, "Comes now, Petitioner, [Father], and makes this demand for the immediate recusal of [the Judge] from the above entitled and numbered cause." The Judge stopped the proceedings and referred the motion to the presiding administrative judge. Subsequently, Father filed a "supplemental" motion to recuse the trial court Judge. The administrative judge dismissed the first motion because it did not comply with TRCP 18a and held a hearing on the second motion. During the hearing, the administrative judge heard argument but did not allow Father to present evidence. Father's second motion was denied and the underlying case proceeded to jury trial. Mother and Father were appointed JMC, and Father was ordered to pay child support. Father appealed, arguing that the administrative judge erred in denying his motions to recuse the trial court Judge.

Holding: Dismissed in Part; Affirmed in Part

Opinion: When a party seeks a judge's recusal based on bias, prejudice, or partiality, the party must show either that (1) the bias, prejudice, or partiality arose from events outside of judicial proceedings; or (2) the judge has displayed a deep-seated favoritism or antagonism that would make fair judgment impossible. Events occurring outside of judicial proceedings must have an "extrajudicial source." Events occurring in a separate judicial proceeding are not "outside of judicial proceedings." Here, even if Father's allegations were true, Father described the events as taking place "in open court." All of the events in Father's motion occurred in the courtroom of the trial court, and the Judge was acting in her capacity as presiding judge of that court. Moreover, even if Father's allegations were true, they did not rise to the level of a "deep-seated favoritism or antagonism that would make fair judgment impossible." Father's remaining issues were dismissed for failure to preserve error or failure to adequately brief his issues for appellate review.

TRIAL COURT ERRED IN GRANTING INJUNCTIVE RELIEF NOT SUPPORTED BY THE PLEADINGS OR TRIED BY CONSENT; TRIAL COURT WAS NOT AFFORDED DEFERENTIAL BEST INTEREST STANDARD BECAUSE INJUNCTIVE RELIEF WAS NOT DIRECTLY RELATED TO CUSTODY, CONTROL, POSSESSION, AND VISITATION OF THE CHILD.

¶15-2-31. ***King v. Lyons,*** ___ S.W.3d ___, 2014 WL 7474123, 01-13-01089-CV (Tex. App.—Houston [1st Dist.] 2014, no pet. h.) (12-30-14).

Facts: Mother and Father were divorced with one Child. Mother filed a SAPCR seeking an order requiring Father to pick up the Child at the curb of her residence, rather than her door—about a 60-foot difference. Fa-

ther filed a counter-petition seeking an injunction requiring the Parents to communicate exclusively through a website designed to facilitate shared child custody. Neither Parent sought an injunction to keep the other away from his or her home or place of employment.

The record of the two-day trial established the Parents' history of bickering, incivility, and inability to cooperate. Mother testified that Father sent her repetitious, confrontational communications by text, telephone, and email. Both Parents testified to feeling threatened by the other. Father testified that he felt threatened by the presence of law enforcement and others when exchanging the Child. Mother denied ever having law enforcement present except for a building security guard when she was living in a high-rise condominium. Neither Parent testified about the other parent's behavior around their respective places of employment.

The trial court's final order required the Parent's to communicate only through a website, to exchange the Child at Mother's curb, and to comply with mutual permanent injunctions requiring both Parent's from going within 200 yards of the other Parent's home or place of employment, with exceptions for exchanging the Child or traveling on public streets. The court found that the injunctions were necessary due to the high level of animosity between the parties and were in the best interest of the Child.

Both Parents appealed, arguing that the injunctions against them were not supported by the pleadings or tried by consent.

Holding: Reversed and Vacated in Part

Opinion: A judgment must be supported by the pleadings. Pleadings provide the opposing party notice and information necessary to prepare a defense. Although pleadings should be liberally construed, a court may not use a liberal construction as a license to read into the petition a claim it does not contain.

When an issue not raised by the parties is tried by express or implied consent of the parties, the issue is treated as if it had been raised by the pleadings. To establish that an issue has been tried by consent, there must be evidence *of trial of* the issue. An issue is not tried by consent if the evidence relevant to that issue is also relevant to other issues raised by the pleadings.

In matters concerning custody, control, possession, and visitation, a trial court may grant injunctive relief that is in the best interest of the child and is consistent with the allegations, general prayers for relief, and evidence, without the need for strict proof of the existence of a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law. However, if the case does not concern the custody, control, possession, or visitation, the party seeking injunctive relief must show entitlement to such relief as required in any civil case.

Here, neither Parent pleaded for the injunctions imposed by the trial court. Further, neither Parent introduced evidence that supported enjoining the Parents from coming within 200 yards of the other Parent's place of employment.

Additionally, while both Mother and Father pointed to evidence that could be construed to support enjoining the Parents from coming within 200 yards of the other Parent's residence, the same evidence was also relevant to other issues raised by the pleadings. Thus, the issue was not tried by consent.

Moreover, the injunctions did not relate directly to custody, control, possession, and visitation, but rather to keeping the Parents physically separated and restraining their conduct in ways that had no relation to the Child. Therefore, the more deferential best interest standard was inapplicable.

Editor's comment: *Like I said above about In re Bustos: This case is a nice change from that old saw, "Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children." E.g., Leithold v. Plass, 413 SW 2d 698, 701 (Tex. 1967). J.V.*

TRIAL COURT MAY UNCONDITIONALLY AWARD APPELLATE ATTORNEY'S FEES IF THE AWARD PROTECTS THE BEST INTEREST OF THE CHILD.

¶15-2-32. *In re Jafarzadeh*, No. 05-14-01576-CV, 2015 WL 72693 (Tex. App.—Dallas 2015, orig. proceeding) (mem. op.) (01-02-15).

Facts: After entering a final order in the parties' SAPCR, the trial court entered temporary orders pending appeal. Father was unconditionally ordered to pay Mother's appellate attorney's fees if Father appealed. Father filed a petition for writ of mandamus, arguing that the trial court erred in failing to condition the award upon Father's unsuccessful appeal.

Holding: Denied

Opinion: Ordinarily, in civil cases, an award for attorney's fees must be conditional upon an unsuccessful appeal. The premise for this condition is based on a punitive rationale that attorney's fees are part of the damages incurred by the prevailing party.

While acknowledging that at least three other COAs have reached a contrary conclusion, this COA held that in a SAPCR, deferring the fee award until resolution of an appeal is impractical because it fails to provide the resources necessary to the appellee to defend the appeal. Unlike other civil cases, an award of attorney's fees in a SAPCR is not based on a punitive or damages rationale, but rather on the rationale that the award is in the best interest of the child. Because both parents are responsible for providing for the child's needs, attorney's fees in a SAPCR may be imposed on either parent. Conditioning the award on an unsuccessful appeal may defeat the ability of the parent who prevailed in the trial court from defending an order that was in the best interest of the child.

Here, the record did not establish that the trial court's order was not in the best interest of the children. Additionally, the amount ordered did not "set a price" on an appeal to discourage Father's resort to appeal.

Editor's comment: *For the very first time, an appellate court has held that an award of appellate attorney fees need not be conditioned on the appellant not prevailing on appeal. Here, the appellee's attorney argued that the appellee (the mother) could not afford to defend herself in an appeal. Additionally, the appellant indicated an intent to appeal the SAPCR related issues, rather than just property issues. G.L.S.*

Editor's comment: *This case is very very interesting. I believe this is the first one to ever hold that in a SAPCR, appellate attorney's fees do NOT have to be conditioned upon success on the appeal. This flies in the face of all reported decisions in this area. Would this case have held the same if the award was made as part of the final judgment, instead of part of a 'temporary orders pending appeal'? It seems so, based on the court's 'best interest' rationale, but I guess we'll have to see how far the holding of this case can be stretched. Regardless, I still think there is a very real concern about this ruling chilling the ability of the losing party from appealing, whether SAPCR or otherwise, which is the whole basis for conditional appellate attorney's fees. I get that 'best interest of the child' is of utmost importance, but how far does this go? How many more statutes can we chip away at with the 'best interest' hammer? It's such a slippery slope. Plus, so many of our cases deal with both property AND SAPCR issues on appeal. Are we now going to have to start segregating the fees incurred for the property part of the appeal versus the SAPCR appeal? R.T.*

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FATHER ENTITLED TO A STAY OF ASSOCIATE JUDGE'S TEMPORARY ORDER CHANGING THE DESIGNATION OF THE PERSON WITH THE EXCLUSIVE RIGHT TO DESIGNATE THE CHILD'S PRIMARY RESIDENCE UNTIL AFTER A DE NOVO REVIEW.

¶15-2-33. *In re E.M.*, No. 02-14-00403-CV, 2015 WL 128739 (Tex. App.—Fort Worth 2015, orig. proceeding) (mem. op.) (01-09-15).

Facts: Father had the exclusive right to designate the primary residence of the Child. Mother filed a suit to modify the parent-child relationship and sought to have the case transferred from the county in which the Child lived to Hidalgo County. The Associate Judge signed an order in connection with Mother's request to transfer that also had the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the Child from Father to Mother. Father filed a timely request for a de novo hearing, but the hearing was set for a date after the Associate Judge's order was to take effect. Father filed a petition for writ of mandamus to direct the Associate Judge to withdraw or stay the temporary order.

Holding: Writ of Mandamus Conditionally Granted

Opinion: In a modification suit, a court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence unless it is in the best interest of the child and certain circumstances are proved. Here, however, the Associate Judge's order did not contain the statutory findings required to support such an order.

Moreover, although Father timely filed a request for a de novo hearing, the Associate Judge's order took effect before the date the hearing was scheduled. Thus, Father had no adequate remedy at law and was entitled to a stay of the Associate Judge's temporary order until the conclusion of the de novo hearing.

FATHER WAIVED ERROR BY FAILING TO OBJECT TO FORM OF TRIAL COURT'S SANCTIONS ORDER

¶15-2-34. ***Grotewold v. Meyer,*** ___ S.W.3d ___, 2015 WL 162075, 01-13-00875-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (01-13-15).

Facts: Mother and Father had one Child before they divorced. In the final decree, Father was ordered to pay child support. Subsequently, both parents filed motions to modify Father's child support obligation. During the proceedings, Father filed a motion asking the trial court for sanctions against Mother for (1) failing to fully disclose her medical history and (2) failing to provide her tax returns. In the same motion, Father requested a continuance for more time to obtain Mother's medical history. The trial court granted Father's motion for sanctions but did not identify the ground(s) on which the sanction was based. The trial court denied Father's motion for continuance.

Father appealed, arguing that because the trial court granted his motion for sanctions, it erred in denying his motion for a continuance.

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

Opinion: A sanctions order must state the particulars of good cause supporting the sanctions. However, a failure to object to the form of a sanctions order waives any error. Here, Father's motion identified two grounds for sanctions but only identified one ground for a continuance. The trial court's order sanctioned Mother, but the order did not state the particulars of good cause supporting the sanctions. However, Father failed to object to the form of the order. Thus, there was no basis for Father's claim that the trial court sanctioned Mother for failing to fully disclose her medical history.

PERMANENT INJUNCTION DISSOLVED BECAUSE MOTHER FAILED TO PLEAD FOR SUCH RELIEF.

¶15-2-35. *Finley v. Finley*, No. 02-11-00045-CV, 2015 WL 294012 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (01-22-15).

Facts: Mother and Father had one Child during their marriage. After the parties separated, Husband broke into Mother's home by throwing a brick through a glass door. Husband tried to take the Child from Mother and punched Mother in the face. Soon after that incident, Mother filed a petition for divorce and an application for a protective order.

During the divorce proceedings, Father's attorney withdrew, so Father filed a motion to continue the final hearing. Although the trial court did not rule on Father's motion, he did not appear at the final hearing. Mother provided testimony, and the trial court granted the divorce and awarded Mother a protective order and a permanent injunction.

Father appealed, arguing, among other complaints, that the trial court abused its discretion by including a permanent injunction in the final decree when Mother did not plead for such relief.

Holding: Affirmed as Modified

Opinion: A permanent injunction cannot stand in the absence of (1) pleadings requesting such relief, (2) the granting of a trial amendment to add a request for a permanent injunction, or (3) trial of the issue by consent. Here, because none of these requirements were met, the trial court abused its discretion by including a permanent injunction in the final decree. Thus, the court of appeals dissolved the permanent injunction, modified the final decree to omit any reference to the permanent injunction and affirmed the remainder of the decree as modified.

Editor's comment: *Like I said above about In re Bustos and King v. Lyons: This case is a nice change from that old saw, "Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children." E.g., Leithold v. Plass, 413 SW 2d 698, 701 (Tex. 1967). J.V.*

SUPREME COURT WATCH

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

***In the Matter of the Marriage of H.B. v. J.B.*, 11-0024,** (pet. granted, oral argument held on November 5, 2013) 326 S.W.3d 654 (Tex. App.—Dallas Aug. 31, 2010) (reversed and remanded) (Dallas County) (amicus briefs filed by Texas State Representative Warren Chisum and the Honorable Todd Staples in support of the State of Texas).

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

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

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

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

In this fraud suit by Byrd against the law firm that represented his ex-wife in a divorce, the issues are (1) whether attorney immunity protects lawyers who allegedly forged a bill of sale for property awarded to the ex-wife in the decree (with tax consequences to the ex-husband) and (2) whether the burden to show the attorney-immunity doctrine's fraud exception should be borne by the ex-husband as plaintiff. Byrd's suit against Cantey Hanger alleged that the firm prepared paperwork to transfer ownership of an airplane his ex-wife got in the divorce but arranged for its sale from Byrd's leasing company to a third party, falsely listing the ex-wife as the leasing company's manager. As a result, the leasing company incurred tax liability that the divorce decree specified the ex-wife would bear. The trial court granted summary judgment to the law firm on the immunity question. The appeals court affirmed.

14-0095
Wayne Ventling v. Patricia M. Johnson
from Nueces County and the Corpus Christi/Edinburg Court of Appeals
Oral argument held on January 13, 2015

Two principal issues in this contest over interest from a final divorce decree's enforcement are:

(1) whether the appeals court's decision that relief should have been granted instead of the trial court's denial of it by interlocutory order triggers interest from the date of the interlocutory order and
(2) whether a judgment ostensibly disposing all claims is final if a claim for attorney fees remains pending.