SECTION REPORT
FAMILY LAW

http://www.sbotfam.org Volume 2015-3 (Summer)

click on title to jump to page

IN THIS MONTH'S REPORT

NEWSLETTER EDITOR
Georganna L. Simpson
Georganna L. Simpson, P.C.
1349 Empire Central Drive, Ste. 600
Dallas, Texas 75247
214.905.3739 • 214.905.3799 (fax)
georganna@glsimpsonpc.com

COUNCIL ADMINISTRATIVE ASSISTANT
Christi A. Lankford. christil@idworld.net
Section Wear and Publications

MESSAGE FROM THE CHAIR

As I write, I am peering out of my office window at the first sunny and rain-free day that many of us have witnessed after what seemed never ending weeks of dark clouds, torrential rains, and disastrous flooding. I hope that this beautiful day is a prequel to the Summer yet to come and that each of you all take some time to rest, relax, and enjoy it.

Legislative Session

By the time you read this, the 84th Regular Session of the Texas Legislature will have closed, and 11 of the 14 bills approved for the Family Law Section's legislative program will be headed to the Governor. The program included bills affecting temporary orders in modification proceedings, enforcement of temporary orders, Associate Judges performing name changes, digitalized signatures, waivers of citation, updated TRO language, definitions and disclosures relating to family violence, application of uniform definitions, and the first major revision to the child custody evaluation process in thirty years. Thanks to those who serve on the Legislative Committee of the Family Law Section, whose work never ends, as they now begin to prepare the package for the next legislative session. Thanks also to those section members who, on their own dime, volunteered their valuable time to meet with legislators, testify before legislative committees, and all of the other attendant duties and tasks that are an inherent part of the success of the Section's legislative package. We also owe a debt of gratitude to the lawmakers who sponsored and supported our legislative package, the Texas Family Law Foundation for their ongoing efforts in working towards passage of the package, as well as protecting family law attorneys and parties to family law cases by their efforts at blocking the bad bills, and Steve and Amy Bresnen and Bresnen & Associates for their continued and unrelenting efforts on behalf of the Foundation in this regard. Thanks to you all, and the many more who may not have not been named, but are certainly not forgotten. For more information, please plan to attend the Family Law Section's Legislative Update CLE events in Dallas, Houston and Austin. See www.texasbarcle.com for specific dates and locations.

Pro Bono Efforts Continue

One of the many important goals of the Family Law Section continues to be to provide every indigent Texan access to an attorney for their family law case. We have a very active Pro Bono Committee that puts together live seminars across the state and via webcast. The price of admission to a seminar, which qualifies for mandatory CLE credit, is the commitment to handle two family law pro bono matters over a twelve month period. These seminars result in hundreds of indigent Texans having access to legal help for their family law matter. Thank you to the Pro Bono Committee for their hard work, and the Section Members who volunteered their time and paid their own expenses to travel across the state providing CLE.

Continuing Legal Education

The Advanced Family Law Course will take place in San Antonio on August 3-6, 2015 at the Marriott Rivercenter. Please join me and the Course Directors, Hon. Judy Warne and Kristal Thomson, for the most intensive family law seminar of the year. For those of you new to family law, or just looking for an update on the basics, make sure and attend Family Law 101 (aka "Bootcamp") on August 2nd, directed by Natalie Webb.

A new course, spearheaded by Gary Nickelson has been added to the agenda as well, the *Masters of Family Law* taking place at Horseshoe Bay on September 25-27, 2015. This new course is designed to educate family law attorneys in advancing their practice to a higher level, with each registrant working intensively in small groups with Masters of Family Law in a personalized atmosphere designed to teach more effective ways to practice, while simultaneously allowing for individual questions and conversations with true experts. Registration is limited to 100 registrants, each having practiced at least 50% family law for five years.

Coming up in November, New Frontiers in Marital Property Law (directed by Chris Nickelson and Cindy Tisdale) in Denver on October 15-16, 2015, and in December, Advanced Family Law Drafting (directed by Hon. Scott Beauchamp) in Dallas on December 10-11, 2015. Check out all of the upcoming State Bar of Texas CLE seminars at www.texasbarcle.com. Also, The Texas Academy of Family Law Specialist's Annual Trial Institute will take place in Charleston, South Carolina on January 15-16, 2016. See www.tafls.org for more information.

Return to Table of Contents

In closing, many thanks to Jimmy Vaught, Immediate Past Chair, the Executive Committee, Council Members, Committee Chairs and Members, and volunteer paralegals, attorneys, accountants and other professionals in the family law community for all of your hard work and commitment to the Family Law Section of the State Bar of Texas. I look forward to being a part of our continuing efforts to protect, advance and enhance the Texas family law community, a community that includes not only all of us, but our clients as well.

Heather L. King
Chair, Family Law Section
State Bar of Texas

BYLAW REVISIONS

At the Family Law Section meeting held during the Advanced Family Law Seminar, members will be voting on the following revisions to the Section Bylaws:

BYLAWS
STATE BAR OF TEXAS
FAMILY LAW SECTION

ARTICLE I
Name and Purpose

Section 1. This Section shall be known as the Family Law Section of the State Bar of Texas.

Section 2. The purpose of the Family Law Section shall be to promote the objectives of the State Bar of Texas by improving Family Law and the practice of Family Law in Texas, subject to the ~~By-Laws~~Bylaws of this Section and the laws, rules and regulations of the State Bar of Texas.

ARTICLE II
Membership and Dues

Section 1. All members of the Section shall be members of the State Bar of Texas, and each shall pay annual dues in an amount set by the ~~council~~Council and approved by the Board of Directors of the ~~Sate~~State Bar of Texas.

Section 2. Subject to the discretion of a majority vote of the Council, associated members may be permitted to join the section. Associate members of the Section shall ~~be persons who meet the qualifications set by the Council, including legal assistants~~consist of non-lawyers and ~~non-attorney academic members~~out of state lawyers, and each shall pay annual dues in an amount set by the Council and approved by the Board of Directors of the State Bar of Texas.

Section 3. Any person eligible to be a member or associate member, upon request of the Treasurer and upon payment of dues for the current year, shall be enrolled as a member or associate member of the Section. Thereafter, dues shall be paid in advance each year beginning on July 1st next succeeding such enrollment. Any member or associate member whose annual dues shall be more than 6 months past due shall thereupon cease to be a member or associate member of the Section.

ARTICLE III
Officers and Council

Section 1. The Officers shall be Immediate Past-Chair, Chair, Chair-Elect, Vice-Chair, Treasurer and Secretary, which shall comprise the Executive Committee.

Return to Table of Contents

Section 2. There shall be a Council, which shall consist of the Chair, Chair-Elect, Vice-Chair, Treasurer, and Secretary, together with twenty-five other members to be elected by the Section as hereinafter provided, all of whom shall be a voting member of the Council. A member of the Council must be a member of the Section.

Section 3. The Chair, Chair-Elect, Vice-Chair, Treasurer, and Secretary shall be nominated and elected, in the manner hereinafter provided, at the Annual Meeting of the Section in each year, to hold office for a one-year term beginning at the close of the Annual Meeting at which they shall have been elected, and ending at the close of the Annual meeting of the Section one year hence, and until their successors shall have been elected and qualified.

Section 4. The terms of the elected Council members shall be for five years, divided into five sections of five members each so that each year the terms of the five members shall expire. At each Annual ~~meeting~~Meeting of the Section, five members of the Council shall be nominated and elected to serve for five years. ("Year" as used herein ~~used, meaning~~shall mean a term beginning at the close of the Annual Meeting at which they shall have been elected and ending at the close of the first succeeding Annual Meeting.) The unexpired terms of any vacancy in the Council membership, other than Officers, shall be filled by election by the Council.

Section 5. Unless excused by the Executive Committee, any member who misses ~~two out of any three consecutive meetings~~more than one Council meeting shall be removed from office and a successor shall be elected by the Council. ~~The Executive Committee may excuse any absence for a death in the family of the member, the member being called to trial in a court more than 100 miles from the member's office on the business day immediately prior to or following the meeting, illness, or for good cause shown.~~

Section 6. No person who has served a full 5-year term as a Council member shall be eligible for election ~~as a member of the Council, if then currently a member of the~~ to another full 5-year term as a Council ~~and has served a full elected term of five years~~member, except ~~that~~ the Executive Committee may nominate and the Section may~~, in its discretion, re-~~ elect ~~to membership~~ a person who has served a full 5-year term as a Council member to fulfill not more than one ~~member each year who has served as a officer or member of the Council continuously for~~ additional 5-year term (Silver Bullet Provision). This provision may be exercised by the Executive Committee only one time per year. Furthermore, this provision does not ~~more than five preceding years. A person who may not succeed herself or himself as a member of~~ bar a person from being nominated and elected to serve a full 5-year term if that person has been off the Council ~~shall be eligible for election as an Officer~~for at least one year.

Section 7. No person shall be eligible for election as a member of the Council or as an Officer if that person is at the time of the election a partner, associate shareholder, member or employee of another voting member of the Council or an Officer of the Section or such member's or Officer's law firm, except as follows:

On a 2/3 ~~favorable~~affirmative vote of the voting members of the Council and Officers present, a second partner, associate, shareholder, member or employee of a law firm may be placed on the slate for election and be eligible for election so long as the second firm member's term will not overlap the existing member's current term as a member or Officer by more than one (1) year. This is the exclusive means by which a second member of the same law firm can become eligible for election to the Council as a member or Officer. Nominations from the floor at the Annual Meeting will not be accepted if the person so nominated is a partner, associate, shareholder, member or employee of the same law firm as a member of the Council or Officer (including Immediate Past-~~chair~~Chair) currently serving.

In no event shall more than two partners, associates, shareholders, members or employees of the same law firm be eligible to serve as members of the Council (including service as Officers) at the same time.

Return to Table of Contents

In no event shall more than one partner, associate, shareholder, member or employee of the same law firm be eligible for election to serve as an Officer (including Immediate Past-Chair) at the same time.

Notwithstanding the foregoing, in the event currently serving members of the Council or Officers become partners, associates, shareholders, members or employees of the same law firm while they are serving, no such member or Officer shall be required to resign. However, no additional partners, associates, shareholders, members or employees of that law firm will be eligible for election or to serve as members of the Council or as Officers until such time as the addition of a member of that law firm would be in compliance with the foregoing restrictions.

Section 8. No person shall be eligible for election as a member of the Council or an Officer if that person is at the time of the election a spouse of or related within one degree of consanguinity or affinity to another voting member of the Council or an Officer~~.~~, except as follows:

~~Section 9. Sections 7 and 8 of this Article shall not apply to any Officer or member of the Council who was originally elected to the Council before January 1, 1994 or is currently serving. Sections 7 and 8 of this Article shall apply to anyone who is not an Officer or Council member on January 1, 1994.~~

On a 2/3 affirmative vote of the voting members of the Council and Officers present, a spouse of or person related within one degree of consanguinity or affinity to another voting member of the Council or an Officer may be placed on the slate for election and be eligible for election so long as the spouse of or person related within one degree of consanguinity or affinity to another voting member of the Council or an Officer's term will not overlap the existing member's current term as a member or Officer by more than one (1) year.

Section 9. The Council may remove an Officer or member of the Council when such removal is determined by the Council to be in the best interest of the Section. Such removal requires an affirmative vote of at least 2/3 of the Council members (not counting the member facing removal).

Section 10. A vacancy may be declared in any seat on the Council upon death, resignation, election as an Officer, or removal of the member. Vacancies are to be filled in accordance with these Bylaws.

ARTICLE IV
Nomination and Election of Officers and Council

Section 1. Not less than six months prior to each Annual Meeting, the Chair shall appoint a Nominating Committee consisting of five members of the Section, including the Chair-Elect, which committee shall make and report nominations for the election of Officers and members of the Council at the next Annual ~~meeting~~Meeting, to succeed those whose terms will expire ~~a~~at the close of that Annual Meeting. The report of the Nominating Committee shall be approved or amended by the Council in accordance with these ~~By Laws~~Bylaws, resulting in the slate of proposed members of the Council and Officers. Such slate of proposed members of the Council and Officers shall thereafter be communicated to the members of the Section in writing by conventional mail, facsimile, or any form of electronic data transmission, including, but not limited to e-mail, no less than thirty days prior to the Annual Meeting.

Section 2. All elections shall be by majority vote of the members of the Section present and voting at the Annual Meeting at which time the election is held.

ARTICLE V
Duties of Officers

Section 1. Chair. The Chair shall preside at all meetings of the Section and of the Council, shall formulate and present to the State Bar of Texas an annual report, and shall perform such other duties and acts as usually pertain to this office.

Section 2. Chair-Elect. Upon the death, resignation, or during the disability of the Chair, or upon the Chair's refusal to act, the Chair-Elect shall perform the duties of the Chair for the remainder of the Chair's term except in the case of the Chair's disability, then only during so much of the term as the disability continues. The Chair-Elect shall be responsible for and perform those tasks and functions assigned by the Chair, and in conjunction with the other Officers as authorized by the Council, shall attend generally to the business of the Section.

Section 3. Vice-Chair. The Vice-Chair shall serve as parliamentarian. The Vice-Chair shall be responsible for and perform those tasks and functions assigned by the Chair, and in conjunction with the other Officers, as authorized by the Council, shall attend generally to the business of the Section.

Section 4. Treasurer. The Treasurer shall be the custodian of all financial books, papers, documents and information of the Section, shall keep an accurate record of all monies appropriated to and expended for the use of the Section, and, in conjunction with the other Officers, as authorized by the Council, shall attend generally to the business of the Section.

Section 5. Secretary. The ~~secretary~~Secretary shall be the custodian of all nonfinancial books, papers, documents, and property of the Section, shall keep a true record of the proceedings of all meetings of the Section and of the Council, and, in conjunction with the other Officers, as authorized by the Council, shall attend generally to the business of the Section.

Section 6. The ~~Award~~Awards & Scholarship Committee shall consider nominations for the Dan Price Award ~~and,~~ Hall of Legends ~~Awards~~Award, Ken Fuller Pro Bono Award and Joseph W. McKnight Best Family Law CLE Article Award and shall make a recommendation to the Executive Committee for those awards not less than thirty days prior to the meeting at which the awards are to be bestowed. The Executive Committee shall consider the recommendations and shall vote to approve or disapprove the committee recommendations. ~~Neither the Dan Price Award nor the Hall of Legends Award~~ None of the Awards listed in this Section may be bestowed without the approval by a majority vote of the Executive Committee.

The Committee for the Hall of Legends Award will include all prior Hapll of Legends Award recipients, the Chair of the Section, one Past-Chair and the Chair of the Awards Committee.

ARTICLE VI
Duties and Powers of the Council

Section 1. The Council shall meet at such times and places as the Chair shall designate; or as may be called (1) by three of the Officers, or (2) by the Secretary when requested in writing ~~so~~ to do so by five members of the Council. A majority of the voting members shall constitute a quorum for the transaction of business at any meeting of the Council.

Section 2. The Council shall have general supervision and control of the affairs of the Section subject to the provisions of the ~~By-Laws~~Bylaws of the Section and the rules governing the State Bar of Texas. It shall especially authorize all commitments or contracts which shall entail the payment of money, and shall authorize the expenditures of all monies appropriated or authorize commitments or contracts which shall entail the payment of more money during any fiscal year than the amount which shall have been previously appropriated ~~to~~by the Section for such fiscal year.

Section 3. The Council may authorize the Chair to appoint committees from Section members to perform such duties and exercise such powers as the Council may direct, subject to the limitations of these ~~By-Laws~~Bylaws.

Section 4. The Council, during the interim between Annual Meetings, shall fill vacancies in its own membership or in the offices of Chair-Elect, Vice-Chair, Treasurer or Secretary, to fill the unexpired term.

Section 5. All binding action of the Council shall be by a majority vote of the Council.

Section 6. Members of the Council shall vote in person, except for proposals submitted for consideration under Section 7 below.

Section 7. The Chair may, upon approval of the Executive Committee, submit or cause to be submitted in writing (including by fax or e-mail), to each of the members of the Council, any proposition upon which the Council may be authorized to act, and the members of the Council may vote upon such proposition or propositions so submitted, by communicating their vote thereon, in writing (including by fax or e-mail) over their respective signature (however, in the case of e-mail, no signature is required as long as an e-mail is received from the recognized e-mail address of the member), to the Secretary, who shall record upon the minutes each proposition so submitted, when, how, at whose request same was submitted, and the vote of each member of Council thereon, and keep on file such written and signed votes. If the votes of a majority of the members of the Council so recorded shall be in favor of such proposition, such majority votes shall constitute the binding action of the Council.

Section 8. The Council may appoint such representatives and agents as the Council may deem necessary. Such persons shall have such authority and perform such duties as shall from time to time be prescribed by the Council. All representatives and agents shall hold their respective positions at the pleasure of the Council and may be removed and discharged at any time, with or without cause, provided that removal without cause shall not prejudice the contract rights, if any, of such representatives and agents.

ARTICLE VII
Meeting of the Section

Section 1. The Annual Meeting of the Section shall be held during the Annual Meeting of the State Bar of Texas or such other place and time chosen by the Council, as permitted by applicable State Bar rules, with such program and order of business as may be arranged by the Council.

Section 2. The members of the Section present at any ~~meting~~meeting shall constitute a quorum for the transaction of business.

Section 3. All binding action of the Section shall be by a majority vote of the members present.

ARTICLE VIII
Miscellaneous Provisions

Section 1. The fiscal year of the Section shall be the same as that of the State Bar of Texas.

Section 2. All dues and other money shall be deposited in such depository or depositories as designated by the Chair, subject to the control of the Council and withdrawn on checks or drafts signed by the Treasurer ~~and supervised by~~ or the Chair. In the event of disability of the Treasurer, the Chair may exercise the ~~posers~~powers herein delegated to the Treasurer.

Return to Table of Contents

Section 3. Expenditures out of the dues or other money, whether current or accumulated, shall be made only by the authority of the Officers or Council. Except for good cause shown, all reimbursement requests submitted by Council members to the Treasurer for payment must be submitted to the Treasurer within 90 days of incurring the expense.

Section 4. No salary or compensation shall be paid to any Officer, Council Member or committee member.

Section 5. Any action or policy recommendation of the Section shall not be construed to represent the official actions or policy of the State Bar of Texas. Such action or policy recommendation of the Section shall reflect State Bar action or policy only if the same is acted on and approved by the Board of ~~Directs~~Directors, the General Assembly, or by the membership in response to a referendum. Otherwise, any action or policy recommendation of the Section is merely informative and represents only the views of the Section or committee submitting them.

Section 6. No Officer or Council member may endorse any candidate in his or her official capacity as an officer or member of the Council.

Section 7. These ~~By-Laws~~Bylaws and any amendments thereto shall ~~not~~ become effective ~~until~~when approved by resolution of the Board of ~~Directs~~Directors of the State Bar of Texas or in accordance with the rules and regulations governing the State Bar of Texas by its members in a duly authorized referendum or in a general assembly ~~in~~at an annual convention.

Section ~~7~~8. These ~~By-Laws~~Bylaws, as amended, shall be effective as of the ~~annual Meeting~~meeting at which they are approved ~~by the Section with respect to the election or succession of Officers and Council Members~~.

Section ~~8~~9. The Section is authorized to collect membership dues and govern expenditures of income. The Section shall submit to the Executive Director by July 15 each year a complete financial report of Section dues for the Preceding fiscal year ending ~~may~~May 31 which includes a balance sheet and income statement. Additionally, the Section will submit to the State Bar accounting department on a monthly basis a true and correct copy of ~~al~~all canceled checks and deposit slips and the check register of Section dues.

The Section's funds available for investment may only be invested in any account, time or demand, which is ~~Federally~~federally insured or backed, and in any corporate ~~Securities~~securities (U.S. Corporation issued debt which has a minimum of an A rating or higher with the emphasis placed on AA and AAA).

ARTICLE IX
Amendments

These ~~By-Laws~~Bylaws may be amended at any meeting of the Section by a majority vote of the members of the Section present and voting, provided such proposed amendment shall first have been approved by a majority of the Council and provided, further, that no amendment so adopted shall become effective until approved by the Board of Directors of the State Bar of Texas.

CERTIFICATION

We certify that the foregoing constitutes a true and correct copy of the ~~By-Laws~~Bylaws of the Family Law Section of the State Bar of Texas, as amended and approved by the Officers and Council at the meeting in ~~New Orleans, La. On December 9, 2006~~_____, and adopted by majority vote of the Section members present and voting at the ~~Annual~~Section meeting in ~~El Paso~~_____, Texas on ~~May ___, 2007~~_____, 2015.

_____
Brian L. Webb
~~By-Laws~~ Chair, Bylaws Committee ~~Chair~~

_____
~~James Loveless~~Heather L. King
Chair, Family Law Section

Return to Table of Contents

TABLE OF CASES

Return to Table of Contents

In the Law Reviews and Legal Publications

LEAD ARTICLES

The Modern Family *Court Judge: Knowledge, Qualities, and Skills for Success*, Natalie Anne **Knowlton**, 53 Fam. Ct. Rev. 203 (April 2015).

Parenting Time and Co-Parenting for Unmarried Parents, Jessica **Pearson**, 53 Fam. Ct. Rev. 217 (April 2015).

Understanding Today's Changing Families, Cynthia **Osborne** & Nora **Ankrum**, 53 Fam. Ct. Rev. 221 (April 2015).

Family Law and Nonmarital Families, Clair **Huntington**, 53 Fam. Ct. Rev. 233 (April 2015).

Establishing Parenting Time in Child Support Cases: New Opportunities and Challenges, Jessica **Pearson**, 53 Fam. Ct. Rev. 246 (April 2015).

Parenting in Texas Child Support Cases, Alicia G. **Key**, 53 Fam. Ct. Rev. 258 (April 2015)

Calculating Safety: Reckoning with Domestic Violence in the Context of Child Support Parenting Time Initiatives, Nancy **Ver Steegh** & Gabrielle **Davis**, 53 Fam. Ct. Rev. 279 (April 2015).

Risks from Clients and Opposing Parties for Family Law Attorneys, James N. **Bow**, Michael C. **Gottlieb**, & Hon. Dianna J. **Gould-Saltman**, 53 Fam. Ct. Rev. 317 (April 2015).

A Universal Approach to Alimony: How Alimony Should be Calculated and Why, Marshal S. **Willick**, 27 J. Am. Acad. Matrim. Law 153 (2014–2015).

The Enforcement of Premarital Agreements at the International Level, John **Sill**, 27 J. Am. Acad. Matrim. Law 245 (2014–2015).

We Are the New IT Lawyers, Kathleen A. **Hogan**, 37-SPG Fam. Advoc. 4 (Spring 2015).

Understanding an ART Lawyer's HIPAA Obligations, Andrea **Bryman**, John J. **Husson**, Bradford **Kolb**, & Brian **Esser**, 37-SPG Fam. Advoc. 6 (Spring 2015).

Using Technology Inside & Outside the Courtroom, Jonathan W. **Lounsberry**, 37-SPG Fam. Advoc. 8 (Spring 2015).

Practicing Family Law in "The Cloud", Carl W. **Gilmore**, 37-SPG Fam. Advoc. 14 (Spring 2015).

Apps 101: Outfitting Your Mobile Device, Scott **Bassett**, 37-SPG Fam. Advoc. 18 (Spring 2015).

Just You and Your IPad, Bryan **Sims**, 37-SPG Fam. Advoc. 24 (Spring 2015).

Authenticating Facebook Posts, Photos, and Other Evidence, Melanie K. **Reichert**, 37-SPG Fam. Advoc. 28 (Spring 2015).

Social Media as Evidence: Navigating the Limits of Privacy, Simon R. **Goodfellow**, 37-SPG Fam. Advoc. 32 (Spring 2015).

Confidentiality in the IT Age, Bryan **Sims**, 37-SPG Fam. Advoc. 38 (Spring 2015).

Federalism, Marriage, and Heather Gerken's Mad Genius, Kristin A. **Collins**, Comment, 95 B.U.L. Rev. 615 (March 2015).

Federalism and Family Status, Courtney G. **Joslin**, 90 Ind. L.J. 787 (Spring 2015).

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

Sometimes the Cases that Nobody Wants Can Have the Greatest Impact, Brandi **Reis** & Hilly **McGahan**, 40-APR Mont. Law. 14 (April 2015).

Families, Law, and Literature: The Story of a Course on Storytelling, Judith D. Moran, 49 U.S.F.L. Rev. 1 (2015).

Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform, Kelly Alison **Behre**, 21 Wm. & Mary J. Women & L. 525 (Spring 2015).

The Kids Are Not All Right: Using the Best Interest Standard to Prevent Parental Alienation Approach to Provide Relief, Kelly **Schwartz**, Comment, 56 B.C.L. Rev. 803 (March 2015).

Military Divorce: Returning Warriors and "The Home Front", Mark E. **Sullivan**, 62 La. B.J. 364 (February/March 2015).

Non-Exclusive Adoption and Child Welfare, Josh **Gupta-Kagan**, 66 Ala. L. Rev. 715 (2015).

Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality, Douglas **NeJaime**, 124 Yale L.J. 340 (March 2, 2015).

Return to Table of Contents

Tips from an International Matrimonial Attorney, David N. **Schaffer**, 27 DCBA Brief 32 (March 2015).
Call of Duty: Family Warfare Edition, Amy M. **Privette**, 27 Regent U.L. Rev. 433 (2014-2015).
Marriage, the Constitution, and the Future of Family Law, Mark **Strasser**, 21 Wash. & Lee J. Civil Rts. & Soc. Just. 303 (Spring 2015).
The Nature of Family, the Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment, John **Witte, Jr.**, 64 Emory L.J. 591 (2015).
Faith-Based Private Arbitration as a Model for Preserving Rights and Values in a Pluralistic Society, Michael J. **Boryde**, 90 Chi.-Kent L. Rev. 111 (2015).
From Contract to Status: Collaboration and the Evolution of Novel Family Relationships, Elizabeth S. **Scott** & Robert E. **Scott**, 115 Colum. L. Rev. 293 (March 2015).
Tribal Laws & Same-Sex Marriage: Theory, Process, and Content, Ann E. **Tweedy**, 46 Colum. Hum. Rts. L. Rev. 104 (Spring 2015).
The Invisible Families: Child Welfare and American Indian Active-Duty Service Members and Veterans, Kathryn E. **Fort** & Peter S. **Vicaire**, 62-APR Fed. Law 40 (April 2015).
Loving v. Virginia as a Civil Rights Decision, Dorothy E. **Roberts**, 59 N.Y.L. Sch. L. Rev. 175 (2014–2015).

TEXAS ARTICLES

Original Meaning and Marriage Equality, William N. **Eskridge, Jr.**, 52 Hous. L. Rev. 1067 (Symposium 2015).

ASK THE EDITOR

Dear Editor*:** A potential client came into see me the other day and told me that his wife, whom he ceremonially married in 2010, is claiming that they have been informally married since 2005. He tells me that between 2005 and 2010, she filed tax returns with the IRS claiming to be single, she listed herself as single on a deed, and on a bond application for a motor vehicle dealer's license. Is this evidence alone enough to defeat the "holding out" element necessary to establishing an informal marriage. ***Drowning in Denton

Dear Drowning in Denton: This evidence does not conclusively negate the holding out element, especially when there is no evidence that these representations were disseminated in the community. *Riley v. Riley*, 14-11-00346-CV, 2012 WL 2550957 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (mem. op.); *see also In re Giessel*, 734 S.W.2d 27, 31 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (proponent spouse's "representations in tax returns and other documents that she was single go to the weight of the evidence; they do not negate a marriage, as a matter of law"); *Martinez v. Lopez*, No. 01–09–00951–CV, 2011 WL 2112806, at *5 (Tex. App.—Houston [1st Dist.] May 26, 2011, no pet.) (mem.op.) (evidence of holding out was sufficient despite the protesting spouse purposefully leaving the proponent's name off various financial transactions and filing federal tax returns as "single"); *Bundle v. Nigh*, No. 14–94–01145–CV, 1996 WL 65381, at *5 (Tex. App.—Houston [14th Dist.] Feb. 15, 1996, no writ) (not designated for publication) (evidence of holding out was sufficient despite documentary evidence, such as tax returns and a warranty deed, indicating the proponent spouse and decedent were single); *cf. Smith v. Deneve*, 285 S.W.3d 904, 910 (Tex. App.—Dallas 2009, no pet.) (discounting the proponent spouse's evidence of contracts that listed the couple as husband and wife in part because "there is no evidence that anyone in the community ever saw those contractual representations"); *Danna v. Danna*, No. 05–05–00472–CV, 2006 WL 785621, at *2 (Tex. App.—Dallas Mar. 29, 2006, no pet.) (mem.op.) (discounting the protesting spouse's references to "wife" in Valentine card and "spouse" in AARP enrollment form because there was "no evidence that anyone in the community saw the card or the AARP form"). *But see Small v. McMaster*, 352 S.W.3d 280, 286 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (evidence was factually insufficient on the element of holding out, considering in part that the proponent spouse filed federal income taxes as "single").

Return to Table of Contents

IN BRIEF

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

Child support: Because "courts in domestic relations cases are often called upon to make close and difficult decisions based on inadequate or incomplete records," the Supreme Judicial Court of Maine could not say that the trial court abused its discretion when it refused to award retroactive child support to a party. *Buck v. Buck*, ___ A.3d ___, 2015 WL1198606 (Me. Mar. 17, 2015) (per curiam). The Wyoming Supreme Court found error when a trial court ordered a parent "to both reimburse transportation costs and pay retroactive child support" because that would amount to a double-dip under the parties' prior settlement agreement. *Wright v. Wright*, 344 P.3d 267 (Wyo. Mar. 9, 2015). In Vermont, an obligor is entitled to an offset for SSDI derivative benefits received by a child, *Rathbone v. Corse*, ___ A.3d ___, 2015 WL 2431786 (Vt. May 22, 2015), whereas in Nebraska, allowing Social Security offsets to child support is discretionary with the trial court. *Johnson v. Johnson*, ___ N.W.2d ___, 290 Neb. 838 (Neb. May 15, 2015).

College: The Indiana Supreme Court rejected a mother's joinder of Ball State University in a modification suit to require the father to pay the daughter's tuition when Ball State refused to release the daughter's transcript, so that the daughter could enroll at Indiana University Northwest, until someone paid the daughter's "outstanding tuition bill in excess of $9,000." *Ball State Univ. v. Irons*, 27 N.E.3d 717 (Ind. Mar. 18, 2015). The Georgia Supreme Court found no error when a trial court ordered a father to pay college expenses for nine semesters, under an agreement upon divorce requiring that the child attend school full time, rejecting the father's contention that the child did not attend full time because she did not go to summer school. *Mims v. Mims*, ___ S.E.2d ___, 2015 WL 2167059 (Ga. May 11, 2015). Applying Pennsylvania law, the Vermont Supreme Court held that an agreement requiring a father to pay his daughters' college tuition if they attended institutions acceptable to him did not require a "consultation" with the father prior to attending college but only that the choice of college be "acceptable," or in other words, "reasonable and appropriate." *Dyke v. Scopetti*, ___ A.3d ___, 2015 WL 1514965 (Apr. 3, 2015).

Division: The North Dakota Supreme Court agreed with a trial court that certain mineral and surface interests awarded to a wife could be valued, as against the husband's contention that because the interests' value was speculative, the court should have awarded each party a percentage of future royalty payments from the interests. *Feist v. Feist*, ___ N.W.2d ___, 2015 WL 1914392 (N.D. Apr. 28, 2015). In another opinion, the Court found no error when a trial court declined to apply discounts for lack of marketability or lack of control to certain entities it awarded to the wife, noting that evidence was presented on this subject to the trial court and that the trial court's valuation of the properties was between the parties' respective estimates. *Adams v. Adams*, ___ N.W.2d ___, 2015 WL 1966341 (N.D. May 4, 2015). The Alaska Supreme Court reversed and remanded a property division because the trial court abused its discretion by taking into account that the wife would have primary care of the couple's child and that the husband was receiving two businesses that generated income when it made the division. *Engstrom v. Engstrom*, ___ P.3d ___, 2015 WL 2328723 (Alaska May 15, 2015).

Evidence: In West Virginia, a mutual restraining order signed upon divorce, by which each party is enjoined from having "any direct or indirect contact" with the other, cannot be merely agreed to but must be supported by pleadings and evidence. *Riffle v. Riffle*, 2014 WL 6634469 (W.V. May 13, 2015). A California appellate court reversed a juvenile court's removal of a child from a home when, over counsel's objection, the court refused to allow an incarcerated parent to be present and present evidence, the appellate court noting that the trial court's decision was "particularly troublesome because nothing suggested the court needed to proceed immediately to adjudicate the petition and craft a disposition order." *In re M.M.*, ___ Cal. Rptr. ___, 2015 WL 2206549 (Cal. Ct. App. May 12, 2015). The Indiana Supreme Court reversed a determination that a child was in need of services because the trial court berated the father to the point that the father waived his right to a fact-

Return to Table of Contents

finding hearing, resulting in deprivation of the father's fundamental rights. *M.K. v. Marion County Dep't of Child Servs. & Child Advocates, Inc.*, ___ N.E.3d ___, 2015 WL 2214311 (Ind. May 12, 2015).

Fees: The Wyoming Supreme Court approved an award of attorney's fees to a pro bono attorney based on discovery abuse by the opposing party, nothing that otherwise a significant deterrent to discovery abuse would be absent in such cases. *Windham v. Windham*, ___ P.3d ___, 2015 WL 1814541 (Wyo. Apr. 28, 2015). A Maine trial court abused its discretion by failing to award attorney's fees to the wife in a divorce case when the husband made significantly more money than the wife, had been found in contempt for failure to pay interim spousal support and failed to file an updated child support affidavit without good cause. *Jandreau v. LaChance*, ___ A.3d ___, 2015 WL 2242515 (Me. May 14, 2015). A California respondent in a domestic violence restraining order proceeding did not succeed when he argued that attorney's fees should not be paid to the prevailing petitioner because had he known that attorney's fees were at issue, he would have settled the case. *Faton v. Ahmedo*, ___ Cal. Rptr.3d ___, 2015 WL 2329052 (Cal. Ct. App. May 15, 2015).

Parent-child: Nebraska courts have the power to order that a child not be home schooled if they find that home schooling is not in the child's best interest. *In re Cassandra B.*, 861 N.W.2d 398 (Neb. Apr. 3, 2015). An Alaska trial court abused its discretion when it forbade the father to have visitation with his daughter on the father's Indian reservation until she was eight years old, the father's history of making "false or exaggerated claims of abuse" by the mother notwithstanding. *Red Elk v. McBride*, 344 P.3d 818 (Alaska Mar. 13, 2015). A California juvenile court judge erred by terminating dependency jurisdiction over a nine-year-old who absolutely refused to visit with his mother, even though the judge said, "It's [a] difficult if not impossible situation but there's [nothing] I can do about it." *In re Ethan J.*, 186 Cal. Rptr.3d 740 (Cal. Ct. App. May 6, 2015). In Illinois, the doctrine of "equitable adoption" is part of probate law and has no application to child custody proceedings. *In re Scarlett Z.-D.*, 28 N.E.3d 776 (Ill. Mar. 19, 2015).

Relocation: A California court did not abuse its discretion when it refused a mother's moveaway request because the court found that if the mother moved away, the father would "work hard" to make sure that the child had ongoing contact with the mother, but the mother would not reciprocate. *Winternitz v. Winternitz*, 185 Cal. Rptr.3d 458 (Cal. Ct. App. Mar. 27, 2015). A divided Iowa Supreme Court found no change of circumstances when a mother, "without consultation and little warning," moved herself and the parties' two children "approximately seventy miles from a Des Moines suburb to a rural home in a new school district." *In re Hoffman*, ___ N.W.2d ___, 2015 WL 2137550 (Iowa May 8, 2015). The Vermont Supreme Court rejected a mother's contention that the father's objection to her move from Vermont to Georgia was moot because the father then moved to Georgia, when the father testified that he came to Georgia only to be near his son and intended to return to Vermont if he obtained custody. *Falanga v. Boylan*, ___ A.3d ___, 2015 WL 2341754 (Vt. May 15, 2015).

Unfriended! Observing that "it would appear that the next frontier in the developing law of the service of process over the internet is the use of social media sites as forums through which a summons can be delivered," a New York trial court authorized service in a divorce case by private message on Facebook. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709 (N.Y. Sup. Mar. 27, 2015) (collecting handful of cases allowing and disallowing service by social media).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

I've been thinking about sports statistics lately. Partly this is because, without professional football right now, my mind turns to sad and pointless exercises involving players who aren't even playing. (Also, I like the sibilants of “sport statistics.”) Really, if somehow, NFL games could be simulated on computer in such a way that I couldn't tell the difference between that and a real game, I’d be perfectly happy. Look at the benefits. Real people wouldn't get concussions, and I could still bet on the games. Everyone wins.

But the other reason I've been thinking about sports stats is that I'm impressed with the way everything is measured so precisely in the world of athletic endeavor. A football player isn’t just good, he’s got a QB rating, a completion percentage, yards after catch, yards after contact, etc. Baseball players are analyzed in every way imaginable, rendering them into living, breathing equations inside of uniforms. But my favorite stat, started in hockey and perfected in basketball, is the plus/minus ratio. This is a cold-hearted way of deciding whether a team is better or worse with a particular guy on the court.

The application to law is obvious, right?

Wouldn’t it be great to measure your performance in court by your “completion percentage,” i.e. the number of objections you make that are sustained? Prove-ups, I suppose, would be the same as “free throw percentage” or “extra point percentage” because you’re supposed to make most of them, but occasionally something goes wrong. “Punts blocked” would cover the failure to even secure your motion to dismiss or when a clerk rejects your filing.

The family law equivalent of “steals” in basketball is when a party projects his or her own failings on the other party preemptively, like the adulterer who claims his wife is having an affair. “Parental alienation” is an offensive rebound by another name. I suppose “flopping” is signing a waiver of citation and service, and, to borrow from auto racing, “laps completed” refers to the number of trials, hearings and mediations in which you’ve been involved, or maybe just your years of practice. I like the idea of keeping up with “saves,” like when there’s an obvious pleading problem in your case as you enter the courtroom but no one seems to notice. This kind of “big data” is used in business and academics all the time these days, and it should be available to both bench and bar.

The most important statistic of all, of course, is the plus/minus ratio, and if we could only measure it in law, it would reveal all we need to know. There are lawyers who, when they enter a room, whether a courtroom or a conference room, bring something helpful, or at least clarifying, to the situation. They get a plus score because they actually make things better. Then there are some lawyers (no one you know) who detract from a case, only making it worse, and they get a minus score. Their mere presence serves to lower the quality of the action.

I will save “slugging percentage” for another article. Hey, get out there and enjoy some warmer weather!

---

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

Return to Table of Contents

ARE THE MH EXPERT'S OPINONS STALE?

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

Stale expert opinions are neither relevant nor reliable. The issue shows often with mental health experts in family law, though it may arise in any case that relies on mental health testimony. For example, a psychologist files a report of a six-month social study or evaluation she conducted. Ten months later, she takes the stand to assert her opinions—stark, bold, and based on data over one year old. Are the opinions stale?

Consider three factors to determine whether the mental health expert's opinions are stale: the evaluation's referral question, the passage of time, and the methods on which the expert relied for her opinions.

An evaluation's referral question opens the door to your "staleness" inquiry. A specific referral question provides context for gauging whether the evaluation's results are stale. For example, a referral question asking an evaluator to provide a structured parenting plan in a child custody dispute is specific. Or a question asking an evaluator to assess whether a defendant at the time of the offense could tell right from wrong and had a mental disorder is specific. In contrast, a referral question merely asking the evaluator "to assess the psychological health and stability of the parties" is nonspecific—it offers no subject- or time-based context with which to judge whether the opinion is stale and, thus, relevant and reliable.

The passage of time, the second factor, builds on the specific referral question. For example, opinions based solely on year-old data to address a parenting plan referral question are likely stale—in most cases, the court should incorporate more current information into its parenting plan decision. On the other hand, year-old data of a defendant asserting an insanity defense of a criminal act near that time may not be stale because the data addresses the defendant's state of mind at the time of the offense.

The methods on which the expert relies for her opinion, the third factor, speaks to the reliability, or trustworthiness, of the expert's data-gathering techniques. For instance, the reliability of personality tests, such as the MMPI-2, to accurately describe an examinee's current emotional problems lessens as time increases from when the examinee completed the testing. Year-old MMPI-2 results used to describe a parent's current emotional state are stale, at best. In contrast, year-old MMPI-2 results gathered shortly after a crime that are used to describe a defendant's emotional state at the time of the crime could properly inform an insanity defense question.

Use these three factors to determine whether the expert's opinions are stale and to frame your ensuing relevance and reliability arguments to the court on the matter.

POST-DIVORCE CHECKLIST

By Christy Adamcik Gammill, CDFA[1]

Many think that signing the divorce papers is finally the end of the strenuous process, when in reality it is just the beginning of it. Divorce is not only emotionally difficult, but also has its financial nuances. Below is a checklist of common, and often, difficult tasks you are faced with once you begin your new life. Having a team of professionals to help guide you through your transition away from married life is essential to protecting your financial future for you and your family. Most importantly those professionals will help you conquer this list.

1. Financial Planning

- Review your financial goals with your advisor, including an updated cash flow analysis

---

[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.*

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

Return to Table of Contents

2. **Banking / Brokerage / Advisory Accounts**
   - Update your accounts by notifying the appropriate entities of account authorization changes and your name/address change, including banks, schools, utilities, and insurance companies
   - Sign and execute the processing of any forms necessary to change the account registrations
   - Name Change - obtain new Social Security card, Driver's License, credit cards, passports, etc.
3. **Revise/transfer titles on personal assets** - House(s), Automobile(s), Boat, and Other Non-Financial Assets
4. **Retirement Plans/Accounts**
   - Qualified Domestic Relations Order or "QDROs" these pertain to qualified plans such as 401(k)s, 403(b)s, Pensions, Profit Sharing Plans, KEOGH's, and Money Purchase Plans
     - Submit certified original QDRO along with necessary pages of your divorce decree to the respective company for approval. Once the QDRO is approved you will receive a letter stating it is in good order (or not).
     - Once the plan administrator processes the QDRO, a new shell account is setup within the company's plan for the benefit of the non-employee spouse [known as the "Alternate Payee"] and the percentage or dollar amount awarded is transferred into the new account.
     - Once the funds have been divided and deposited into Alternate Payee's account, he or she will receive documents via mail or e-mail to rollover or distribute the funds once the account has been segregated.
     - If you have begun working with a financial professional, you may engage one to aid you in this process
   - Individual Plans- include but not limited to: IRAs, SEP IRAs, Simple IRAs, Roth IRAs, and Annuities
     - The holding firm or brokerage account will typically require their own papers and/or a letter of instruction from the original account holder to divide or transfer the account into someone else's name.
     - Annuities can be complex and the implications of a transfer or ownership should be carefully evaluated before assigning to another party or transferring to an ex-spouse*.
     - Be certain to obtain tax advice regarding consequences of transfers and liquidations of non-qualified plans. These will have a cost basis that will be important to keep track of in the future.
     - The brokerage firm will typically have its own IRA Rollover/Distribution Form to transfer funds incident to divorce. Your ex-spouse will need to sign and account certain necessary pages of your decree. It is recommended to have these papers ready to go for the prove-up of the divorce.
   - Follow up diligently on your Divorce Transfer Paperwork to ensure it is moving along and properly processed.
5. **In Health, Life, and Other Insurance**
   - COBRA - allows you to stay on your ex-spouse's employer sponsored health insurance up to 36 months after divorce. There will be a premium equal to 102% of current Employer cost, which may be a temporary solution to finding private health insurance. Stay informed of changing health care laws and options.
   - Private Health Insurance - consult with a health insurance broker who will spend time helping you in regards to medical conditions, premiums, physicians, and deductibles. For pre-existing conditions, consult a broker about finding the best health insurance carrier and putting it into place.
   - Life Insurance: You will want coverage at least equal to present value of future stream of payments of Child Support and Alimony or Property Settlement/distribution. You will also want to update beneficiaries on policies owned by you.
   - Property/Casualty Insurance: This is a great time to shop your existing/new coverage for auto, umbrella and homeowners/renters insurance.
6. **Social Security**
   - You may be eligible for up to 50% of your ex-spouse's Social Security Retirement Benefit if you were married for 10 years or longer. If you are unmarried, your benefit would be the greater of 100% of your own benefit, or 50% of your ex-spouse's benefit at full retirement age. The earliest

non-widow retirement benefit may be as early as age 62 and will have an applicable benefit reduction and may be permanently reduced.

7. **Real Estate**
   - If you or your ex-spouse are required to re-finance the mortgage or take your name off of the mortgage, you will want to work with your attorney to get the appropriate documents signed and executed.
8. **Wills and Trusts**
   - Update plans for your estate. Wills, Trusts, and Powers of Attorney will all need revising.
   - If you have minor children: Special trusts need to be created for certain assets such as IRAs, life insurance and some annuities. You may also need to revisit guardianship choices.
9. **Mortgage**
   - Review options with Mortgage Planner regarding qualifying for a new home purchase or the refinance of a current home
   - Determine if vacating spouse will be compensated and how this will be structured/what types of loan programs are available
   - If child support and/or alimony will be used for qualifying for new loan discuss current lender guidelines with a Mortgage Planner
10. **Professional Team of Advisors**
    - Build a team of people to help you work through financial issues
      - **Family Law Attorney** – Team Leader: Custody, Property and Alimony expert; preparation and execution of legal documents. Will oversee timely payments on financial obligations or cooperation in the signing of any of the aforementioned documents
      - **Financial Professional** – partners with other experts during your divorce; post-divorce financial planning and asset management and risk management. If you did not have the primary relationship with your advisor during your marriage, you may consider interviewing one of your own.
      - **CPA** – income tax preparation and analysis for current and future personal and business tax returns; returns may be particularly complicated during the year of divorce
      - **Estate Planning Attorney** – new Wills, Trusts; See-Through Trust if you have minor children
      - **Health Insurance Broker** & **Mortgage Broker - assist in the areas above**

*It is recommended that you seek advice from a financial professional before making any changes to an annuity contract and you consult your tax advisor as well.

Return to Table of Contents

ARTICLES

Here's a Quarter, Call Someone Who Cares: The Decline of the Heart-Balm Torts and Marital Causes of Action and Alternative Justifications for Their Resurrection

By Daniel E. Jones [1]

Introduction:

Generally speaking, the common law of virtually every state once offered spurned lovers the opportunity to air their spouses' marital misgivings before a civil court in hopes of being awarded a financial judgment from either their spouse or their spouse's illicit partner. These common-law causes of action were known as the "heart-balm" torts and they existed in some form or fashion in practically every state. The most prevalent heart-balm torts included alienation of affection, criminal conversation, and breach of promise to marry.

The "alienation of affection" cause of action once permitted a spurned spouse to bring a civil suit against anyone who could be shown to have been the direct cause of the loss of affection between the spouses. The justification for alienation of affection suits was rooted in the idea that the wife was the property of the husband and that any interference with the husband's right to his property ought to be actionable in court.[2]

Despite its name, "criminal conversation" was a civil cause of action that permitted a spouse to sue anyone who had engaged in sexual relations with his or her spouse. The criminal conversation cause of action was predicated primarily on two outmoded notions—the status of adultery as a criminal act and the exclusive right of the husband to engage in sexual activity with his wife.[3]

Finally, the "breach of promise to marry" cause of action permits one spouse to bring suit against the other for breaking off an engagement before the wedding. Breach of promise to marry suits were primarily utilized to give rejected wives-to-be compensation for their diminution in value as prospective partners, but are now used as a means to allow a spurned fiancé to recover wedding expenses, for example.[4]

But as time wore on and society progressed, the admittedly arcane justifications undergirding the heart-balm torts became less satisfactory to society and ultimately to those whose opinion really mattered—state legislators. Beginning in the 1930s and perhaps most stridently in the 1950s, many state legislatures began statutorily eliminating these common-law causes of action.[5] Once fixtures of practically every jurisdiction's common law, very few states still permit suits for alienation of affection, criminal conversation, and breach of promise to marry.[6] This article examines the history of the heart balm torts, particularly in Texas, examines their current status as viable causes of action and seeks to identify possible contemporary justifications for their revival.

Alienation of Affection

The alienation of affection tort is usually one brought by a deserted spouse against a third party allegedly responsible for the failure of the marriage. Typically the defendant in an alienation of affection lawsuit is the deserting spouse's new lover, although various courts have permitted alienation of affection suits against any other individuals whose conduct inappropriately interfered with the marriage relationship.[7] Such defendants

---

[1] Mr. Jones is scheduled to receive his J.D. from the University of Texas in 2015 and may be reached at danieledwardjones@utexas.edu.

[2] William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 Ariz. St. L.J. 985, 985-1004 (2001).

[3] Caroline L. Batchelor, Comment, *Falling Out of Love With an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. Rev. 1910, 1910-14 (2009).

[4] J.P. Ludington, *Measure and elements for breach of contract to marry*, 73 A.L.R.2d 553. (1960)

[5] William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 Ariz. St. L.J. 985, 987 (2001).

[6] *Id.*

[7] *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988)

Return to Table of Contents

have included other family members, marriage counselors, employers, and various others.[8] In general, the plaintiff in an alienation of affection lawsuit must prove: (1) that true affection existed in the marriage at one time; (2) that the affection is now destroyed and (3) that the defendant caused that destruction (or at least impairment) of the marital relationship.[9] The essence of the tort is that the defendant must be shown to have aggressively lured the plaintiff's spouse away—this includes proving actual malice or improper motives on the defendant's part.[10] Unlike the similar but wholly distinct tort of criminal conversation (discussed supra), adulterous relations are not required—an alienation of affection case can be successfully prosecuted without the defendant having even touched the plaintiff's spouse. [11]

General History:

The origins of the alienation of affection cause of action are not entirely clear. Like any tort cause of action, alienation of affection lawsuits seek to remedy an injury that has allegedly been endured by the plaintiff.[12] Courts have variously described the injury redressed by this cause of action as an injury to the person, an injury to personal rights, an injury to feelings, and even an injury to property.[13] But the most commonly articulated explanation for the injury that alienation of affection suits seek to remedy is an injury to property—principally, a trespass.[14] In a (thankfully) bygone era, wives were considered the chattel of their husbands—and any interference by a third-party with the marriage relationship was therefore a trespass to the property rights the husband maintained either in his wife, or in his relationship with his wife.[15] In that sense, the alienation of affection cause of action is essentially the marital analogue to the civil cause of action for intentional interference with a contractual relationship. Alienation of affections made its first appearance in the United States in New York in 1866.[16] Shortly thereafter, every state except for Louisiana recognized the tort, although the specific elements of the tort varied slightly across jurisdictions.[17]

Texas History:

The phrase "alienation of affection" first appears in Texas appellate law in 1922 in an opinion rendered by the Court of Criminal Appeals of Texas in *Bowlin v. State*—a murder case, in fact.[18] There, farmer and spurned-lover Henry Bowlin crept through his spouse's lover's property under the cover of darkness and shot and killed the adulterer through his bedroom window.[19] In examining the possible justifications for murder set forth by Mr. Bowlin's defense, the court referenced "alienation of affection" as a probable motive (Mr. Bowlin had intercepted mail from Mrs. Bowlin that indicated that her affections had indeed been alienated by the victim, Jim Richardson).[20] However, the reference to the *Bowlin* case in this article is largely a historical one, as the use of "alienation of affection" in *Bowlin* was merely a reference to a possible motive for the killing—it was not a reference to a specific and independent civil cause of action in the family law context.

The first appearance of "alienation of affection" as a cause of action in a family law case came in 1925 in the decision handed down in *Burnett v. Cobb*.[21] In *Burnet*, the court held, "the overwhelming weight of modern authority is to the effect that the wife, under laws similar to those of this state, can maintain a suit such as here is prosecuted." Although the *Burnett* opinion is the first reference in Texas appellate law to alienation of affection as a civil cause of action, the opinion does not make clear whether the court is proclaiming that a wife (as

---

[8] *Id.*
[9] Restatement (Second) of the Law of Torts § 683
[10] *Id.*
[11] *McMillan v. Felsenthal*, 482 S.W.2d 9 (Tex. Civ. App.1972)
[12] Restatement (Second) of Torts § 683 (1977)
[13] Jill Jones, Comment, *Fanning and Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 Pepp. L. Rev. 61, 61-70 (1999)
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Bowlin v. State*, 93 Tex. Crim. 452, 248 S.W. 396, 467 (App. 1922).
[19] *Id at 456*.
[20] *Id* at 399.
[21] *Burnett v. Cobb*, 262 S.W. 826, 827 (Tex. Civ. App. Amarillo, 1924, no writ).

opposed to *only* a husband) may now maintain such an action, or, instead whether the court is merely holding that such a cause of action is a legitimate one, regardless of whether the plaintiff is a wife or a husband.

Despite well-developed common law roots, the Texas Supreme Court did not recognize alienation of affection as a cause of action until 1971.[22] Even more bizarre is the cause of action's relatively brief stint in the family law litigator's toolbox. "Alienation of affection" had hardly reached its jurisprudential adolescence before it was abolished as a cause of action by the Texas legislature in 1987.[23] The legislative record for HB 203, which abolished the cause of action indicates that the primary bases for abolishing the cause of action, at least facially, included social and economic concerns. Advocates for HB 203 argued that emotionally harmed spouses primarily utilized the cause of action vindictively and rarely recovered.[24] To boot, alienation of affection lawsuits were very expensive to litigate.[25] Thus, advocates for HB 203 made a compelling case for the bill's passage and the resultant abolition of alienation of affection as a cause of action: because the suits were rarely prosecuted successfully, were exorbitantly expensive to litigate, and because such litigation could cause great damage to the family unit, the continued viability of alienation of affection lawsuits as a key to the courthouse was unjustifiable.[26] Also of note is that at the time HB 203 was passed in 1987, 35 other states had also abolished the cause of action, either statutorily or judicially.[27]

Elements:

In order to succeed in an action for alienation of affection, by a preponderance of the evidence a Texas plaintiff was required to prove, by a preponderance of the evidence, that: (1) the defendant intentionally or purposely enticed the spouse, (2) there was a loss of affection or consortium, and (3) the defendant's conduct was the controlling cause of the loss of consortium (benefits of the family or marriage relationship).[28] While it may not be apparent at first review, Texas courts have held that the first element (intentional or purposeful enticement of the spouse by the defendant) necessarily requires that the plaintiff prove the defendant enticed the spouse *with the intent of interfering with the marriage relationship*.[29] Consequently, satisfying this first element requires that the plaintiff also prove that the defendant had *knowledge* of the marriage relationship.[30]

Successfully prosecuting an alienation of affection case can be very difficult, as a cursory inspection of the elements illustrates. For instance, because the first element requires the plaintiff to prove that the defendant had knowledge of the marriage relationship, a defendant in an alienation of affection lawsuit could theoretically escape liability by claiming that he or she was not aware that the individual with whom he or she engaged in adulterous conduct was married. Further and perhaps more interesting is the escape from liability provided to defendants who can prove that despite the adulterous conduct that transpired, the adulterous spouse still (somehow) has maintained affections for the plaintiff-spouse.[31] While it may sound difficult to convince the fact finder that a spouse who has committed adultery with a third-party is all the while still in love with his or her plaintiff-spouse, such claims have in fact been successful in defeating alienation of affection claims in various jurisdictions, including Texas.[32] Take, for example, *Felsenthal v. McMillan*. There, the defendant defeated the plaintiff's alienation of affection action through a summary judgment motion based on the deposition testimony of the plaintiff and his spouse. The plaintiff's spouse testified in her deposition that despite having engaged in adulterous intercourse with the defendant, she still had affection for her husband.[33] In his deposition, the plaintiff acknowledged that he was satisfied that she in fact still maintained affection for him.[34]

Further still, and perhaps more outlandish than the previously described escape hatches for liability, is the possibility that a court would entertain a defense that while the third-party knowingly engaged in adulterous

---

[22] *Reagan v. Vaughn*, 804 S.W.2d 463, 475 (Tex. 1990)
[23] TFC 1.106-1.107
[24] *Smith v. Smith*, 126 S.W.3d 660 (Tex. App.—Houston [14th Dist.] 2004, no pet.)
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Blankenship v. Towe*, No. B14-92-00632-CV, 1993 WL 236314, at *1 (Tex. App.—Houston [14th Dist.] July 1, 1993, no pet.) (not designated for publication).
[29] *McMillan v. Felsenthal*, 482 S.W.2d 9 (Tex. Civ. App.—Tyler 1972, no writ).
[30] *Id.*
[31] *Felsenthal v. McMillan*, 493 S.W.2d 729, 729 (Tex.1973)
[32] *Id* at 730.
[33] *Id.*
[34] *Id.*

conduct with the plaintiff's spouse, some external proof exists that this particular adulterous conduct was not the singular controlling cause of the alienation of affection. One can easily imagine a situation in which some other event, and not the adulterous conduct, could be proven to be the singular controlling cause of the alienation of affection. In such a situation, it is conceivable that the adulterous conduct could have had some effect on the eventual alienation of affection but was not, in and of itself, the controlling cause. While none of the above-mentioned escape hatches for liability are technically defenses (they are, in fact, negations of essential elements), they are demonstrative of how easily a defendant might escape liability, and consequently, how difficult it could be for a plaintiff to marshal the evidence necessary to successfully prosecute an action for alienation of affection.

Status:

As discussed above, alienation of affection as a cause of action has been abolished by statute in the state of Texas. And while a majority of states have also abolished alienation of affection as a cause of action, it remains in use in several states. Specifically, alienation of affection lawsuits are permitted in 7 states.[35] Of these, alienation of affection perhaps enjoys the most use in North Carolina.

Criminal Conversation

General History:

The marital tort of criminal conversation involves neither criminal activity nor conversation. Its roots can be traced to the 17th century English common law, when adultery was a criminal act, women had no legal status, and punishments for adultery were far worse for adulterous women than they were for adulterous men.[36] Some ancient civilizations permitted the man to kill the person with whom his wife had been intimate.[37] Far from permitting the adulterous wife to escape liability for her role in the deed, other civilizations quite literally provided that the adulterous wife be fed to the dogs.[38]

The marital tort of criminal conversation is relatively simple compared to alienation of affection—criminal conversation seeks merely to punish the act of adultery.[39] Unlike alienation of affection, criminal conversation requires proof that the defendant had sexual intercourse with the plaintiff's spouse.[40] And unlike alienation of affection, the tort of criminal conversation is not punishing the defendant for interference with the plaintiff's property. Rather, the tort of criminal conversation punishes the defendant for interfering with the plaintiff's exclusive right to sexual relations with his or her spouse (it is conceivable that, in a sense, criminal conversation is attempting to protect a property interest in the exclusive right to have sexual relations with his or her spouse, but it has not been widely described as such).[41] Also unlike alienation of affection, criminal conversation is widely regarded to be a strict liability tort—hardly any defense or justification insulates a defendant from prosecution for the tort.[42] Surprisingly (surprising at least in modern society, that is) the defendant's lack of knowledge of the marriage relationship was no defense.[43] Neither was it a defense that the plaintiff's spouse was the aggressor in the adulterous act.[44] Most surprisingly, the defendant is still liable even in situations where the plaintiff's spouse has actively misrepresented his or her marital status.[45] The only defense recognized by courts in criminal conversation cases is the plaintiff's consent to the adulterous act—but such consent is difficult to prove and will not be readily implied.[46]

---

[35] Jill Jones, Comment, *Fanning and Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 Pepp. L. Rev. 61, 61-70 (1999)
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Felsenthal v. McMillan*, 493 S.W.2d 729, 730 (Tex. 1973)
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

To succeed in a criminal conversation action, most jurisdictions require the plaintiff to prove: (1) that the plaintiff and his or her spouse were actually in a valid marriage relationship; and (2) that the defendant and the plaintiff's spouse engaged in sexual intercourse.[47] In many cases, a plaintiff will allege causes of action for both criminal conversation and alienation of affection, given the similarity of the torts and the likelihood that if a cause of action lies for one, a cause of action probably lies for the other.[48]

In most jurisdictions that maintain the cause of action, the plaintiff is entitled to recover for emotion distress resulting from the fact that the defendant has had sexual relations with his wife. In the determination of the amount recoverable for such emotional distress, the husband's neglect or indifference toward his wife is a factor to be considered.[49] If, during the marriage with the plaintiff, the wife has repeatedly had sexual relations with the defendant, the plaintiff's damages will be enhanced, if she has previously had sexual relations with other men his damages will be reduced.[50] If, in addition to the loss of exclusive cohabitation with his wife, the plaintiff has lost her affections and service in the home, he is entitled to recover therefore.[51] He is also entitled to recover for any medical expenses incurred by reason of the pregnancy or illness of his wife resulting from the intercourse with the defendant.[52]

Texas History:

The first mention of criminal conversation in a Texas appellate court opinion is the Supreme Court of Texas' decision in *McGowen v. Bush*.[53] But the *McGowen* decision did not review any of the actual substantive regarding law criminal conversation—instead, the decision concerned the validity of a note paid in settlement of a criminal conversation accusation, and whether it had been signed under duress (the accuser allegedly chased the man out of his house, brandished a shotgun, and told others he would kill the man if he didn't pay up).[54] *McGowen* illustrates the prevalence of the criminal conversation cause of action in the 19th century, and the methods employed by alleged interveners seeking to prevent litigation and settle debts with their accusers.

In 1973, the Texas Supreme Court made its first acknowledgement of the tort of criminal conversation as a legitimate cause of action in the state, holding in *Felsenthal v. McMillan* that the state had in fact adopted the common law cause of action through article one of the constitution.[55] In *Felsenthal*, the plaintiff husband initiated a lawsuit for criminal conversation and alienation of affection against his wife's paramour, who had admittedly engaged in sexual relations with the plaintiff's wife. The plaintiff and his wife were owners of a small bar in Longview. According to the evidence admitted by the trial court, it was common for the wife to run the bar when her husband was away conducting other business activity.[56] On the night of the alleged adultery, a group of bar patrons, including the defendant, walked the plaintiff's wife to her car upon the closing time.[57] The defendant then asked the plaintiff's wife to ride with her in his car—she did just that, and rode with the defendant to his nearby lakehouse, where the plaintiff's wife engaged in sexual intercourse with the defendant.[58] Sometime later, the plaintiff was made aware of what transpired that night between his wife and the defendant and sued the defendant for both alienation of affection and criminal conversation.[59] The trial court granted summary judgment for the defendant on both the alienation of affection and criminal conversation claims.[60] Specifically, with regard to the alienation of affection claim, the court granted the defendant' summary judgment motion based on the wife's deposition testimony that she still had affections for her husband, despite having engaged in sexual intercourse with the defendant.[61] The trial court also made note of the plaintiff's

---

[47] Restatement (Third) of Torts §685 (2014)
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *McGowen v. Bush*, 17 Tex. 195 (Tex. 1856)
[54] *Id* at 198.
[55] *Felsenthal v. McMillan*, 493 S.W.2d 729, 731 (Tex. 1973)
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

deposition, as he expressed therein his satisfaction that the encounter was impromptu and not planned, and was satisfied that his wife still had affection for him. [62]

On appeal, the appellate court ruled that the trial court erred with respect to granting the motion for summary judgment on the plaintiff's claim for criminal conversation.[63] Thus, upon petition, the Supreme Court of Texas was left to determine whether a cause of action for criminal conversation was indeed still a valid cause of action in Texas. The majority decided that it was still a valid cause of action, and even stated in dicta that the cause of action would also lie for an aggrieved wife against her husband's paramour (a generous gesture).[64] But another important aspect of the McMillan decision is important in understanding the history of the criminal conversation cause of action in the State of Texas—the dissent.

The four dissenting justices stated that criminal conversation should no longer be recognized as a cause of action.[65] The dissenting justices highlighted the aspects of the case that made the majority's decision to keep the criminal conversation cause of action on the books unseemly. Primarily, the dissent focused on the following facts: that the wife's intercourse with the defendant was consensual, that the marriage was still intact, and that the wife maintained affection for her husband all the while. The dissenting justices expressed significant anxiety about holding the defendant liable when the intercourse was consensual and the resulting harm done to the plaintiff and his marriage was apparently, and even admittedly, minimal. [66]

Aside from expressing concerns about the facts of the case and whether justice was being served by the Court, the dissenting justices claimed that criminal conversation had no place in the Texas legal system, reasoning that while the commission of adultery was a serious immoral transgression, an award from a court could neither alleviate the emotional distress caused by the adultery nor strengthen the marital bonds that had been weakened.[67] The dissenting justices also expressed their doubt that criminal conversation, a strict-liability tort for the third-party, could deter the adulterating spouse from committing adultery. Overall, the dissent foreshadowed the impending demise of the criminal conversation cause of action—it would be abolished by statute just 2 years later.

Status:

The *McMillan* case appears to have been the impetus for the abolition of criminal conversation as a cause of action; less than two years after it was handed down, the Texas legislature abolished criminal conversation statutorily.[68] Perhaps the facts of the *McMillan* case, and the seemingly outrageous idea that a consensual sex act between adults could impose a liability on one of those adults and not the other, even if the other consenting adult lies about his or her marital status, was enough to motivate state legislators to rectify this apparent injustice. But instead of merely limiting the criminal conversation cause of action so that it would be inapplicable in fact scenarios like *McMillan*, the state legislature completely eliminated the criminal conversation cause of action—this suggests that while the unique fact situation in *McMillan* might have been the impetus for criminal conversation's abolition, the legislators may have been ready to eliminate the cause of action for other unknown reasons.

Elements:

Because the cause of action for criminal conversation was only recognized by the Supreme Court of Texas in 1973 and was subsequently abolished by statute less than two years later, there is a dearth of appellate cases clearly delineating the elements a plaintiff is required to prove in order to successfully prosecute a criminal conversation action. In fact, the only appellate court decision that clearly articulates the elements is the previously discussed *Felsenthal v. McMillan* opinion. There, the appellate court stated that a plaintiff is burdened

---

[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Smith v. Smith*, 126 S.W.3d 660 (Tex. App. –Houston [1st Dist.] 2004, no pet.)

with proving that (1) an actual marriage existed between the spouses and (2) sexual intercourse occurred between the defendant and the guilty spouse during the coverture.[69] In essence, the cause of action as set forth in Texas was, for all practical purposes, the same as it was in other jurisdictions.

Breach of Promise to Marry

General History:

The heart-balm tort of breach of promise to marry was originally a cause of action utilized by soon-to-be brides who were jilted by their fiancés after engagement but prior to marriage.[70] Inherited from English common law just as the other heart balm torts were, the breach of promise to marry cause of action was rooted in the treatment of a promise of marriage, and in fact the subsequent marriage, as property transactions.[71] Generally, a successful prosecution of a breach of promise to marry action required that the plaintiff prove (1) an agreement to be married; and (2) a breach of that agreement to be married.[72] Spurned women would bring the suits and seek recovery of one of three types of monetary damages (specific performance of the contract was, thankfully, not an available remedy): expectation damages to place her in the financial and social position she would have attained had the marriage taken place (very much akin to the rights or remedies available to a divorced spouse at the time); traditional tort damages to recover for the emotional anguish and humiliation of the broken engagement; and reliance damages including the lost economic security, opportunity costs of a foregone alternative such as employment, and also the impaired prospect of marrying another due to the woman's status now as damaged goods.[73] The only defense a runaway groom could mount in attempt to skirt a breach of promise to marry action was to allege that his soon-to-be bride either lacked chastity or otherwise acted in a manner substantially at odds with prevailing norms of womanhood. But, such a defense did not always come without cost—if the jury believed that the man was simply slandering the would-be-bride without foundation, the jury could increase the damages it awarded to the would-be-bride as punishment.[74] By the late nineteenth century, breach of promise to marry lawsuits were more common in America (where they had been adopted as part of the common law) than they were in England (their supposed place of jurisprudential birth). While the suits certainly enjoyed popularity in the local newspapers and entertainment tabloids, the suits were not without their critics.

Critics of the breach of promise to marry lawsuits often condemned what they believed were excessive jury verdicts that did far more than recompense an injured party. Rightly or wrongly, many also claimed the suits were rich blackmail and extortion fodder for less-than-scrupulous women. Compounding the criticism these lawsuits began to face was the shift in societal treatment of the engagement-to-marry from property transaction to expression of love and affection. Subsequently, when the injury that gained the focus of society became the broken heart and not the broken bank, society became skeptical of individuals who attempted to mend their broken hearts in the courtroom. By the 1930's, states began to statutorily abolish a variety of heart balm statues—including breach of promise to marry.

Texas History:

The first consideration of a breach of promise to marry action in Texas case law was the Texas Supreme Court's decision in *Glasscock v. Shell*. There, the plaintiff was the father of a spurned bride who had yet to reach the proper age to bring the suit herself. The father brought the action against the defendant, Glasscock, who the father alleged had entered into a contract to marry his daughter, which Glasscock then allegedly breached. The issue before the Supreme Court of Texas was the proper measure of damages in such a case—a matter of first impression for the court. The court discussed a variety of analogous causes of action and synthesized their findings with the general rules set forth for the pleading of damages. The court found that although exemplary damages may be awarded in such breach of promise to marry lawsuits, the plaintiff must plead for the exemplary damages above and beyond the regular compensatory damages that a jury may award on the simple cause of action.

The court's decision in *Glasscock* illustrated the various ways in which a breach promise to marry could be brought. The simplest case is that which was set forth by the facts in *Glasscock*—a simple breach of a

[69] *Felsenthal v. McMillan*, 493 S.W.2d 729, 729-32 (Tex.1973)
[70] Alan Grant and Emily Grant, *The Bride, the Groom, and the Court: A One-Ring Circus*, 35 Cap. U. L. Rev. 743, 743-57 (2007).
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

promise to marry where the plaintiff sought only to receive compensation for the defendant's breach. But under certain circumstances, a simple breach of promise to marry can be enhanced, specifically and only if the plaintiff pleads aggravating factors and asks for damages as a result of those aggravating factors. For instance, a plaintiff could allege that in addition to entering into an agreement to be married to the defendant, she was induced by the defendant to have premarital intercourse with him. Or that in addition to entering into an agreement to be married, she expended considerable amounts of time and money preparing for a wedding—time and money that are now, by his breach, rendered wastes. Simply put, acts or omissions by the defendant that are likely to enhance the damage endured by the plaintiff— either emotionally, physically or financially—can subject the defendant to other types of damages (above and beyond the normal compensatory damages), including punitive damages and exemplary damages—but only if the plaintiff has specifically pleaded for them.

Elements:

A plaintiff alleging a breach of promise to marry must prove: (1) a valid contract to marry, (2) a breach of that promise to marry and (3) damages sustained by plaintiff as a result of the breach of the promise to marry.[75] A plaintiff bringing a breach of promise to marry action must do so within a year of the date the cause of action accrues.[76] A promise to marry is deemed to be continuous—it is therefore valid and continues until an event takes place that either ends the promise to marry or makes the promise to marry invalid by action of law.[77] A mere postponement of the marriage or failure to marry on the day set for ceremony does not necessarily constitute a breach, as the contract is deemed to continue in force until one of the other parties, either by words or by conduct, shows that he or she is unwilling to fulfill the contract.[78] While a breach of promise to marry suit was originally only the refuge of a spurned would-be-bride, the enactment of the 1972 Amendment to the Texas Constitution providing for equality under the law extended the cause of action (at least hypothetically) to use by spurned would-be-grooms.

Status:

Despite the fact that the so-called heart balm torts have fallen into general disrepute among legislators and jurisprudential scholars alike, the cause of action for breach of promise to marry remains a viable cause of action in Texas. But viability should not be mistaken for vitality--the last Texas appellate opinion deciding a breach of promise to marry issue was rendered over 40 years ago.[79]

Policy:

Of all the so-called heart-balm torts, breach of promise to marry is perhaps the tort least vulnerable to criticism for attempting to mend principally emotional or social harms in the courtroom. The breach of promise to marry action seeks to remedy actual financial injury suffered by a plaintiff through reliance on the promise of marriage made to her (or him) by the defendant.

Further, the breach of promise to marry action involves a relatively simple issue to adjudicate, and one that is relatively free from sensational and intimate facts when compared to actions for alienation of affection or criminal conversation, and that issue is this—was there an agreement to be married and if there was, did the defendant unjustifiably breach it?

Plainly, the martial tort of breach of promise to marry is easier to justify because it seeks to remedy a serious and substantial economic harm, it does not involve the airing (so to speak) of the sort of dirty laundry seen in other marital tort actions, and it is a relatively simple issue to adjudicate in our court system. Although it may not be the source of a fount of recent appellate decisions, the breach of promise to marry action is a tool that should continue to remain in the family law practitioner's toolbox.

---

[75] *Lohner v. Coldwell*, 15 Tex. Civ. App. 444, 39 S.W. 591 (1897).
[76] Texas CPRC 16.002(a)
[77] *Gutierrez v. Uribe* 104 S.W.2d 569 (Tex. Civ. App. Fort Worth 1937).
[78] *Id.*
[79] Scanlon 1973.

Engagement Ring Cases:

While not a per se marital or heart-balm tort, another cause of action arising under the marriage relationship is that of the conditional gift—specifically in the context of engagement where, for example, the gifting of engagement rings is done "in contemplation of marriage" or "on consideration of marriage." Under the common law, virtually all gifts must satisfy the following three elements in order to be considered completed gifts: (1) the donor must intend to give the gift; (2) the donor must actually deliver the gift to the donee; and (3) the donee must accept the gift.[80] Generally speaking, once these three elements have been satisfied, the donee becomes the owner of the gift and the donor has no right to take the gift back.[81] However, conditional gifts are the exception to the general rule that a donor may not take a gift back once the three elements have been satisfied. Conditional gifts are those gifts given by the donor to the donee with the expectation that a future event or action will take place, and if that future event or action does not take place, the donor may recover the gift.[82] Most jurisdictions classify engagement rings as conditional gifts, where the donor can regain possession of the ring if the engagement is terminated or marriage never occurs. [83]

An important distinction among the jurisdictions that recognize engagement rings as conditional gifts, however, is the ability of the donor to recover the ring when the donor is at fault for the termination of the engagement or the failure of the couple to marry.[84] In jurisdictions known as "fault" jurisdictions, the donor may not recover the ring if the donor is at fault for the termination of the engagement or the failure of the couple to marry.[85] In the so-called "no-fault" jurisdictions, the donor has a right to recover the ring regardless of whether the donor is at fault for the termination of the marriage or the failure of the couple to marry.[86]

Texas History:

The first explicit reference by a Texas court of the possibility of a gift being given in "contemplation of marriage" was made in *Hatchett v. Hatchett*.[87] There, the court was tasked with determining issues irrelevant to the substance of this article, but the court did reveal that whether the gift was given in contemplation of marriage could have bearing on the interest a husband-donor may or may not have in such a gift after marriage.[88] However, the first unequivocal exposition of Texas law concerning the revocability of a gift given in contemplation of marriage came in *Shaw vs. Christie*.[89] There, soon-to-be husband and wife purportedly entered into a contract to purchase land before their marriage, under the condition that if the two never married each other, the property would be owned solely by the husband.[90] The court, noting a lack of Texas case law on the topic, relied on a proposition of the law as set forth in a general legal commentary, and held the following:

> [B]ut that this contract falls within the following proposition of the law announced by 28 C.J. 651, Subject, Gifts, Sec. 48: "Gifts in contemplation of marriage." A gift to a person to whom the donor is engaged to be married, made in contemplation of marriage, although absolute in form, is conditional; and upon breach of the marriage engagement by the donee the property may be recovered by the donor.
>
> The property in issue was not put in the name of the appellee in consideration of her marriage to appellant, but to be held by her for him on condition of their marriage at an indefinite date to be fixed in the future, and if the marriage was not consummated, then she was to reconvey the property to him. The title did not pass to her unconditionally but on a condition that was breached by her. [91]

---

[80] Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 (2003).
[81] *Id.*
[82] Elaine Marie Tomko, *Rights in Respect of Engagement and Courtship Presents When Marriage Does Not Ensue*, 44 A.L.R.5th (1996)
[83] *Id.*
[84] *Id* at §2[a].
[85] *Id.*
[86] *Id.*
[87] *Hatchett v. Hatchett*, 28 Tex.Civ.App. 33, 67 S.W. 163, writ refused.
[88] *Id.*
[89] *Shaw v. Christie*, 160 S.W.2d 989 (Tex. Civ. App. Beaumont 1942)
[90] *Id.*
[91] *Id* at 991.

Elements:

Quite frankly, no Texas case law makes explicit reference to the elements a plaintiff must prove when seeking to recover property given as an alleged conditional gift in contemplation of marriage. However, the elements can be extracted from the relevant Texas case law on the subject. A gift to a person to whom the donor is engaged to be married, and made in contemplation of that marriage, although absolute in form, is considered a conditional gift.[92] Gifts made in contemplation of marriage are subject to the implied condition that they are to be returned if the donee breaks the engagement. Consequently, when a donee breaks an engagement, the recovery of the gifts or their value may be effected.[93] Absent a written agreement, a donor is not entitled to the return of an engagement ring if the donor terminates the engagement.[94] Also, when an agreement between an engaged couple as to the disposition of engagement rings is not in writing, any dispute arising over ownership when the engagement is broken is subject to the fault-based conditional-gift rule.[95] If, however, a binding agreement between the parties exists, application of that rule is not appropriate.[96]

Thus, absent a written agreement between the future spouses concerning the disposition of the engagement ring of gift upon the termination of the engagement, it can be deduced that a party attempting to recover an engagement ring or other gift made in contemplation of marriage will be required to prove: (1) that the gift was made in contemplation of marriage and (2) that the donee (and not the donor) terminated the engagement. The second element is illustrative of the adoption by the state of Texas of the fault-based conditional gift rule, in stark contrast to other jurisdictions (like Iowa, Kansas, Minnesota, Montana, New Jersey and others) where the donor may recover the engagement ring or gift even when the donor is the party who terminated the engagement.[97]

Status:

A donor may still recover an engagement ring or gift in the state of Texas from the donee upon termination of the engagement assuming the above conditions are satisfied. While the amount of Texas case law concerning the issue is admittedly minimal, it is conceivable that the donor's ability to recover the engagement ring is still widely utilized either in the shadow of the law or at the trial court level. Given the high cost of litigation, it is likely that the majority of engagement ring cases are resolved below the appellate level, as the attorney fees that would be necessary to litigate the issue beyond the trial court could easily exceed the cost of the engagement ring or engagement gift itself. The three most recent appellate opinions concerning gifts made in contemplation of marriage were issued in 2008, 2003, and 1994. Beyond these three most recent cases, the next most recent appellate opinion was issued in 1965.

Policy:

The ability of a donor spouse to recover an engagement ring or gift upon termination of the engagement by the donee spouse does not appear to be a very controversial issue, and its continued existence as a tool for spurned donors is in some ways a testament to the relatively benign nature of the cause of action. Perhaps the only area of controversy surrounding the ability of the donor spouse to recover the engagement ring or gift upon termination of the engagement is whether that ability should be conditioned upon the donor's lack of fault for the termination of the engagement. Outside of Texas, a number of jurisdictions (as discussed above) have adopted a no-fault position where the donor may recover the engagement ring or gift even if the donor is the party who terminated the engagement. Courts that adopt this no-fault conceptualization of the conditional-gift

---

[92] *Ludeau v. Phoenix Ins. Co.*, 204 S.W.2d 1008 (Tex. Civ. App.—Galveston 1947). Writ refused n.r.e.; *Shaw v. Christie*, 160 S.W.2d 989 (Tex. Civ. App.—Beaumont 1942).

[93] *McLain v. Gilliam*, 389 S.W.2d 131 (Tex. Civ. App.—Eastland 1965), writ refused n.r.e., (June 16, 1965)

[94] 41 Tex. Jur. 3d Gifts § 16.

[95] *Id.*

[96] *Curtis v. Anderson*, 106 S.W.3d 251 (Tex. App.—Austin 2003) (referring to Tex. Fam. Code Ann. § 1.108).

[97] *Fierro v. Hoel*, 465 N.W.2d 669 (Iowa Ct.App.1990); *Heiman v. Parrish*, 262 Kan. 926, 942 P.2d 631 (1997); *Benassi v. Back and Neck Pain Clinic, Inc.*, 629 N.W.2d 475 (Minn.Ct.App.2001); *Albinger v. Harris*, 310 Mont. 27, 48 P.3d 711 (2002); *Aronow v. Silver*, 223 N.J.Super 344, 538 A.2d 851, 853 (1987).

rule claim (1) it is practically impossible for the courts to determine "fault" in the breakup of an engagement or whether the breakup was justified; (2) engagements are meant to be periods of evaluation, and parties to the engagement should not be penalized for ending a doomed relationship, and (3) the underlying public policy favoring no-fault divorces should also apply to engagements.[98] The court in *Curtis v. Anderson* detailed the above justifications for the no-fault position on the conditional-gift rule at considerable length only to hold that Texas courts in fact subscribed to the fault-based conditional gift rule. The court provided no reasoning for the fault-based conditional-gift rule, other than the fact that it had long been subscribed to by Texas courts.

Should Alienation of Affection and Criminal Conversation Be Resurrected in Texas?

While the causes of action of breach of promise to marry and for the recovery of engagement rings or gifts remain viable in the state of Texas, the causes of action for alienation of affection and criminal conversation do not. As discussed above, alienation of affection and criminal conversation fell victim to statutory abolition at the hands of the Texas legislature after enjoying viability as causes of action against parties interfering with marriage relationships. Admittedly, the justifications for the alienation of affection and criminal conversation causes of action or heart-balm torts were arcane. As discussed in detail above, the alienation of affection cause of action was predicated on the idea that the wife was the chattel of the husband and that any interference in the relationship the property had with his wife (read, "chattel") was an actionable trespass. Similarly, the cause of action for criminal conversation was predicated on the idea that husbands had an exclusive right to sexual activity with their wives. While the principles that supported alienation of affection and criminal conversation as causes of action were abhorrent in their characterization of wives as the chattel of their husbands, modern, more palatable justifications for the resurrection of these heart-balm torts exist, and should be examined.

Various justifications for the resurrection of the heart-balm torts exist. Perhaps the most sensible justification is the similarity between alienation of affection or criminal conversation and the still-viable civil cause of action for interference with a contractual relationship. Texas and virtually every other jurisdiction permit a plaintiff-party to file suit against a defendant-3rd party who intentionally interferes with the plaintiff's contractual relationship with a second party. An odd result occurs, then, as Texas law appears to value business relationships more than it does marriage relationships. Despite the Texas legislature's insistence that the institution of marriage be protected from "threats" like gay marriage, the Texas legislature fails to offer marriage even the slightest protection from third-party interference—a protection that Texas law nonetheless offers to businesses and others who maintain contractual relationships. Flatly, if Texas law offers businesses a protection from third-party interference it should also provide married couples protections from similar intentional interference with their marriage relationships. Further, in the same way that the threat of a potential lawsuit may discourage otherwise would-be third-parties from interfering with established contractual relationships, the resurrection of the alienation of affection or criminal conversation causes of action might ward off individuals who would otherwise contemplate meddling in an existing marriage relationship. If the institution of marriage is one worth "protecting" from gays and lesbians, shouldn't the institution of marriage also be worth protecting from actual threats- like individuals who willfully interfere with it?

Perhaps less obvious than the previously discussed justification is the tendency in some jurisdictions to give less weight (or in some cases no weight at all) to evidence proffered by one spouse about the other spouse's fault in the breakup of the marriage when making an equitable property division upon divorce. In practice, many courts are willing to at least hear evidence of fault, but whether that evidence is actually considered by the fact-finder (or, if it is considered, whether it is given appropriate weight) is practically impossible to tell. In some jurisdictions, testimony regarding fault in a divorce is heard so frequently that many judges tire of hearing it and instead ask the attorneys to move on to other aspects of the case. So if the only venue in which a faithful spouse may seek redress is a court where the judge might ignore the fault of the adulterous or unfaithful spouse at least give insufficient consideration to the issue of fault, the faithful spouse may in fact be deprived of any real opportunity to have his or her day in court on the issue of fault. The resurrection of the heart balm torts would, at the very least, provide a faithful spouse an opportunity to seek some redress against a third-party responsible for the adulterous behavior of the unfaithful spouse.

Another justification for the resurrection of these heart-balm torts is a purely economic one—demand. A cursory glance of some online, community-sourced, question-and-answer pages illustrates just how many people are interested in whether they might be able to pursue a lawsuit against the person with whom their spouse

[98] *Curtis v. Anderson*, 106 S.W.3d 251, 256 (Tex. App.—Austin 2003) (referring to Tex. Fam. Code Ann. § 1.108).

has engaged in marital infelicities. Questions like "can I sue the man my wife is having an affair with?" litter these sorts of general legal advice pages, but no remedy exists for these jilted spouses. Spouses in such situations must instead argue their cases before the court—a court, which, as discussed above, may give the issue of fault little or no consideration when making a division of property.

Perhaps reviving the heart-balm torts of alienation of affection and criminal conversation is too tall a task given their tainted reputation as relics of prehistoric norms. If that is indeed the case, then consideration of a new tort that could provide a spurned-spouse redress without falling prey to the same criticisms as alienation of affection and criminal conversation may be an appropriate next step. Such a tort could provide a spouse with the ability to bring a cause of action against a third-party who knowingly and intentionally interferes with the *family* relationship, either by engaging in sexual acts with a married individual or some other act or conduct the third party knows or should know will reasonably interfere with the family relationship. Predicating the tort on harm caused to the family relationship instead of predicating the tort on harm caused to the marriage relationship may weaken the typical criticisms that befell alienation of affection and criminal conversation. Focusing the tort on the family relationship may also bolster support for such a tort's implementation, as the importance of the family unit has only become more evident with the passage of time. The inclusion of a knowledge component (particularly, knowledge of an existing marriage relationship) would make such a tort more palatable than the resurrection of criminal conversation, where no knowledge of an existing marriage relationship is necessary for a plaintiff to prevail. Under such a theory, the family unit itself could perhaps recover for the willful interference by the interloper, recovering from the interloper the benefit the family unit would have enjoyed but-for the interloper's interference. Whatever the particulars, a tort that could provide a faithful spouse redress against a knowing interloper while also avoiding the weaknesses that befell alienation of affection and criminal conversation could serve a positive role in meeting the needs of spurned-spouses and perhaps even discouraging interlopers from interfering in the first place.

Conclusion:

The heart-balm torts have admittedly forgettable historical justifications rooted in outmoded societal notions of marriage. Despite that fact, heart-balm torts like alienation of affection and criminal conversation might be the only plausible recourse for a spurned-spouse seeking to be made whole. Forgettable historical justifications aside, newer and more palatable justifications exist for the resurrection of the heart-balm torts and should be explored, even if doing so means creating a new tort action altogether that avoids the pitfalls of the doomed alienation of affection and criminal conversation.

Family Branding: Reconciling Interwoven Parental Interests when Determining the Best Interest of a Child on a Petition to Change the Surname of a Child

By Meredith Morse[1]

I. Introduction

Our names play a lifelong role in shaping our identities. We wear our names emblazoned on the backs of our sports jerseys; it's the first thing we learn how to write when we're young. We're arranged alphabetically in the classroom in accordance with our names. Our names follow us throughout life and help others to identify us. Our names are linked to our college transcripts, our medical records, our credit scores; it's what we use to Google ourselves. It is the first thing we learn when we meet someone new (and, for some of us, it's the first thing that we're likely to forget about them).

With respect to the relationship between children and the family, a name represents a lineage and connection to one another. Traditionally, the family name that is passed down by generation, the surname, adhered to relatively rigid style – children born of wedlock bore the surname of their father; children born out of wedlock adopted the surname of their mother. However, the blossoming of the modern blended family and the trend

[1] Meredith Morse just completed her second year at the University of Texas School of Law and can be reached at meredithmorse@utexas.edu

Return to Table of Contents

toward stylistic variety of surname adoption has comparatively complicated the dynamic of the tradition of last names. To add further to the complication: we possess the power to change our own names, and the names of our children – and we do! When these issues arise in our lives, most of us in the Lone Star State turn toward Texas courts to guide us through the procedure of enacting a formal name change.

II. Texas Family Code Chapter 45, Subsection A

Chapter 45, Subchapter A of the Texas Family Code governs the procedure for changing a minor child's name in Texas.[2] Its provisions outline: (1) who may file a petition to change the name of a child,[3] (2) which venue is proper for these proceedings,[4] (3) requirements for what must be laid out in the petition,[5] (4) who is entitled to a citation under subchapter A,[6] (5) when a court may order the name of a child changed,[7] and (6) the rights and liabilities unaffected by a name change of a minor child.[8]

Chapter 45 Subchapter A is often invoked to change a minor child's first name in conformity with a different name by which the child has grown to identify.[9] This course of action is common when children adopt middle names or nicknames in favor of their original names. These proceedings frequently occur without conflict.

However, litigation over the name change of a minor child frequently arises when one parent petitions to change the child's surname.[10] The child's surname is often a hotly contested topic in family law litigation and arises frequently during both child custody proceedings and paternity suits.[11] In these instances, § 45.004(a)(1) gives rise to the central issue: how should courts determine what is in the child's best interest with respect to a petition to change the minor child's name?

Determination of a child's best interest is a fact-specific inquiry, and Texas case law has developed a nonexclusive list of factors to consider before enacting a name change of a minor child. However, courts disagree as to which factors properly pertain to the child's best interest and frequently reach inconsistent conclusions when analyzing these factors.

III. Best Interest of the Child Inquiry

The Texas Family Code provides that "[t]he court may order the name of a child changed if the change is in the best interest of the child."[12] The Texas Supreme Court has interpreted this directive as meaning that courts will exercise the power to change a child's name reluctantly and only when the substantial welfare of the child requires it.[13] The best interest of a child must be evinced by more than conclusory evidence or a bare request to change the child's name.[14] Moreover, mere evidence of parental interest in the name change is insufficient to effect a name change of a minor.[15] The burden is on the movant to demonstrate that the requested name change would be in the best interest of the child.[16] In the event that there is a responding party, that person is under no duty to demonstrate evidence that maintaining the child's original surname would pose any detriment to the child's best interest.[17]

---

[2] "Minor" and "child" have distinct meanings under the Texas Family Code. "Minor means a child under the age of eighteen, whereas "child" can be used for persons over the age of eighteen. *See* Tex. Fam. Code Ann. §101.003. This discussion is limited to the context of name changes with respect to minor children, but "minor child" and "child" may be used interchangeably throughout.

[3] Tex. Fam. Code Ann. § 45.001 ("A parent, managing conservator, or guardian of a child may file a petition requesting a change of name of the child in the county where the child resides.").

[4] *Id.*

[5] Tex. Fam. Code Ann. § 45.002.

[6] Tex. Fam. Code Ann. § 45.003.

[7] Tex. Fam. Code Ann. § 45.004.

[8] Tex. Fam. Code Ann. § 45.005.

[9] See Introductory Notes to Chapter 45.001, Sampson & Tindall's Texas Family Code Annotated (St. Paul: Thomson/West, 2010).

[10] *See infra.*

[11] *See infra.*

[12] Tex. Fam. Code Ann. § 45.004(a). Courts may not enact a permanent name change in a temporary court order. See *In re Pacharzina*, 03-12-00353-CV, 2012 WL 2161005, at *1 (Tex. App.—Austin June 14, 2012, no pet.).

[13] *Newman v. King*, 433 S.W.2d 420 (Tex. 1968).

[14] *In re H.S.B.*, 401 SW.3d 77 at 83 (conclusory testimony); see also *In re M.C.F.*, 121 S.W.3d 891, 897 (Tex. App.—Fort Worth 2003, no pet.)(bare request).

[15] *In Interest of J.K.*, 922 S.W.2d 220, 223 (Tex. App.—San Antonio 1996, no writ).

[16] *Bennett v. Northcutt*, 544 S.W.2d 703, 708 (Tex. Civ. App.—Dallas 1976, no writ).

[17] *Id.*

Return to Table of Contents

The child's best interest is a fact-specific inquiry unique to each case.[18] Trial judges have wide discretion in determining whether a name change would suit the best interest of the child.[19] This determination is a matter of inference and opinion, rather than a finding of a simple objective fact.[20] Judges are positioned to form these opinions because they have the opportunity to evaluate the credibility of the evidence involved and assess the physical, mental, moral, and emotional needs of the child.[21]

The child's best interest is the primary concern with respect to these petitions.[22] While the statute is silent as to whether the interests of the parents relate to the inquiry into the child's best interest, parents are among the few parties with standing to file a petition requesting a court to change a child's name.[23] Texas courts have incorporated parental interest into their inquiry of the best interest of the child to varying extents.[24] Moreover, some courts have also recognized a parent's interest in having the child bear the same surname as the parent in question.[25]

The best interest of the child test is the basis of inquiry for many decisions made in family law jurisprudence, including issues of conservatorship, possession of, and access to a child.[26] Essentially, all suits affecting the parent child relationship (SAPCR) litigation invoke this crucial inquiry.[27] However, the Texas Supreme Court has issued only one opinion discussing the best interest test to changing the name of a minor child.[28] This decision offers guidance to courts when applying the best interest of a child to petitions to change the surname of a minor child, but its provisions are construed loosely so as to offer Texas courts wide discretion in addressing this inquiry.[29]

Texas courts have developed a list of factors that bear on the best interest of a child when reviewing a petition to change the surname of a minor.[30] Some of these factors explicitly consider the effect of the name change upon parental interests, while others analyze the impact of a potential surname without addressing the parental interests at play.[31]

IV. Factors Relevant to the Best Interest of a Child Inquiry in Name Change Petitions

A. Factors that Focus Primarily on the Child

Section 45.004(a)(1) specifically addresses the best interest of the child in granting courts authority to order the surname change.[32] However, only a few specified factors relevant to this inquiry focus primarily on the express preference and character of the child.[33] Moreover, these factors are not controlling on the issue of what constitutes the best interest of a child with respect to a petition to change the child's surname.[34] The factors that focus primarily upon the child are the child's preference, the age and maturity of the child, and the length of time the child has used a given surname.[35]

1. Child's Preference

Courts may consider the preferences of the child regarding the potential and existing surnames in determining whether to grant a petition for the name change.[36] Further, petitions to change the name of a child ten

---

[18] *In re M.C.F.*, 121 S.W.3d 891 (Tex. App.—Fort Worth 2003, no pet.).
[19] *In re H.S.B.*, 401 S.W.3d 77 (Tex. App.—Houston [14th Dist.] 2011, no pet.).
[20] *Bennett*, 544 S.W.2d at 709.
[21] *Mumma v. Aguirre*, 364 S.W.2d 220, 223 (Tex.1963).
[22] *Id.*; *see also* In re S.M.V., 287 S.W.3d at 449.
[23] Tex. Fam. Code Ann. § 45.001.
[24] *See infra* part VI.
[25] *Newman v . King*, 433 S.W.2d 420, 423 (Tex.1968) (a protesting father has a protectable interest in having his child bear his surname).
[26] Tex. Fam. Code Ann. §153.002.
[27] *Lowe v. Lowe*, 971 S.W.2d 720 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).
[28] See *Newman v. King*, 433 S.W.2d 420 (Tex. 1968).
[29] *Id.*
[30] *In re H.S.B.*, 401 S.W.3d 77 (Tex. App.—Houston [14th Dist.] 2011, no pet.).
[31] *See infra* part V.
[32] Tex. Fam. Code Ann. § 45.004(a)(1).
[33] *Id. See infra.*
[34] *Bennett*, 544 S.W.2d at 708.
[35] *See infra.*
[36] *Id.*; *see Bennett*, 544 S.W.2d at 708 (child's preference a factor to be considered but not controlling); *Brown*, 683 S.W.2d at 63.

years of age or older must include the child's written consent to the name change.[37] However, a child's preference for a particular name is not a controlling factor in the best interest of the child inquiry.[38] The courts can regard a child's preference as no stronger than opinion evidence, and the trial judge is not required to accept the child's preference as conclusive on the issue of the child's best interest, even if no contrary evidence is offered.[39] The trial judge may evaluate child's preference, like any other opinion, in light of child's age, personality, and general situation.[40]

While Texas courts account for evidence of the child's preference for a surname in their inquiry into the child's best interest, they will designate a surname in opposition of a child's preference if they find that other factors in the inquiry outweigh the child's preference. For example, in *Bennett v. Northcutt*, the appellate court affirmed the refusal of a petition to change a minor child's surname where the child exhibited a strong preference to use the proposed surname.[41] The child was adopted in infancy and given her adoptive father's surname, but when the couple divorced seven years later and the mother remarried soon thereafter, the child expressed a desire to change her surname to that of her new stepfather as well.[42] The mother presented evidence that the nine-year-old child personally insisted upon using her stepfather's surname for almost two years following the mother's remarriage.[43] Furthermore, the mother presented testimony from the child's pediatrician and a graduate psychologist, both of whom interviewed the child and testified that the child would experience anxiety and detriment if she were not allowed to change her name in conformity with her stepfather's surname.[44]

The adoptive father presented little evidence at trial as to the child's best interest in retaining his surname.[45] He offered the testimony of two child psychologists who answered hypothetical questions in favor of the child retaining her adoptive father's surname; however, neither of the psychologists had spoken with the child, nor were they aware that the child expressed a strong preference for the surname of her new step-father.[46] Moreover, both experts admitted in their testimony that if the child expressed such a preference, that she could experience confusion and anxiety if she were forced to go against her wishes.[47] The adoptive father did not present any further evidence at trial in favor of the child retaining his surname.[48]

Nevertheless, the court determined that the burden was not upon the father to establish that the child would experience any detriment upon change of surname.[49] The court explained that the child's preference alone is not to be examined in a vacuum, and that the preference is only one of numerous factors bearing upon the best interest of a child with respect to the use of a given surname.[50] The court concluded that denying the petition to change the child's surname to be in conformity with that of her preference was not an abuse of discretion.[51] The court analogized the importance of a child's preference regarding a change of surname to the weight a child's preference is given in custody proceedings and with respect to visitation, where the child's preference is considered but does not control the decision.[52]

---

[37] Tex. Fam. Code Ann. § 45.002(b).
[38] *Brown v. Carroll*, 683 S.W.2d 61 (Tex. App.—Tyler 1984, no writ); *see also In Interest of Griffiths*, 780 S.W.2d 899 (Tex. App.—Amarillo 1989, no writ) (trial court properly compelled mother to use biological father's surname when six-year-old child expressed strong preference for her new stepfather's surname).
[39] *Bennett*, 544 S.W.2d at 708.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Bennett*, 544 S.W.2d at 708.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Bennett*, 544 S.W.2d at 708; *see also* Plass v. Leithold, 381 S.W.2d 580, 581 (Tex. Civ. App.—Dallas 1964, no writ) ("The burden, rather was on the applicant to establish that the change would be for the best interest of the child, and the absence of evidence to the contrary does not establish abuse of the trial court's discretion.").
[50] *Bennett*, 544 S.W.2d at 708.
[51] *Id*
[52] *Id.*; *see also Brooks v. Brooks*, 480 S.W.2d 463, 465 (Tex. Civ. App.—Eastland 1972, no writ) (where preference of child over 14 years of age was not controlling in a custody proceeding); *Walker v. Showalter*, 503 S.W.2d 624, 626 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ) (where 13-year-old's preference was not controlling with respect to visitation);

2. Child's Age and Maturity

Often examined in light of the child's preference, courts will also consider the age and maturity of the child as a factor in determining the child's best interest.[53] However, like the child's preference, this factor is not controlling in determining the child's best interest or the appropriate surname that the child should use.[54] Rather, this factor is examined alongside analysis of other relevant factors specified by Texas courts.[55] For example, in *Bennett*, the child's preference was analyzed in light of both her age and maturity.[56] The child in question was only nine years old at the time the mother petitioned to change her child's surname to that of the mother's new husband.[57] Moreover, the court indicated by analogy that, even when comparatively older children express a certain preference, this factor alone is not controlling.[58]

3. Length of Time a Child has Used a Given Surname

The length of time that a child has used a given surname is inevitably and inextricably linked with the age of the child. Nevertheless, neither an increase in a child's age nor an increase in the length of time a surname has been used correspond with an increase in the weight the child's preference is given during this consideration.[59] Rather, courts view the length of time a surname has been used primarily when considering other factors relevant to the inquiry into the child's best interest.[60] For instance, if a younger child has used a particular surname for a majority of her life, courts may be reluctant to enact a name change given the potential for confusion or inconvenience that this change may pose.

Courts are likely hesitant to qualify any of these three factors as controlling in this inquiry in order to allow courts wide discretion in determining the best interest of the child. Moreover, despite the statute's explicit focus on the child's best interest, since the child's preference and characteristics are not controlling factors, this encourages courts to analyze the child's age, maturity, preference, and length of use of a given surname in light of the numerous other specified factors relevant to this analysis.

B. Discussion of Seminal Texas Appellate Cases

Just as Texas courts would struggle to assess the child's best interest inquiry by examining solely the child's preference in a vacuum, Texas courts may find the parental interest in the petition to enact a name change of a child to be an effective measure of determining the child's best interest. To be certain, when courts account for elements such as parental conduct and motivation into the analysis, not only does it make for productive litigation; it creates for compelling fact patterns.

Before a discussion of the multiple factors relevant to the best interest of a child inquiry – a discussion that consider multiple parties, whose interests all intersect in multiple manners – it may be revitalizing and helpful to lay out two compelling fact patterns that have stridently shaped Texas case law concerning the name change of a minor child. As the same string of analysis often implicates multiple salient issues, these cases provide stories that the reader can use as scaffolding to better bolster their understanding of the interplay between these numerous factors.

1. *In re* S.M.V. [61]

The child in interest is S.M.V., who initially bore the surname "Valdez." Mother of S.M.V. and Valdez were together for some time. They had a prior son together, but unfortunately, the couple experienced a falling out early on in his infancy. Luckily for the lovebirds, they later reconciled, and Mother soon after discovered that she was pregnant with S.M.V. She told Valdez, however, that another man, Vo, was the father of this unborn little girl. Mother testified that Valdez "did not want to bring another man into the picture," and "decided

---

[53] See, e.g., *Scoggins v. Treviño*, 200 S.W.3d 832, 837 (Tex. App.—Corpus Christi 2006, no pet.); *In re M.C.F.*, 121 S.W.3d at 897–98; *In re Guthrie*, 45 S.W.3d at 725.
[54] *Scoggins*, 200 S.W.3d at 839.
[55] *Id.*
[56] *Bennett*, 544 S.W.2d at 709.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 708.
[60] *Id.*
[61] *In re S.M.V.*, 287 S.W.3d 435 (Tex. App.—Dallas 2009, no pet.). Section IV(B)(i) follows entirely from this case; therefore, footnotes appended to each sentence have been omitted in the interest of conserving space and avoiding redundancy.

not to tell [Vo] anything." Mother gave birth to S.M.V. in October 2002. Mother and Valdez married eight months later, in June 2003, but by February 2004, after just as many months had passed, Mother left Valdez.

Mother informed Vo of his potential parentage for the first time in July 2004. She testified that he visited "almost every day," bringing "diapers, wipes, and clothing" for their child. However, Valdez, for whom S.M.V. was named, still wanted to be part of the child's upbringing and did not want Vo to have any part in his child's life. Mother testified that, a few weeks following a physical confrontation between Valdez and Vo, Valdez arrived at her door with a paternity test declaring him the father of S.M.V. After that, Mother testified, Vo backed down from his active role in the child's life.

Nevertheless, Mother resumed her relationship with Vo in June 2005. Mother and Vo were blessed with another daughter, A.R.V. Although, at the time of the initial trial, she and Vo were unfortunately no longer together, Mother testified that she and Vo still "communicate good." Mother indicated that A.R.V. and S.M.V. are very close, and that they are also close with Vo and his family, including Vo's other children from prior relationships.

In August 2006, the trial court found that Valdez was not in fact the biological father of S.M.V., and that, miraculously, she was instead the biological child of Vo. While a later proceeding in September 2007 appointed Mother, Valdez, and Vo as joint managing conservators of S.M.V., it also amended the child's birth certificate to state that Vo is her biological father.

After that trial, Valdez attempted to petition for a new trial on the grounds that the jury should have known, but did not know, of the "compelling evidence" that Vo "was a self-admitted drug dealer," that he had several felony drug charges pending against him at the time of the initial trial, and that he would face jail time due to those charges. The court ultimately determined that this evidence was not newly discovered evidence warranting a new trial in the paternity action.

After that trial, Mother and Vo reconciled, and they married shortly thereafter. Mother adopted Vo's surname, and thus brought forth the petition to change S.M.V.'s surname from "Valdez" to "Vo."

Thus, at the time of Mother's marriage, S.M.V. shared a surname with one of her joint managing conservators and one older half-brother (Valdez and Mother's son from the beginning of this tale), but she did not share a surname with her full sister or either of her biological parents. She was four years old when her mother brought forward the petition to change her surname to "Vo."

The trial court accepted the petition and ordered the change of V in S.M.V to "Vo." The appellate court, in light of all the evidence, affirmed the name change.

2. Scoggins v. Treviño.[62]

Billy Ray Scoggins and Yolanda Treviño had never been married, nor had they lived together, though they did admit to engaging in a decade-long romantic relationship, which produced a child, Julie Treviño, in March 1995. While Julie had never shared a home with her father, they did enjoy regular, albeit furtive and fleeting, contact with each other. Julie lived with her mother Yolanda and her half-brother, a son from Yolanda's former marriage to another man. The three lived as a family in a house that Billy Ray and Yolanda purchased from Yolanda's parents, although Billy Ray's name was the sole name on the deed and the utilities. Additionally, Billy Ray furnished Yolanda with a car to drive and furniture for the house. He also paid for Julie to take dance and gymnastics classes.

Billy Ray owned and operated a prominent construction company in the community that was awarded contracts to build seven local public schools in the area. Billy Ray did well for himself financially at Scoggins Construction Company and considered himself well respected amongst his small community.

Despite the relationship between Billy Ray and Julie, Billy Ray denied paternity of Julie in a suit to establish a parent-child relationship. Paternity tests could not rule out Billy Ray as the father, and in March of 1998, when Julie was three years old, Billy Ray was established as Julie's father, and her birth records were changed to reflect this finding.

Billy Ray dutifully met his child-support obligations, which, according to the trial record, were Yolanda's sole source of income. And while Billy Ray maintained his usual clandestine contact with Julie, he would not allow Julie to stay at his house during his designated custody periods. Instead, they would meet in public, like in restaurants or stores.

---

[62] *Scoggins v. Treviño*, 200 S.W.3d 832 at 838 (Tex. App.—Corpus Christi 2006, no pet.). Section IV(B)(ii) follows entirely from this case; therefore, footnotes appended to each sentence have been omitted in the interest of conserving space and avoiding redundancy.

In his brief, Billy Ray's explanation for this behavior was that his wife, Linda Scoggins, was unaware of Julie's existence. Moreover, if Linda were to find out about the existence of his extramarital romance and child, she would be "upset."

Yolanda filed a petition to change Julie's last name from "Treviño" to "Scoggins." She testified at trial that Julie desired to possess her father's surname and that it was, in her opinion, within Julie's best interest to share her father's surname.

Billy Ray testified that, in his opinion, it would not be in Julie's best interest to share his surname. During his direct examination, Billy Ray explained: "I am married and I have other kids the same age as this child, and the embarrassment—I'm going to have to tell these kids that their father has a child outside of wedlock." He further opined:

> It's not only in her best interest to remain Trevino, because she's been Trevino all of her life, but I also have other kids that are named Scoggins, and they are going to have to deal with this. Harlingen–San Benito is a very small community, and you are asking the court to force me to tell my kids and the whole community that I have a child out of wedlock.

Scoggins, 200 S.W.3d at 834, 835.

On cross-examination, Billy Ray added further color to the compelling case: Billy Ray cited additional concern over sharing a surname with Julie because Billy Ray's daughter with his wife Linda, as well as Billy Ray's granddaughter, were in the same gymnastics and dance classes as Julie. Billy Ray further testified that they had no idea that Julie was related to them in any way. He testified that it was in Julie's best interest to continue to be kept a secret.

For a myriad of reasons that may be evident to the reader already but which will be set forth in greater detail later in the text, both the trial court and the appellate court affirmed the surname change from "Treviño" to "Scoggins."

C. Factors that Analyze Both Parental and Child Interests

Parental and child interests are inextricably linked, and this is especially true of the factors relevant to determining the best interest of a child with respect to petitioning to change a child's surname. Because no single factor controls the best interest of a child inquiry, the degree of intersectionality within these factors between parental involvement and a child's best interest is befitting of the multiple perspectives that arise in these petitions.

These factors all directly implicate the role of the parent in shaping the best interest of a child with respect to the child's surname. The factors that analyze both parental involvement and the child's best interest include: (1) ease and convenience to for the child to have either the same or different surname from the custodial parent; (2) whether the name would best help the child or custodial parent avoid embarrassment, inconvenience, or confusion; (3) whether the given surname would help identify the child as part of a family unit; and (4) whether the change will positively or negatively affect the bond between the child and either parent or the parents' families.

Texas courts use the terminology "custodial" and "non-custodial" when referring to parents implicated in discussing the factors relevant to assessing a child's best interest when ruling on a petition to change the surname of a child.[63] However, Texas courts do not refer to possessory interests in a child as "custodial" interests, but rather as an interest that falls under the designation of a "conservatorship."[64] Nevertheless, Texas courts continue to utilize the colloquial "custodial" and "noncustodial" terms in reference to the living arrangements between parents and children when discussing factors relevant to the best interest of a child inquiry.

1. Ease and Convenience for the Child to have the Same Name as or a Different Name from the Custodial Parent

Among the factors that account for the child's best interest, courts consider whether it would be more convenient or easier for the child to have the same surname as or a different surname from the custodial parent.[65] Due to the proliferated importance of the surname in providing structure and organization in a child's life, it is appropriate for courts to consider the ease and convenience of the child when determining whether ordering a

[63] *In re M.L.P.*, 621 S.W.2d at 431.
[64] Tex. Fam. Code Ann, §153.002.
[65] *In re Guthrie*, 45 S.W.3d 719; see, e.g., *In re M.L.P.*, 621 S.W.2d at 431.

name change would serve the child's best interests. However, Texas courts also acknowledge the accompanying potential for confusion that the custodial parent would experience as a result of the petition to change the child's name, as well.[66] However, Texas case law draws a marked distinction between parties whose interests are implicated by this factor and parties whose ease and convenience will not be addressed in the inquiry; Texas courts have explicitly addressed that this particular factor does not implicate the interests of the non-custodial parent.[67] While this factor facially restricts its inquiry to the interest of the child, the court's deliberate exclusion of the non-custodial parent's interest indirectly allows for further analysis of the effect of the name change upon the custodial parent.

In *S.M.V.*, the court cited ease and convenience of the child sharing her surname with both of her biological, custodial parents as a persuasive factor compelling the surname change from "Vazquez" to "Vo." The court determined that S.M.V. would experience greater convenience and ease if she shared the surname of her household and biological parents.

Additionally, in *In re M.C.F.*, the appellate court reversed a trial court order granting the non-custodial father's petition to change his child's surname to that of his own, in part due to the inconvenience the change would pose to the custodial mother.[68] At trial, the mother presented evidence that her surname was listed as her child's surname on the child's birth certificate, Social Security card, doctors' records, health insurance, life insurance, Medicaid records, and day care registration.[69] Consequently, the mother was able to demonstrate that, if the court granted the father's petition to change the child's surname to that of his own, she would be forced to painstakingly change a litany of official records to reflect the new surname.[70] Furthermore, the mother could encounter problems managing the child's estate, education, and medical treatment in the future if his name were different than hers.[71]

While this factor facially focuses primarily upon the ramifications to the child's convenience and ease in the face of a petition to change a child's surname, this factor explicitly links this inquiry to the interests of the custodial parent.[72] Thus, if a non-custodial parent is the moving party in a petition to change the surname of his or her minor child, arguments implicating the ease and convenience of the non-custodial parent will be considered an improper basis for outlining the child's best interest in the petition.[73]

2. Whether a Given Surname would Best Avoid Embarrassment, Inconvenience, or Confusion for the Custodial Parent or Child

This factor ties in directly to the analysis of whether a surname different from that of the custodial parent would pose an increased inconvenience or risk of confusion for the child. However, this factor implicates a broader array of effects than the preceding factor by delving into the potential embarrassment that may result from ordering the surname change of a minor child. Moreover, this factor not only indirectly implicates the custodial parent's interest; this factor specifically invokes this interest as relevant to the child's best interest inquiry.[74] Again, courts explicitly do not recognize the interests of non-custodial parents as relating to this factor.[75] Moreover, testimony that a name change will pose a detriment to the child's best interest as a result of non-custodial parent's embarrassment or inconvenience is insufficient evidence to independently constitute embarrassment, inconvenience, or confusion to the child.[76]

---

[66] *In re Guthrie*, 45 S.W.3d at 719.

[67] *Scoggins v. Treviño*, 200 S.W.3d 832 at 838 (Tex. App.—Corpus Christi 2006, no pet.)(where the court understood the ease and convenience of a child possessing the same surname as that of the custodial parent to relate to the convenience and preference of the custodial parent and child, not the non-custodial parent); *see also* *Guthrie*, 45 S.W.3d at 725.

[68] *In re M.C.F.*, 121 S.W.3d 891 (Tex. App.—Fort Worth 2003, no pet.).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See infra.*

[73] *Scoggins v. Treviño*, 200 S.W.3d 832 at 838 ("Although [the non-custodial father] contends that the name change would cause him a great deal of inconvenience, we understand this factor to relate to the convenience and preference of the custodial parent and child, not the non-custodial parent.").

[74] *In re Guthrie*, 45 S.W.3d at 719; *see also* *Newman*, 433 S.W.2d at 423–24; *Plass v. Leithold*, 381 S.W.2d 580, 582 (Tex.Civ.App.—Dallas 1964, no writ).

[75] *Scoggins v. Treviño*, 200 S.W.3d 832 at 838 (Tex. App.—Corpus Christi 2006, no pet.)(" we understand this factor to relate to the convenience and preference of the custodial parent and child, not the non-custodial parent.")

[76] *Scoggins*, 200 S.W.3d at 838 ("There is no evidence that the name Scoggins would cause Julie or Yolanda any embarrassment, inconvenience, or confusion); *see also* *In re Guthrie*, 45 S.W.3d at 725.

Sometimes, whether embarrassment or inconvenience to the child would result from a name change is a relatively straightforward inquiry. *In re T.G.-S.L.* provides a prime example of an easy analysis of this factor.[77] In *In re T.G.-S.L.*, a schizophrenic mother appealed a trial court order that changed her infant son's name from Tailpipe Greasy-Spoon Lange to Taylor Gregory Lange.[78] The appellate court plainly stated that "no reasonable trier of fact could find that being named Tailpipe Greasy–Spoon would not lead the child to suffer embarrassment, inconvenience, and confusion."[79]

Oftentimes, however, the inquiry into whether embarrassment to the child would result is not always as clear-cut. For example, in *In re S.C.S.*, a joint conservator mother unsuccessfully challenged a trial court order changing her child's surname to that of his biological father.[80] The mother expressed concern that assuming the biological father's last name, Bodily, would subject her son to torment and bullying as he got older.[81] However, the appellate court affirmed the trial court's order changing the son's surname to that of his biological father and determined that there were sufficient factual grounds that supported the trial court's decision.[82]

It is feasible that a child would incur embarrassment, confusion, or inconvenience as result of having to explain his or her unexpected or unfamiliar surname to other children. However, in *In Interest of J.K.*, the appellate court rejected the use of this argument as a pretextual advancement of the non-custodial parent's interests.[83] The non-custodial father petitioned to change his minor child's surname from that of his own surname to that of the child's mother, arguing that his son should not bear his paternal surname because it would be embarrassing for the child to explain his surname to other children.[84] The father (who did not attend the hearing to adjudicate the surname of his child) also argued (through his attorney) that it would be embarrassing or confusing for the child if, in later years, the child attempted to contact the father or the father's extant family, as the father expressed that he had no intention of ever developing a relationship with the child. The mother demurred that the surname she used was that of her ex-husband, who bore no relation to the child, and that the use of the biological father's surname would better connect the son to his parentage.[85] The trial court granted the father's request, and the custodial mother appealed.[86] The appellate court reversed the lower court's decision and reinstated the paternal surname, admonishing the father for couching his own "self-serving arguments" within the scope of this factor.[87] The court noted that any disruption to the non-custodial father's current marriage or family was an improper inquiry that bore no relevance to the best interest of the child in question.[88]

With respect to the given confusion to the child or custodial parent, in *S.M.V.*, the court was confident that changing the child's surname to conform with that of her biological parents and her full sibling would ease understanding and convenience for the child. Moreover, the court did not find that S.M.V. would experience embarrassment or unease over association with her biological father, despite his criminal history. These interests were superseded by the court's objective to ease understanding for the child.

---

[77] *In re T.G.-S.L*, 02-12-00391-CV, 2013 WL 43738, at *1 (Tex. App.—Fort Worth Jan. 4, 2013, no pet.)
[78] *Id.*
[79] *Id.*
[80] *In re S.C.S.*, 05-09-00832-CV, 2010 WL 3091373, at *1 (Tex. App.—Dallas Aug. 6, 2010, pet. denied).
[81] *Id.*
[82] *Id.* The appellate court found that the adoption of the father's surname would better help the child to connect to the paternal family unit. *See infra*.
[83] *Id.*
[84] *Id.*
[85] *In re S.C.S.*, 05-09-00832-CV, 2010 WL 3091373, at *1
[86] *Id.*
[87] *Id.*
[88] *Id.*

3. Whether the changed name or the present name would help identify the child as part of a family unit

Courts carefully consider whether the proposed name or the present name would help the child identify as part of a family unit.[89] This analysis arises often in tandem when considering the possible confusion, embarrassment, or inconvenience that a child or custodial parent may face, as well.[90]

For example, in *S.M.V.*, the court decided that changing the child's name to conform with that of her household – her biological parents and her full-sister – would better help the child identify with a familial unit than would retaining a surname belonging to her joint conservator and older half-brother.

Furthermore, the court in *Scoggins* maintained that Julie's ability to identify with a well-known and well-respected family unit in a small community would help her identify with a family unit better than retaining the surname "Treviño," which the court accused Billy Ray of exploiting in order to conceal his extramarital family unit from his wife and the community.

However, identification with an existing family unit is not a dispositive factor, and this interest can be overridden by other factors affecting the best interest of a child when the child's proposed connection with the family unit would be tenuous. For example, the Houston Court of Appeals in *In Interest of A.E.M.* reversed an order changing a minor child's surname to that of his father's, despite the fact that the minor child had a half-sibling who also shared the father's surname. The father was not the custodial parent for either child, there was no evidence that the visitation schedules for the two children would overlap, nor was there evidence that the children lived in the same area or were close in age. Absent any evidence that the children would associate frequently enough to form an identity with that family unit, the court held that the interest of identifying with a family unit was overridden by the convenience provided to the custodial parent (here, the mother) by maintaining the same surname as her minor child.

4. Whether the change will positively or adversely affect the bond between the child and either parent or the parents' families

Similar to whether a given surname will encourage a child to identify with a familial unit, courts will also encourage the adoption of a surname when it encourages a bond between the child and existing family members.[91] The difference between these two factors is slight, yet distinct enough to warrant separate inclusion into the analysis of the best interest of a child inquiry. The former factor focuses its attention more on the child's ability to connect with others who share the same surname, whereas the latter actually incorporates into the analysis the effect that a given surname would have on parties other than the child in question.

In *In re H.S.B.*, the appellate court reversed the lower court's order granting a change of a child's surname to that of his biological non-custodial father, because the father's surname would not allow the child to affiliate with a family unit.[92] The court found it critical that the child shared his original surname with his custodial parent and older brother.[93] Moreover, the court was persuaded by evidence that the two brothers were already incredibly close, attended the same school, lived in the same home, and participated in the same sports and church activities.[94] The court found that the evidence in favor of changing the surname of a minor child born out of wedlock to the biological father's surname was legally insufficient against this evidence of a bond between the child and his brother, especially since the child would not share a surname with any biological siblings or the custodial parent were he to retain his father's surname.[95]

---

[89] *In re Guthrie*, 45 S.W.3d 719; *Newman*, 433 S.W.2d at 423–24 (name changed to stepfather's surname when same as brothers and sister in family); *In re C.B.M.*, 14 S.W.3d at 862 (court affirmed refusal to change surname to father's name when the child was raised exclusively by mother and maternal family); *In re J.K.*, 922 S.W.2d at 222 (in a paternity action, father petitioned to change child's surname from that of his surname to that of the child's mother; court of appeals reversed, reinstated paternal surname because the child's siblings possessed the father's surname).

[90] *In Interest of J.K.*, 922 S.W.2d at 223.

[91] *In re H.S.B.*, 401 S.W.3d 77, 87 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

[92] *Id.*

[93] *Id. See, e.g.*, *In re S.M.V.*, 287 S.W.3d at 450 (affirming name change partly because there was a potential for confusion resulting from the child having a surname different from both biological parents, and the new surname was shared with a full sibling, thus encouraging familial bond); *In re Guthrie*, 45 S.W.3d at 726 (affirming change from mother's former husband to biological father's surname partly because there was no family in the child's life with the original name, and there was a family history and heritage associated with the father's name).

[94] *In re S.M.V.*, 287 S.W.3d at 450.

[95] *In re H.S.B.*, 401 S.W.3d 77, 87 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

In *Scoggins,* although Billy Ray allegedly threatened to decrease his already limited time with Julie if he were to share a surname with her, the court determined that the change in surname from Treviño to Scoggins would positively affect the bond between Julie and her dance and gymnastics classmates/relatives, as well as her other relatives in his esteemed family.

D. Factors that Focus Primarily upon the Parental Involvement

Even though the statute governing the name change of a minor child in Texas does not explicitly address the role that parental interest plays in determining the best interest of a child, Texas courts do explicitly consider factors that focus principally upon parental involvement, behavior, and interest in their inquiry into whether a name change would be in a child's best interest. Because parental involvement is a natural facet to the best interest of a child, it is not surprising that Texas courts have interwoven parental and child best interest in several key factors. However, when the governing statute is entirely silent as to the parental rights at stake, it is interesting to note that Texas case law has developed an extensive list of factors that allow for parental interest to participate in the best interest of the child inquiry. These factors include: (1) assurances that, when the child maintains or adopts the mother's surname, the mother will retain her corresponding surname in the event of marriage or remarriage; (2) the degree of community respect associated with the surname; and (3) instances of parental misconduct, which can include whether either party delayed in requesting to or objecting to a name change or whether the parent seeking the name change is motivated by an attempt to alienate the child from the other parent. These factors all hinge far more heavily upon the involvement or behavior of the parents than they do the potential effects of a given surname upon a child.

1. When the Child Maintains the Mother's Surname, Courts will Consider Assurances by the Mother that She would not Change her Name if She Married Or Remarried

When the child maintains the mother's surname, courts will consider assurances by the mother that she will not change her name if she married or remarried as bearing upon the child's best interest with regards to the change of surname.[96] If this assurance would allow the child to share a surname with the custodial parent, courts regard this factor as weighing in favor decreasing confusion and increasing an affiliation with a family unit for the child.[97] This factor is tightly tethered to the notion of identification with a family unit, increasing the bond between family members who share surnames, and abating the confusion or inconvenience associated with surname changes.

2. Degree of Community Respect Associated with Surname

Courts can consider parental misconduct in the context of the behavior's larger societal effect by determining the degree of community respect associated with the present or changed name.[98] In *Scoggins,* the Court of Appeals counted the reputation of the paternal surname as a factor in favor of affirming the surname change of the minor child.[99] Other jurisdictions recognize the potential detriment that a surname can affect upon a child when the name carries a pervasive, negative connotation.[100]

In *In re S.M.V.,* Vazquez called attention to Vo's reputation and self-admitted status as a drug dealer. However, whatever status the court appraised Vo to possess among his community and in prison, they deemed the affiliation with a family unit that S.M.V. would incur as a result of sharing the surname "Vo" outweighed any correlative benefit she would have received from being associated with the Vazquez surname in the community.

In *In Interest of A.E.M.,* the court did consider persuasive the father's argument that changing his minor child's surname to conform with that of his own would contribute to the best interest of the child in that the

---

[96] *In re Guthrie*, 45 S.W.3d at 725; *See e.g. Scoggins v. Treviño*, 200 S.W.3d 832, 837 (Tex.App.-Corpus Christi 2006, no pet.).

[97] *Guthrie*, 45 sS.W.3d at 725; *see also In re H.S.B.*, 401 S.W.3d 77, 87 (Tex. App.—Houston [14th Dist.] 2011, no pet.)(indicating that this factor is intended to apply to either parent because the best interest of the child would be served by no further anticipated name changes).

[98] *In re Guthrie*, 45 S.W.3d at 719; In re S.C.S., 05-09-00832-CV, 2010 WL 3091373, at *1 (Tex. App.—Dallas Aug. 6, 2010, pet. denied). *See also In re M.C.F.*,121 S.W.3d at 897 ("The child would be better served with a name that is positively associated with the community").

[99] *Scoggins*, 200 S.W.3d at 839.

[100] *See* Aaron Perzonowski, *Unbranding, Confusion, and Deception*, 24 HARV. J.L. & TECH.. 1, 16 & n. 82 (2010) (noting that the daughter-in-law of investment scam artist Bernie Madoff petitioned a New York court to change her children's names "to escape the stigma of Madoff's crimes").

father's surname carried with it a "military reputation." There was no evidence on the record that the child intended to join the military, nor was there evidence of the degree of community or military respect associated with his surname.

3. Instances Of Parental Misconduct

Courts will assess whether a parental interest in a given surname is motivated by an endeavor to alienate the child from the other parent. Evidence of such an attempt would inextricably invoke the inquiry of whether the movant's proposed surname would allow the child to identify with a familial unit and foster bonds with extant family members. Naturally, a party's attempts to isolate the child from a party in interest will be counted heavily against the offending party.

Courts will regard the level of financial support that a parent has either provided or failed to provide. However, when parents fulfill their financial obligation toward their children, it does not count as a factor that weighs favorably in their interest; rather, courts adopt the perspective that allowing this factor to count in favor of parental interest would be impermissibly rewarding parents for fulfilling obligations to their children that they already owe. Rather, this inquiry assesses failure to provide financial support to the child as a factor weighing heavily against the offending party in the petition to change a child's surname.

Courts can also consider whether either party delayed in requesting or objecting to a name change.[101] Courts may interpret a party's deferral to engage in the surname change process as disinterest, or as an indication of the party's consent to the previous arrangement. It could represent a lack of appreciation for the judicial procedure, or even an outright refusal to abide by it. Thus, even when the delay is rectified and the proper legal recourse taken, courts can still note the delay against the offending party.

Compare the instances of parental misconduct implied in *In re S.M.V.* with those instances of parental misconduct outlined in *Scoggins*. In *In re S.M.V.*, courts affirmed the name change in conformity with the biological father despite evidence of his felonious drug involvement. In *Scoggins*, which could be considered rife with instances of parental misconduct, the court viewed the overall deceptive manner in which Billy Ray entertained his relationship with his daughter Julie as an instance of parental misconduct befitting of finding against his wishes and ordering his daughter's surname changed in conformity with his own.

V. Disagreement among Texas Courts over Weight of Parental Interest in Best Interest of the Child Inquiry

An old law school adage pertinent to its study and practice in Texas: "Research Texas law, and you'll be sure to find opposite opinions for everything."

Although all courts will examine instances of parental conduct as they relate to the factors that directly concern the child, such as parental practices that jeopardize the health, safety, or general welfare of the child, Texas courts disagree about whether factors that examine parental interest alone are an appropriate inquiry to consider when determining the child's best interest in considering a petition to change a child's surname.[102] For instance, both the Houston and Fort Worth appellate courts specifically rejected the factor that explicitly considers the embarrassment or inconvenience of the custodial parent with respect to the name change.[103] They denounced this factor as an impermissible shift of the focus of the inquiry from the best interest of the child to the interests of the parent.[104] This factor, along with delay in requesting or objecting to a petition to change a minor's name, and abandoning considerations of parental financial support, were explicitly renounced in these jurisdictions.[105] The Houston and Fort Worth appellate courts dismissed the factor considering delay in responding to petition to change a minor child's name as having no implication for the best interest of the child.[106] Moreover, these courts abandoned consideration of parental financial support. While evidence of a failure to

---

[101] *In re S.M.V.*, 287 S.W.3d 435 (Tex. App. Dallas 2009); *Scoggins v. Treviño*, 200 S.W.3d 832 (Tex. App. Corpus Christi 2006); *In re Guthrie*, 45 S.W.3d 719 (Tex. App. Dallas 2001) (rejected by In re H.S.B., 401 S.W.3d 77, 87 (Tex. App.—Houston [14th Dist.] 2011, no pet.)).

[102] *In re H.S.B.*, 401 S.W.3d 77, 87 (Tex. App.—Houston [14th Dist.] 2011, no pet.); *see also In re A.W.G.*, 02-10-00376-CV, 2011 WL 3795237, at *3 (Tex. App.—Fort Worth Aug. 25, 2011, no pet.) (synthesizing factors and abandoning factors not deemed in the child's best interest).

[103] *In re H.S.B.*, 401 S.W.3d at 87, rejecting factors discussed in *In re Guthrie*, 45 S.W.3d at 724 (rejecting factor accounting for embarrassment or inconvenience of custodial parent), *followed by* *In re M.C.F.*, 121 S.W.3d 891 (Tex. App.—Fort Worth 2003, no pet.).

[104] *In re H.S.B.*, 401 S.W.3d at 87.

[105] *In re M.C.F.*, 131 S.W.3d at 897 (rejecting factors regarding delay in requesting or objecting to a name change and consideration of a parent's financial support).

[106] *Id.*

financially support the child may be taken into account during an inquiry into the factor of parental misconduct, the court warned that incorporating consideration of a parent's financial support serves to reward or punish a parent for conduct expected of them and unrelated to whether a name change is actually in a child's best interest.[107]

Meanwhile, other jurisdictions in Texas continue to incorporate considerations of procedural delay, financial support, and, significantly, custodial parent ease and convenience as appropriate factors for consideration. Consequently, Texas appellate courts have produced splintered decisions regarding inquiries into the best interest of a child with respect to petitioning for a surname change for a child.

While these two appellate courts consider these factors as impermissibly shifting the focus of the inquiry of the best interest of the child to the interests of the parent, a majority of the factors that courts use to determine whether a name change would be in the best interest of a child either implicitly or directly implicate parental interest. Moreover, Texas appellate courts directly disagree with respect to the weight that they accord parental interest when adjudicating name changes of minor children.

VI. Problems with Disregarding Parent Interest in Best Interest of a Child Inquiry

The trial judge is afforded wide latitude in applying the enumerated factors to the best interest of a child inquiry. Further, upon appellate review, judges are afforded the abuse of discretion standard. Ultimately, the confluence of these two standards often leaves a party disgruntled by the outcome of a petition to change the name of a child with little recourse to serve their own interests by relying upon the judicial system. Moreover, many parents will feel that their financial support, inconvenience, and embarrassment should be directly taken into account by the courts adjudicating this highly personal, important matter. That Texas courts differ on whether these inquiries even bear appropriately on the best interest of a child would likely discourage parents' notions that the court is fairly addressing their tightly interwoven interests. This disagreement among Texas courts indicates a dangerous source of conflict and confusion for both the parents who petition to change the name of their minor children and the courts who must adjudicate these delicate proceedings.

Parents petitioning to change the name of a minor child will want to control their "family brand" and ensure that their parental interests are properly accommodated. Parents will seek to influence the adjudication of their children's surnames in favor of their own interest, perhaps believing that to be the correct best interest of the child. If parents worry that Texas courts will not properly address their parental interests, they may seek extrajudicial means of either effecting or resisting the name change of a minor child. These extrajudicial measures include casually instructing friends, family, teachers, medical professionals, coaches and religious mentors to refer to a child by a certain name, as well as more procedural, permanent means of enacting their desired name change. In instances where a formal birth certificate is not required in order to register a child by name, parents could successfully support the use of a particular surname to the point where it would ultimately and extrajudicially establish the child's identification with an incorrect surname. This would undoubtedly lead to indelible confusion for the child, and perhaps the family, later on in life, as the child discovers and attempts to reconcile the competing surnames and parental interests at stake – the very reason we want courts to carefully spearhead this particular inquiry.

Further, Texas courts expressly discourage extrajudicial measures for changing a minor child's name.[108] They view it as an instance of parental misconduct within the context of a petition to change the name of a minor child, but moreover, these extrajudicial endeavors to enact a desired name change can undermine the perceived legitimacy and ultimate judicial authority of the courts. However, if parents believe the courts do not offer their interests reasonable attention, they will be tempted to employ these measures.

---

[107] *Id.* ("Consideration of a parent's financial support is generally irrelevant to whether a name change is in the child's best interest; it merely gives a non-custodial parent an increased naming right in exchange for something that the parent is already required to do… Further, a child's best interest may actually be disserved by a policy that considers a child's name to be the quid pro quo for accepting legal responsibility").

[108] *In Interest of Griffiths*, 780 S.W.2d 899 (Tex. App.—Amarillo 1989, no writ)(Trial court properly compelled mother to use biological father's surname, where mother endeavored to unilaterally and extrajudicially change child's surname to that of her new husband's); *see also In Interest of Baird*, 610 S.W.2d 252 (Tex. Civ. App.—Fort Worth 1980, no writ)(" Although there is no proceeding to change the name of the child, appellants are attempting to do so without a court proceeding.").

The lay parent is likely not closely attuned to the case law discrepancies between Texas courts in factoring in parental interest to the best interest of a child inquiry. However, parents who abided by the procedural requirements, and who came away from the experience with the impression that their own closely interwoven interests were not adequately addressed by the courts, perhaps will feel slighted. These disgruntled parents will undoubtedly be vocal about their discontent with the system, which in turn affects the perceived legitimacy of the courts.

Texas courts should not incentivize parents to shirk the judicial procedure for effecting a name change of a minor child, especially when they explicitly view such an evasion of the law as evidence of parental misconduct. Thus, Texas courts should directly address the parental interest when determining the best interest of the child. Texas courts should standardize their approach to incorporating parental interest in the factors that indicate the best interest of a child during the petition for the surname change of a minor child.

VII. Conclusion

Names are important, especially within the context of the family. Both child and parental interests are at play. Due to the fact-specific nature of the judicial inquiry, the trial judge has broad discretion in determining the best interest of the child and the extent to which parental interests factor into the analysis. Texas courts differ widely with respect to the weight that parental interests play in their inquiry. This variance, coupled with the wide discretion of the trial judge, robs parents of assurance that their interests are taken into account.

Because the standard of review upon appeal is so stringent, parents dissatisfied with the disposition of the petition to change the name of a minor child have little recourse once the trial judge an order. This dissatisfaction might encourage parents who fear that their interests are not appropriately accommodated to seek extrajudicial means of establishing the use of their preferred surname. Texas courts discourage extrajudicial measures of establishing the change of a minor child due to the inconvenience and confusion that this practice engenders for the courts and the child. Additionally, if parents resort to extrajudicial means to enact changes of their children's surnames, the perceived legitimacy of the judicial system suffers. Since these would be hindrances to the State's legitimate goals in adjudicating the surname change of a minor child, Texas courts should collectively and deliberately address the parental interests at play in suits to change the surname of a minor child.

Guest Editors this month include Michelle May ONeil, Rebecca Tillery Rowan (*R.T.R.*), and Sallee S. Smyth (*S.S.S.*)

DIVORCE
GROUNDS

HUSBAND FAILED TO ESTABLISH INSUPPORTABILITY AS A GROUND FOR DIVORCE.

¶15-3-01. *Alvarez v. Alvarez*, No. 04-13-00787-CV, 2015 WL 876863 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (04-29-15).

Facts: Husband filed for divorce on the sole ground of insupportability. Wife filed a general denial. The final trial date was reset by agreement of the parties; however, Wife failed to appear at the reset final hearing. Husband testified that he and Wife were presently married, that they were no longer living together, and that they were seeking a divorce. The divorce was granted on the ground of insupportability. Wife appealed arguing that the judgment of divorce was unsupported by the evidence.

Holding: Reversed and Remanded

Opinion: A party who pleads insupportability as a ground for divorce must establish the statutory elements: (1) that the marriage has become insupportable because of discord or conflict; (2) that discord or conflict destroys the legitimate ends of the marriage; and (3) that there is no reasonable expectation of reconciliation. It is sufficient for a spouse to provide one word yes-or-no answers to his or her attorney's questions as to whether the elements are present. Here, however, Husband merely testified that he and Wife were married but not living together. Because spouses may have reasons for living apart other than discord or conflict, Husband's testimony alone was insufficient to establish the ground of insupportability.

Editor's comment: *This is a simple issue but this case shows how important it is to cover all of the requirements in a prove-up. Don't try to skip any steps. M.M.O.*

DIVORCE
STANDING AND PROCEDURE

WIFE'S DIVORCE PLEADING DISMISSED BECAUSE HUSBAND HAD ALREADY OBTAINED A VALID DIVORCE UNDER PAKISTANI LAW.

¶15-3-02. ***Ashfaq v. Ashfaq,*** ___ S.W.3d ___, 2015 WL 1925832, 01-14-00329-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (04-28-15).

Facts: Husband and Wife married in Pakistan and lived there for a few months before Husband returned home to Fort Worth. Wife remained in Pakistan for almost two years before she was granted a U.S. visa and was able to join Husband in the U.S. Less than one unhappy year later, the couple returned to Pakistan for a wedding, and Husband had Wife's parents take her to their home. Husband announced to Wife his intention to divorce

her and returned to Fort Worth. After the Pakistani divorce was final, Wife moved to Houston. Husband subsequently returned to Pakistan to marry another woman who returned to Fort Worth with Husband. About a month after Husband's second marriage, Wife filed for divorce in Houston.

At trial, Husband introduced evidence of Pakistani divorce laws through an expert witness licensed to practice in Pakistan. After hearing the evidence, the trial court determined the Pakistani divorce was valid, dismissed the divorce for want of jurisdiction, and treated the remainder of Wife's pleading as a post-divorce petition for division of assets, upon which it entered a judgment.

Wife appealed, arguing that Texas had sole jurisdiction over the parties' divorce because the parties lived in Texas, that the Pakistani divorce should not have been recognized, and that Husband failed to comply with Pakistani law in procuring the divorce. Wife further argued that Pakistani divorce law denied her due process, was fundamentally unfair, and violated public policy. Wife did not contest the trial court's division of assets.

Holding: Affirmed

Opinion: Foreign law is a fact issue. If the parties' divorce was valid under Pakistani law, then whether Texas would have had jurisdiction to hear the divorce was not a relevant question.

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

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

Editor's comment: *This is a good case for the predicate to prove up a prior divorce under foreign law. M.M.O.*

DIVORCE
SPECIAL APPOINTMENTS

AMICUS ATTORNEY NOT ENTITLED TO ATTORNEY'S FEES AS SANCTIONS BECAUSE SHE PRESENTED NO EVIDENCE OF SANCTIONABLE CONDUCT; FATHER'S LACK OF AUTHORITY TO BRING A SUIT ON BEHALF OF HIS CHILD DID NOT PRECLUDE HIM FROM BRINGING THE SAME CLAIMS INDIVIDUALLY.

¶15-3-03. ***Tanner v. Black,*** ___ S.W.3d ___, 2015 WL 1122945, 01-13-01059-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (03-12-15).

Facts: Mother and Father had one Child. During their divorce proceedings, the trial court appointed the Amicus Attorney. After the divorce decree was rendered, Father sued the Amicus Attorney individually and on behalf of the Child as her next friend. The Amicus Attorney filed a general denial, pleaded the affirmative defense of immunity, counterclaimed for sanctions, and filed special exceptions. However, the Amicus Attorney did not request a hearing on her special exceptions, immunity defense, or sanctions motion. The Amicus Attorney also filed a Motion to Show Authority, in which she argued that Father lacked authority to act as next friend of the Child because the divorce decree required the joinder of Mother in legal proceedings brought on the Child's

behalf. Father later conceded that he lacked authority to proceed on behalf of the Child. At the show authority hearing, the Amicus Attorney argued that Father's individual claims should also be dismissed because his claims were "derivative" of the claims brought on behalf of the Child. The Amicus Attorney then requested attorney's fees as sanctions. The trial court heard evidence of the amount and reasonableness of the Amicus Attorney's attorney's fees and struck all of Father's pleadings. Father appealed arguing that the trial court erred in striking all of his pleadings and in awarding attorney's fees as sanctions without a finding that his suit was groundless and brought in bad faith or for the purpose of harassment.

Holding: Reversed and Remanded

Opinion: Tex. R. Civ. P. 12 provides that if a party to a lawsuit believes that the suit is being prosecuted or defended without authority, the party may file a sworn motion questioning the attorney's authority to act. The primary purpose of this rule is to protect defendants by enabling them to determine who authorized the suit. A ruling on such a motion is merely a pretrial determination of an attorney's authority to represent a party. If the challenged attorney fails to show authority to act, the court shall strike the pleadings if no person who is authorized to prosecute or defend appears.

Here, Father conceded that he lacked authority to represent the Child without joinder of Mother. However, the Amicus Attorney had no pleading on file challenging Father's authority to bring the suit on his own behalf. Further, while the Amicus Attorney asserted in her answer the affirmative defense of immunity, she did not have a hearing set to hear that defense, and at the hearing she did not argue immunity. Moreover, Father's pleadings asserted that the Amicus Attorney acted in bad faith, which is an exception to immunity. Accordingly, there was no basis for striking Father's individual pleadings.

Rule 13 and Chapter 10 sanctions both require the order to state a reason for the sanctions. Here, although the order failed to state the particulars of good cause or the basis for the imposed sanctions, Father failed to object to the form of the sanctions order and waived his complaint on appeal. However, other than testimony regarding the amount and reasonableness of Amicus Attorney's attorney's fees, there was no evidence regarding sanctions or sanctionable conduct presented during the show authority hearing.

DIVORCE
ALTERNATIVE DISPUTE RESOLUTION

WIFE FAILED TO ESTABLISH ANY EXCEPTION UPON WHICH TRIAL COURT COULD SET ASIDE A STATUTORILY COMPLIANT MSA.

¶15-3-04. *In re Lechuga*, No. 07-15-00088-CV, 2015 WL 2183744 (Tex. App.—Amarillo 2015, orig. proceeding) (mem. op.) (05-07-15).

Facts: Husband and Wife had one child. During the parties' divorce proceeding, they entered into a statutorily compliant MSA that resolved all child-related and property-related issues. Subsequently, Wife filed a motion to set aside the MSA because she stated, "[a]fter thought and reflection regarding the [MSA], [Wife] believes that the Agreement is not fair and does not reflect a fair division of the properties." Further, she stated she was "'rushed into' the agreement without a full understanding of what she was agreeing to." After a hearing, the trial court ordered that the MSA be set aside and that Wife reimburse Husband for further mediation expenses. Husband filed a petition for writ of mandamus.

Holding: Wirt of Mandamus Conditionally Granted

Opinion: The only statutory exception that permits a court to set aside an otherwise compliant MSA applies if a party was a victim of family violence, the family violence impaired that party's ability to make decisions, and the MSA is not in the best interest of the child. All three elements must be present to meet the exception. Because there was no allegation or evidence of family violence, the statutory exception did not apply.

Further, although Wife complained that she entered into the MSA under duress, she presented no facts that rose to a level that would make her "incapable of exercising her free agency or unable to withhold her consent."

Additionally, Wife contended that she entered into the MSA due to Husband's fraud. However, the only allegation of a failure to disclose assets related to a debt on the family house, of which Wife admitted being aware prior to mediation. Further, the MSA made Husband liable for the debt on the family house. From the record, it appeared that Wife "after thought and reflection" simply decided she was not happy with the property division in the MSA. Dissatisfaction with the agreement is not a valid basis for setting aside a statutorily complaint MSA.

Finally, the court of appeals noted that because there was no evidence that this MSA was illegal or procured by fraud, duress, coercion, or other dishonest means, it was not required to determine whether such evidence would establish a common-law exception to the enforcement of a statutorily compliant MSA.

Editor's comment: *Glad to see that In re Lee is not opening up the door to wiggling out of MSAs. This case reminds practitioners that there are very few narrow exceptions to the enforceability of MSAs that comply with the TFC. R.T.R.*

DIVORCE
DIVISION OF PROPERTY

WIFE FAILED TO INTRODUCE EVIDENCE SUFFICIENT TO SUPPORT PROPERTY DIVISION IN DEFAULT DIVORCE DECREE.

¶15-3-05. *Colmenero v. Colmenero*, No. 01-14-00071-CV, 2015 WL 1245849 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (03-17-15).

Facts: Wife filed for divorce. Husband was served, but he did not file an answer. The final trial was conducted without Husband. Wife testified that she and Husband had purchased seven properties during their marriage: six in Mexico, and one in Houston. She testified that Husband should be awarded all the Mexico properties and that she should be awarded the Houston property. Additionally, Wife testified that Husband and Wife owned a business that operated out of the Houston property. Wife asked for the business to be awarded to her. Wife then asked that each party be awarded the household furnishings, clothing, money, and cars in their respective possession. Finally, the parties had one minor child and one adult child. Wife testified that Husband's average monthly net resources were $3000 and that he should be ordered to pay $400 a month in child support. The trial court granted all of Wife's requested relief.

After the divorce decree was signed, Husband filed a motion to set aside the default judgment. Husband argued that his failure to file an answer was due to accident or mistake. He asserted that after Wife filed for divorce, the couple continued to live together, and he did not believe it was necessary to answer her petition. Husband additionally argued that the division of the estate was not "just and equitable." The trial court denied Husband's motion. He appealed, contending that the evidence was insufficient to support the relief granted in the divorce decree.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Tex. Fam. Code § 6.701 provides that "[i]n a suit for divorce, the petition may not be taken as confessed if the respondent does not file an answer." Thus, Wife was required to put forward proof to support the material allegations in her petition. However, Wife failed to identify the value or the assets of the community

estate. There was no evidence of the value of the estate or of any component part upon which the trial court could have concluded that the division was just and right. In addition, because the child support determination may have been "materially influenced" by the property division, the court of appeals also remanded that portion of the final decree for further proceedings.

Editor's comment: *This case like many others continues to stand for this principle: if you are going to prove up a default divorce, remember to prove up the VALUES of the property and the estate. Otherwise, the trial court has no evidence to determine what is "just and right." To make it fast and easy, bring a proposed property division spreadsheet with all of the values listed, enter it into evidence, and have your client quickly testify from that. R.T.R.*

HUSBAND'S CONSTRUCTIVE FRAUD SUPPORTED JUST AND RIGHT DIVISION BASED ON VALUE OF RECONSTITUTED ESTATE.

¶15-3-06. ***Slicker v. Slicker,*** ___ S.W.3d ___, 2015 WL 2407814, 05-13-01762-CV (Tex. App.—Dallas 2015, no pet. h.) (05-21-15).

Facts: Husband and Wife separated after nearly 40 years of marriage. Wife filed a petition for divorce seeking a disproportionate share of the marital estate because Husband had committed fraud on the community. Wife also alleged Husband used community assets in violation of the trial court's standing order. In addition, Wife sought spousal maintenance. During the trial, much of the evidence related to a trust created during the marriage by Husband's parents as grantors. By the time of the divorce, the property contributed to the trust by Husband's parents was no longer owned by the trust, and the trust held 5 new assets. In the years leading up to the parties' separation, Husband made large withdrawals without Wife's knowledge from the trust. During the proceedings, Husband sought reimbursement for a distribution from the trust on the basis that the trust was allegedly separate property and the distribution had been allegedly used to pay community debts. However, Husband provided no evidence of how the large withdrawals were spent, and he provided no evidence of tracing to support his claim that the distributions were his separate property.

After the parties separated, Husband withdrew funds from an entity created by Husband and Wife during the marriage to pay a "salary" to himself and the parties' adult son. Although he claimed that funds were used to support the parties' lavish lifestyle and to pay for trips and entertaining guests, Husband introduced no evidence of trips taken by the parties or any entertainment expenses of the parties. Evidence showed that the trust held assets that would normally be held by a community estate. For example, the trust sold a home during the pendency of the divorce and purchased a condominium for Husband. Additionally, an entity that owned a vacation home was sold to another family trust at less than fair market value, and emails indicated that the "goal" of the transaction was "to give [Husband] the opportunity to buy his…share back in the future at the same price."

At the conclusion of trial, the court found the value of the reconstituted estate included the large distributions made by Husband, awarded Wife a money judgment based on Husband's waste and/or constructive fraud, ordered that Husband pay Wife for the improper spending during the pendency of the divorce, and awarded Wife spousal maintenance. Husband appealed, arguing that the evidence was insufficient to support the trial court's judgment and that the court made no specific finding that he had committed constructive waste or fraud.

Holding: Affirmed

Opinion: Although there was no explicit finding that Husband committed waste or constructive fraud, the trial court did find that the "value of the community property lost to waste and/or constructive fraud committed by [Husband] should be considered as part of the total value of property awarded to [Husband]" and that "[Wife] should be given a judgment of $275,000 for [Husband's] waste and/or constructive fraud committed against [Wife]." Additionally, although Husband argued that there was no fraud because Wife was fully aware the

parties' financial situation, Husband offered no evidence to support this conclusory statement. Further, Husband made no attempt to show that the large withdrawals he made from the trusts were used for community purposes or that Wife was aware of the withdrawals. Moreover, Wife and her psychologist each testified that Husband controlled the relationship and the finances. Finally, Husband offered no evidence to support his contention that the distributions received from the trust were his separate property. Thus, despite Husband's contention that the estate had a negative value at the time of the divorce, the trial court was entitled to divide the reconstituted community estate at the value as if Husband's fraud had not occurred.

Editor's comment: *This case has somewhat complex facts, but is worth the read if you are considering requesting a reconstituted estate in one of your own cases. It seems to me like the court of appeals went out of its way to affirm the trial court's judgment, when it probably could have otherwise reversed on some technicalities of pleading and proof. But, in the end, it sounds like the wife was a pretty sympathetic party, and I imagine that went a long way in both the trial court and appellate court's rulings. R.T.R.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

TRIAL COURT IMPERMISSIBLY MODIFIED PROPERTY DIVISION AFTER PLENARY POWER EXPIRED.

¶15-3-07. *Sydow v. Sydow*, No. 01-13-00511-CV, 2015 WL 1569950 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (04-07-15).

Facts: During the majority of their marriage, Husband and Wife lived in their first condo. A few years before the divorce was filed, an investment company purchased a second condo in the same building. Through an agreement between the investment company and Husband's law firm, Husband orally agreed to pay all taxes, insurance, HOA fees, and expenses associated with the second condo in exchange for Husband and his family being permitted to live in the second condo. When they moved into the second condo, Wife was unaware of the agreement and believed that she and Husband owned the second condo. When they separated, Husband returned to the first condo, while Wife remained in the second condo.

During the divorce proceedings, the trial court entered temporary orders requiring Husband to pay all expenses associated with both condos because Wife had not worked in 15 years and had no income. A few months later, Husband stopped paying the expenses associated with the second condo, and Wife was evicted, still under the belief that she and Husband owned the condo.

In a separate proceeding, a trial court determined that Wife was not liable for any past due expenses based on the breach of contract because she was not a party to the contract.

Shortly after Wife was evicted, Husband and Wife entered an MSA in the divorce, and a final decree was entered pursuant to the MSA. The MSA provided that all debts and liabilities had been disclosed to each other and that any undisclosed or undivided liabilities would be paid by the party incurring them. The MSA's attached schedule purported to list all the liabilities of the parties but did not list the liabilities associated with the second condo. The final decree also did not include any reference to the liabilities associated with the second condo and provided that the parties were discharged from any further liabilities imposed by temporary orders of the court.

About two years later, Husband filed a petition for enforcement and motion for clarification, asking the trial court to order Wife to pay the expenses associated with the second condo as ordered in the decree. The trial court found that because Wife had exclusive use of the condo during the disputed time period, she was the party who incurred the liability. Thus, the trial court granted Husband's petition and clarified the final decree to award all liability related to the second condo during the disputed time period to Wife. Wife appealed, arguing that the trial court abused its discretion in modifying the property division after its plenary power had expired.

Holding: Trial Court's Order Void; Appeal Dismissed for Want of Jurisdiction

Opinion: After a trial court's plenary power has expired, it may still render further orders to enforce the division of property or to clarify the prior order. However, after its plenary power has expired, a trial court may not amend, modify, alter, or change the division of property made or approved in the divorce decree. Such an order is void.

Here, the final decree, based on the MSA, superseded the prior temporary orders and discharged the parties from all *further* liabilities and obligations imposed by the temporary orders. The decree did not discharge the parties from any previously accrued liabilities and obligations imposed by the temporary orders. Thus, neither the final decree nor the MSA discharged Husband from his obligation to pay on the second condo pursuant to the temporary orders. Therefore, by reallocating those expenses to Wife, the trial court erroneously modified the property division after its plenary power expired.

Editor's comment: *This case is a scary reminder of how carefully you need to craft the language in your MSAs, especially when it comes to whether and when and how temporary orders are terminated and/or superseded. Try to think about these things ahead of time, and not depend on your abilities at 7:00pm on the day of mediation, when you and your client are tired, hungry, and ready to leave. Here, language from an MSA over two years old is brought out, dusted off, and winds up being the deciding factor as to whether Husband or Wife was responsible for debts on a condo that were incurred during the divorce proceeding. R.T.R.*

CONTEMPT ORDER VOID FOR UNCONSTITUTIONALLY IMPRISONING WIFE FOR HER FAILURE TO PAY A DEBT.

¶15-3-08. ***In re McLaurin,*** ___ S.W.3d ___, 2015 WL 1967536, 01-14-00920-CV (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (04-30-15).

Facts: About a year after Husband's and Wife's divorce, Wife filed a post-judgment action to enforce certain terms of the divorce decree. Wife alleged that Husband failed to execute certain documents or to surrender certain personal property to her. Husband filed a response requesting sanctions on the basis that Wife's motion was frivolous and was filed in bad faith without reasonable inquiry. The trial court issued a final judgment denying Wife's requested relief and granting Husband reimbursement for attorney's fees as sanctions. Wife appealed that judgment. When the due date for Wife's sanctions passed without her payment of them, Husband filed a petition for enforcement asking the trial court to hold Wife in contempt. The trial court entered an interim order requiring Wife to pay the judgment by a new date certain. After that date had passed, the trial court issued a contempt order that found Wife failed to pay the ordered sanctions despite her ability to do so, held Wife in both civil and criminal contempt, and sentenced her to confinement in county jail for 180 days as punishment and thereafter until she purged herself of contempt by paying the sanctions. Wife filed a petition for writ of habeas corpus, arguing the contempt order was void because it unconstitutionally imprisoned her for failing to pay a debt.

Holding: Writ of Habeas Corpus Granted

Opinion: Section 18 of Article I of the Texas Constitution prohibits imprisonment for a debt. A judgment for attorney's fees in a case other than enforcement of child support is a debt. Although a court may issue sanctions for failure to comply with a court order, those sanctions cannot include imprisonment for failure to pay a debt.

Return to Table of Contents

DEED CONVEYING PROPERTY VOID BECAUSE IT LACKED REQUISITE INTENT; WIFE SIGNED SIGNATURE PAGE OF DEED WITH INTENT TO CONVEY PROPERTY TO HUSBAND, BUT DEED RECORDED BY HUSBAND PURPORTED TO CONVEY PROPERTY TO HUSBAND'S FATHER.

¶15-3-09. *In re Merrikh*, No. 14-14-00024-CV, 2015 WL 1247064 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (mem. op.) (on reh'g) (05-19-15).

Facts: The day after Husband and Wife were married, Husband's parents conveyed certain real property to Husband. About six weeks later, Husband conveyed the property to Wife. About a month later, Wife conveyed the property to Husband's father. At trial, Wife contested the validity of this deed and alleged that it was procured by fraud. The property was conveyed twice more after the contested deed: once to Husband and Wife's four year old daughter, and later from the daughter back to Husband's father. Husband purportedly executed the deed on his daughter's behalf.

After a bench trial, the trial court found that the deed conveying the property from Wife to Husband's father was procured by fraud and that it, and all subsequent transfers were void. The court further found that the property was Wife's separate property by gift and that Husband's parents had no interest in the property. Husband's parents (who were co-Respondents at trial) appealed the judgment and argued that there was insufficient evidence to establish fraud. In the alternative, they argued that Wife's claim was barred by the statute of limitations.

Holding: Affirmed

Opinion: While a deed procured by fraud is *voidable* and subject to a four-year statute of limitations, an invalid deed is *void*. Delivery is an essential element to a valid deed. Delivery consists of two elements: (1) the deed must be delivered into the grantee's control; and (2) the grantor must intend for a deed to become operative as a conveyance to the grantee. If the intent element is lacking, the deed is void, and subsequent grantees cannot not acquire title to the property the deed purports to convey. The grantor's intent is determined by examining all of the facts and circumstances preceding, attending, and following the execution of the instrument.

If a deed has been recorded, there is a presumption that it was delivered with the requisite intent. However, the presumption can be overcome if the party challenging the validity shows one of the following: (1) that the deed was delivered or recorded for a different purpose; (2) fraud, accident, or mistake accompanied the delivery or records; or (3) the grantor had no intention of divesting herself of title.

Here, Wife testified that Husband presented her with a blank signature page and told her that by signing the page, she would be transferring the property to Husband. Wife believed Husband and signed the page. Although the page was notarized, Wife testified that she did not sign in the presence of a notary. The deed was recorded over two months later and actually transferred the property to Husband's father. Based on this evidence, the trial court could have reasonably determined that Wife intended to convey the property to Husband, yet the deed was recorded for a different purpose. Although the trial court's findings of fact did not include such a finding, an omitted finding, supported by the evidence, may be supplied by a presumption that it supports the judgment.

SAPCR
STANDING AND PROCEDURE

TRANSGENDER FATHER LACKED STANDING TO SEEK CONSERVATORSHIP AND POSSESSION OF CHILDREN BECAUSE HE WAS NOT LEGALLY A "MAN" AT THE TIME HE FILED HIS PETITION, AND HE HAD NOT HAD ACTUAL POSSESSION OF THE CHILDREN FOR AT LEAST SIX MONTHS PRIOR TO FILING THE PETITION.

¶15-3-10. *In re N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (03-11-15).

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

Holding: Affirmed

Opinion: A plaintiff must have standing to file suit at the time the suit is filed and throughout every stage of the legal proceedings. Tex. Fam. Code § 160.602(a)(3) gives standing to maintain a proceeding to adjudicate parentage to "a man whose paternity of the child is to be adjudicated." Tex. Fam. Code § 102.003(a)(8) gives standing to file an original SAPCR to "a man alleging himself to be the father of a child filing in accordance with Chapter 160…" The Family Code defines a man as a male of any age, but the Family Code does not define "male." Webster's defines a male as an individual with "gametes…which fertilize the eggs of a female." Black's defines male as "of the masculine sex." The order changing Father's identity was signed about a month after his petition to adjudicate parentage. Thus, at the time Father filed his petition, he lacked standing under both Tex. Fam. Code § 160.602(a)(3) and § 102.003(a)(8) because on that date, Father was still legally a female and could not be defined as "a man" under the Texas Family Code.

Tex. Fam. Code § 102.003(a)(9) gives standing to file an original SAPCR to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition[.]" Here, Father had an active role in the Children's lives while he was still in a relationship with Mother. However, after their separation, which occurred almost three years before he filed suit, Father was not as involved with the actual care, control, and possession of the Children. The Children resided with Mother. Father attended some doctor's appointments, but Mother was always also present. Father did not authorize any medical treatment or make educational decision for the Children after he and Mother separated.

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

SAPCR
PATERNITY

TRIAL COURT ABUSED DISCRETION IN ORDERING GENETIC TESTING WHEN THE CHILD HAD A PRESUMED FATHER, FOUR-YEARS HAD PASSED SINCE THE CHILD'S BIRTH, AND THE ALLEGED FATHER DID NOT ESTABLISH ANY EXCEPTION TO THE FOUR-YEAR LIMITATIONS PERIOD.

¶15-3-11. *In re Young*, No. 05-15-00024-CV, 2015 WL 1568835 (Tex. App.—Dallas 2015, orig. proceeding) (mem. op.) (04-07-15).

Facts: During Mother's and Presumed Father's marriage, they had two Children. Their final divorce decree appointed them joint managing conservators, with Presumed Father having the right to designate the primary residences of the Children. At the time of the divorce, the Youngest Child was about four years old. About three years later, Alleged Father filed a petition to adjudicate parentage of the Youngest Child and sought biological testing. After a hearing, of which no record was made, an associate judge signed a report ordering that genetic testing go forward. Presumed Father requested a de novo hearing. A reporter's record of the de novo hearing was made. After Presumed Father concluded his case in chief but before Mother could begin her case in chief, the trial court announced that Presumed Father failed to establish what he needed to establish and that the associate judge's ruling was affirmed. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A man married to a mother of a child born during the marriage is a presumed father, and that status is recognized until rebutted or confirmed in a judicial proceeding. A proceeding to adjudicate parentage must be brought before the child's fourth birthday, unless an exception applies. If a party to a proceeding to adjudicate paternity requests genetic testing, the court shall order the child and other designated individuals to submit to testing. However, the party must establish he is entitled to maintain a proceeding to adjudicate parentage before a trial court can order genetic testing.

Here, although Alleged Father alleged that Mother testified that she was not living with or engaging in intercourse with Presumed Father at the time of the Younger Child's conception, there was no record of that testimony. No reporter's record was made of the hearing before the associate judge, and Mother did not testify at the de novo hearing. Although a district judge may consider the record from the hearing before the associate judge, the party with the burden of proof must still carry that burden in the de novo hearing. Because there was no evidence before the trial court regarding the only relevant issue, whether Presumed Father and Mother were cohabiting or engaging in intercourse at the time of the Younger Child's conception, the trial court abused its discretion in ordering genetic testing.

Editor's comment: *Whenever financially possible, get a record. It might be a pain to bring your own court reporter for hearings in front of the associate judge, but if it involves a highly contested issue that you think you MIGHT need to de novo to the district judge, just bite the bullet and bring a reporter. The amount of money that is being eaten up with this mandamus and subsequent rehearing is vastly more than the cost of the court reporter that supposedly would have transcribed Mother's game-changing testimony in front of the AJ, and probably obviated the need for the mandamus in the first place. R.T.R.*

Return to Table of Contents

SAPCR
CHILD SUPPORT

BECAUSE FATHER'S COMPANY WAS FOUND TO BE A "SHAM CORPORATION," FATHER WAS FOUND TO BE INTENTIONALLY UNDEREMPLOYED, AND TRIAL COURT COULD REVIEW THE COMPANY'S TAX RETURNS AS EVIDENCE TO DETERMINE FATHER'S POTENTIAL INCOME.

¶15-3-12. *In re Merrikh*, No. 14-14-00024-CV, 2015 WL 1247064 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (mem. op.) (on reh'g) (05-19-15).

Facts: Mother and Father were informally married and had two Children during the marriage. After a bench trial, the trial court found that Father was intentionally underemployed and that Father's net monthly resources were $3000. The trial court ordered Father to pay $750 per month in child support. Father appealed, arguing that Mother failed to meet her burden to show that he was intentionally underemployed.

Holding: Affirmed

Opinion**:** On appeal, Father challenged the trial court's finding of fact that he was intentionally underemployed. However, the trial court also found that Father's business was a "sham corporation," and Father did not challenge that finding on appeal. Thus, Father and Father's business were treated as one and the same. Further, on two business account applications, Father stated that his company's gross sales were $500,000 and $1 million, respectively. Based on those applications, Father's average gross monthly income was between $41,000 and $83,000 per month. Thus, there was sufficient evidence before the court for it to determine that Father's potential net monthly was $3000.

Editor's comment: *I wonder why the husband failed to challenge the finding that his company was a "sham corporation." That is an analysis I would like to read! But if you don't challenge the finding, then the court of appeals takes it as true. R.T.R.*

SAPCR
ENFORCEMENT OF CHILD SUPPORT

MOTHER'S PLEA TO JURISDICTION FAILED TO NEGATE THE TRIAL COURT'S JURISDICTION OVER FATHER'S REQUEST FOR REIMBURSEMENT TO OFFSET ARREARAGES.

¶15-3-13. ***In re C.D.B.,*** ___ S.W.3d ___, 2015 WL 1405921, 14-13-00718-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (03-24-15).

Facts: In a prior agreed order, Father was required to pay child support semi-monthly until the Child turned 18 or graduated from high school, which ever occurred later. When the Child was a junior in high school, he began living with Father. The Child turned 18 shortly after graduating from high school. About six months later, Father filed a SAPCR, in which he requested: (1) reimbursement for support paid during the period that Mother allegedly relinquished custody of the Child to Father; (2) reimbursement of payments as a counterclaim to

Mother's claim for arrearages or an offset of support provided by Father; and (3) retroactive Child support from Mother. Mother moved to dismiss Father's petition on the grounds that the Child had become emancipated and that the trial court lacked jurisdiction to modify the prior order. The trial court agreed and dismissed the SAPCR. Father appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: In construing the substance of Father's petition, the court of appeals determined that Father requested three different forms of relief: (1) a request for direct reimbursement for the period during which Mother had relinquished custody to Father; (2) a request for reimbursement or offset relative to arrearages; and (3) a request for retroactive support for the period during which the Child was in his care.

Father's ongoing child support obligation]nded when the Child turned 18 shortly after graduating from high school. Thus, the order was no longer subject to modification. Because the Child had become emancipated, the trial court lacked jurisdiction to grant father relief for his first request.

However, under Tex. Fam. Code § 157.005, the court retains jurisdiction to confirm arrearages and render a cumulative money judgment for past due child-support if a motion for enforcement is filed before the 10th anniversary of the child's emancipation or the termination of the child support order. Additionally, pursuant to Tex. Fam. Code § 157.008, an obligor may plead as an affirmative defense that the obligee voluntarily relinquished actual possession and control of the subject child.

Unless the pleadings "affirmatively negate the existence of jurisdiction," a plea to the jurisdiction should not be granted without allowing the plaintiff an opportunity to amend his pleadings. Mother only argued that the trial court lacked jurisdiction to modify the prior order because the Child had turned 18 and had graduated from high school. Mother failed to differentiate between the several forms of relief requested by Father. Mother did not dispute Father's allegation that there was a claim for arrearages, thus the court of appeals accepted Father's allegation as true. The court of appeals interpreted Father's reference to a "claim" for arrearages as sufficient to mean there was a motion to enforce. Thus, Father's request for reimbursement or offset against arrearages was construed as an affirmative defense or counterclaim, over which the trial court retained jurisdiction.

Dissenting Opinion: (C.J. Frost) In reviewing whether a court has jurisdiction, the court is not limited by the grounds asserted in a plea to the jurisdiction. Tex. Fam. Code § 157.008(d) only permits an obligor to request reimbursement as a counterclaim or offset *against the claim of the obligee*. Father's petition referenced the prior child support order but made no reference to any petition filed by Mother. Father was the petitioner in the underlying lawsuit, while Mother was the Respondent. Because the record reflected that Mother had not filed a motion for enforcement, Father's pleading could not be construed as an affirmative defense. Further, even if Father was entitled to seek confirmation of his arrearages, his assertion of such a claim would not give the trial court jurisdiction to decrease the amount of Father's child-support obligation after the Child had turned 18 and graduated from high school.

FATHER'S CONFINEMENT FOR CONTEMPT IMPROPER BECAUSE FATHER RECEIVED NO NOTICE THAT HEARING COULD RESULT IN HIS CONFINEMENT AND BECAUSE THE TERMS AND CONDITIONS OF HIS RELEASE ORDER WERE IMPERMISSIBLY VAGUE AND AMBIGUOUS.

¶15-3-14. *In re Spates*, No. 14-15-00235-CV, 2015 WL 1393265 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (mem. op.) (03-24-15).

Facts: Father was ordered to pay monthly child support. About ten years later, the OAG filed a motion for enforcement against Father, alleging that he was in arrears. The trial court found Father in contempt and ordered him committed but failed to sign a written judgment of contempt or commitment. About a month later, Father filed a petition for writ of habeas corpus that was granted due to the absence of a signed contempt judgment.

Subsequently, the OAG noticed a hearing but did not file a new motion for enforcement. Without holding a contempt hearing, the trial court signed a combined judgment of contempt and commitment order, referencing the earlier contempt hearing. However, Father was not immediately confined.

Father filed another petition for writ of habeas corpus, which the court of appeals construed as a petition for writ of mandamus because Father had not been deprived of his liberty. The writ of mandamus was granted based on the trial court's failure to hold another contempt hearing and that the order was not signed sufficiently close in time to the pronouncement of contempt.

About a month later, the OAG filed another motion for enforcement. The trial court subsequently held a hearing on the OAG's motion. The trial court signed a contempt order, holding Father in contempt for 5 violations of the child support order, and sentenced Father to 180 days' confinement for each violation to run concurrently, and Father was taken into custody.

Father filed another petition for writ of habeas corpus, arguing that the trial court failed to state with specificity the provisions of the underlying order that had been violated, thereby denying him due process.

Before the petition for writ of habeas corpus was addressed by the court of appeals, the trial court ordered Father released and suspended the balance of his sentence (165 days) until further orders of the court. The trial court ordered Father to return for a subsequent hearing to finalize an order suspending his commitment and to place Father on community supervision. Father's petition for writ of habeas corpus was dismissed as moot on Father's motion.

Father appeared at the hearing to finalize the suspension of his commitment, at which, the trial court signed an order reducing Father's child support obligation and signed a commitment order directing the sheriff to take Father into custody to serve the remaining 165 days of his sentence.

Father filed another petition for writ of habeas corpus, contending his confinement was illegal because his suspension was revoked without notice of any allegation that he was in violation of the suspension order, without a hearing on the matter, and without an order stating the reason for the revocation.

Holding: Writ of Habeas Corpus Granted

Opinion: The OAG agreed with Father's assertions that no motion to revoke his suspension was filed, that the terms and conditions of his release order were vague and ambiguous, and that Father was not apprised of the possibility of incarceration as a result of the most recent hearing. Rather, the trial court determined sua sponte that Father should be committed to county jail. Neither a contempt nor a commitment order may be based on an ambiguous order. Moreover, Father was not afforded sufficient notice to make a defense of any potential violations of the underlying order.

CIVIL-CONTEMPT ORDER VOID DUE TO IMPOSSIBILITY OF PERFORMANCE.

¶15-3-15. *In re Gibbs*, No. 01-15-00218-CV, 2015 WL 1778358 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (mem. op.) (04-16-15).

Facts: Father was found in contempt for failure to pay court-ordered child support. The trial court sentenced Father to serve 180 days' confinement for criminal contempt, and as a civil-coercive-contempt measure, the trial court ordered Father confined after his criminal-contempt sentence was served until he paid a specified amount towards his arrearages, plus attorney's fees and court costs. After serving 160 days under the civil-contempt order, Father sought a petition for writ of habeas corpus. In an affidavit attached to his petition, Father asserted he lacked the financial resources to satisfy the civil-coercive-contempt provision assessed against him. Father stated that he was unemployed, received no income from any business or other source, had no retirement or other savings, had no debts owed to him, owned nothing of value to be sold or used as collateral, and knew of no source from which he could obtain funds to purge himself of civil contempt. In a reply, Mother asserted that to establish the contempt order was void, Father needed to show that performance was impossible at the

time of the commitment order. Further, Mother complained of Father's failure to provide records of two prior trial court hearings on Father's motions for early release.

Holding: Writ of Habeas Corpus Granted

Opinion: An order of contempt imposing a coercive restraint is void if the condition for purging the contempt is impossible of performance. Here, Father filed an uncontroverted affidavit establishing his present inability to pay. Although Father did not file statements of facts from the hearings denying his two motions for early release, those statements of facts were not necessary to show his present uncontested inability to pay.

PROVISION IN AGREED DECREE REQUIRING FATHER TO PAY FOR CHILD'S COLLEGE TUITION AND EXPENSES WAS NOT CHILD SUPPORT AND WAS ENFORCEABLE ONLY AS A CONTRACT.

¶15-3-16. ***Bartlett v. Bartlett,*** ___ S.W.3d ___, 2015 WL 1966860, 14-14-00058-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (04-30-15).

Facts: Mother and Father had two Children. In their agreed final decree of divorce, they included a provision that required Father to pay 100% of the Children's college tuition and related expenses, provided that the Children maintained an above-C GPA. However, when the oldest Child began college, Father refused to pay the Child's college expenses. Mother paid for the expenses and sued Father for breach of contract. After the Child's third semester, his GPA fell below a C average, but after taking summer school, he brought his GPA back above a C. The trial court signed a judgment in Mother's favor awarding her damages for the amounts paid for the Child's tuition and related expenses. The trial court also issued findings of fact and conclusions of law, in which it found that the college-expenses provision in the parties' agreed decree was not a provision for child support and that the parties had intended the provision to be enforceable as a contract.

Father appealed, arguing that the college-expense provision was void, was not enforceable as a contract, and was precluded by statute. Father further argued that the Child's failure to maintain a C GPA constituted a material breach and excused Father from future performance.

Holding: Affirmed

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

The "Education Beyond High School" provision was not included in the child support section of the agreed final decree. Rather, it was a subsection of the "Division of Marital Estate." Further, in the child support section, the decree provided that Father would pay $1800 a month with a step-down provision of $1500. Thus, it could not be argued that the Education Beyond High School was a provision in lieu of child support. Therefore, the provision was not "child support," so provisions of the Texas Family Code applicable to child support were not applicable to this provision, which was enforceable as a contract.

In addition, although the Child's GPA fell below a C average, the Material-Breach doctrine required a court to consider:

(1) the likelihood that the Child would cure his failure to perform;
(2) the extent to which the Child's behavior comported with standards of good faith and fair dealing;
(3) the extent to which the Child would suffer forfeiture;
(4) the extent to which Father would be deprived of a reasonably expected benefit;
(5) the extent to which Father could be adequately compensated for that expected benefit;
(6) the extent to which Father would be prevented from or delayed in making reasonable suitable arrangements; and
(7) the extent to which the agreement provided for performance without delay.

The Child's GPA admittedly fell below a C average for one semester, during which time he had knee surgery, but the Child cured his failure by taking summer school to bring his GPA back above a C average. Father was not deprived a benefit because the Son remained a full-time student with an above-C GPA at the time of trial.

Further, the agreement did not require performance on a semester-by-semester basis, nor did it call for forfeiture of obligations previously owed for a breach in a later semester.

Concurring Opinion: (C.J. Frost)

The majority mischaracterized the contractual provision and applied a breach of contract analysis when the provision was actually a condition precedent. The "Education Beyond High School" provision required Husband to pay for the Child's incurred college expenses, "***provided that***" the Child maintained a C average. "Provided" is unmistakable language of condition. The ordinary meaning of maintain is "to prevent a decline, lapse or cessation from [an] existing state or condition." When the Child incurred expenses for his first two semesters, his GPA had not fallen below a C, and the condition precedent was satisfied. However, the Child's GPA fell below C before he incurred expenses for his third semester. Thus, the condition precedent had lapsed at the time expenses for the third semester were incurred. Therefore, Father was only obligated under the contract to pay for the Child's first two semesters but not for future semesters.

Moreover, even if it were appropriate to apply the Material-Breach Doctrine to this case, the Child's failure to maintain a C average was a material breach because the C-average requirement was the *sine qua non* of the agreement. By failing to maintain a C average, the Child potentially delayed his graduation date, thereby increasing the expense of his education.

However, because Father failed to raise an affirmative defense at trial that the condition precedent had not been satisfied, Mother was not required to prove that it had been satisfied. Therefore, there was no reversible error.

Editor' comment: *For a truly well-written primer on contract law - particularly breach v. condition precedent - look no further than Chief Justice Frost's concurring opinion. R.T.R.*

COMMITMENT ORDER VOID FOR LACK OF NOTICE TO CONTEMNOR.

¶15-3-17. *In re Baker*, No. 14-15-00421-CV, 2015 WL 2250666 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (mem. op.) (05-12-15).

Facts: Father was found in contempt for failure to pay child support and was sentenced to incarceration. However, his sentence was suspended for 60 months conditioned on Father paying $1,000.00 for coercive contempt. Subsequently, the OAG requested that the suspension be rescinded and asked the trial court to set probation. The trial court did so and ordered Father to appear for a compliance hearing. After the hearing, the trial court found Father was not in compliance, ordered that he be taken into custody, and issued a written commitment order. Father filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: Due process requires a constructive contemnor be given full and complete notification and a reasonable opportunity to meet the charges by way of defense or explanation. Here, no party filed a motion to revoke Father's community supervision, and the trial court did not issue a show cause order indicating Father's community supervision might be revoked during the hearing.

Return to Table of Contents

"FATHER" OWED NO ARREARAGES UNDER MICHIGAN CHILD SUPPORT ORDER BECAUSE MOTHER FRAUDULENTLY MISREPRESENTED THAT "FATHER" WAS THE CHILD'S FATHER.

¶15-3-18. *OAG v. Duran*, 2015 WL 3454228, No. 13-13-00423-CV (Tex. App.—Corpus Christi 2015, no pet. h.) (mem. op.) (05-28-15).

Facts: Mother and Father were in a relationship, and Mother had a Child. Although she did not put Father's name on the Child's birth certificate, she told Father he was the Child's father. Subsequently, she sought and obtained an order for child support from Father through a Michigan court.

Eventually, Father discovered he was not the Child's father and filed a petition in a Texas court to terminate his parent-child relationship. The trial court ordered genetic testing, which conclusively established Father was not the Child's father. The OAG did not contest the termination but insisted that despite a termination, Father would still be responsible for child support arrearages. Father responded that under its inherent powers, the trial court could determine that Father should not have to pay arrearages. Father argued that Mother should not benefit from her fraud and that because the Child was now an adult, any arrearage payments would go directly to her. After a hearing, the trial court ordered that "based on the guiding principles of equity" Father's arrearages were $0.00. The OAG appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 161.005(c)(2) allows a man to terminate the parent-child relationship when a mother has deceived him into believing he was the child's father, and genetic testing establishes he was not. Under that statute, the man is not responsible for future child support after the date the parent-child relationship is terminated, but the termination order does not affect his obligation before that date.

Here, the original child support order was issued by a Michigan court, so under UIFSA, Michigan laws would apply. Additionally, the child support order had not been registered in Texas, so Father was not precluded from challenging the validity of the Michigan order. Moreover, there was no evidence that Michigan law would require Father to be responsible for child support arrearages after a termination order, and the OAG produced no evidence that Michigan had a law similar to Tex. Fam. Code § 161.005(c)(2).

STEP-GRANDPARENTS HAD SUFFICIENT INTEREST TO INTERVENE IN SAPCR BECAUSE MODIFICATION COULD AFFECT THEIR RIGHTS TO TELEPHONE VISITATION GRANTED TO THEM IN PRIOR AGREED ORDER

¶15-3-19. ***In re Shifflet,*** ___ S.W.3d ___, 2015 WL 967556, 01-14-00929-CV (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding) (03-03-15).

Facts: Five years after their divorce, the parents signed an agreed order in a SAPCR naming them joint managing conservators with Father having the exclusive right to designate the Children's primary residence. Also in that order, Step-Grandparents were given telephone visitation with the Children at least three days a week and were permitted to enforce the order in their own names.

About five years later, Father filed a petition for a writ of habeas corpus with respect to the Children, alleging that Mother had been illegally keeping them away from him. Mother filed an answer and asserted that she had been in possession of the Children to protect their safety because Father had been convicted of domestic violence against his girlfriend. Father did not appear at the subsequent hearing. Step-Grandparents had not been noticed and also did not appear. The trial court signed an order denying Father's habeas petition and issued

findings that the Children had been in Mother's possession for over six months before the filing of the habeas petition. The trial court entered temporary orders appointing Mother sole managing conservator and denying Father access or possession until further order of the court.

That same day, Mother filed a SAPCR seeking permanent sole managing and possessory conservatorship of the Children. Subsequently, Step-Grandparents filed a petition in intervention seeking sole managing conservatorship of the younger Child. Step-Grandparents alleged that they had sole managing conservatorship of the Child for at least six months, that Father had voluntarily relinquished care to them, that the Child had lived with them with the permission of both parents, and that Mother also lived with them and the Children for a period of time.

Mother filed a motion to dismiss and argued that the prior factual findings negated Step-Grandparents' claim of actual care, custody, and control of the Child. Mother argued that the factual findings made Step-Grandparents supporting affidavit insufficient as a matter of law. At a hearing on Step-Grandparents' standing to intervene, Mother asked the trial court to take judicial notice of the factual findings, which it did. No other evidence was presented. The trial court orally granted Mother's motion to dismiss.

Step-Grandparents filed a petition for writ of mandamus arguing that they should have been allowed to rebut Mother's motion to dismiss and that they had had sufficient standing to intervene under Tex. Fam. Code § 102.003(a)(9) or, in the alternative, under Tex. Fam. Code § 156.002(a).

Holding: Writ of Mandamus Conditionally Granted

Opinion: A trial court may take judicial notice of its own records in a cause involving the same subject matter *between the same, or practically the same, parties*. Further, a trial court may take notice *that* a pleading has been filed in a case or *that* it has signed an order, but it may not take notice of the *truth* of allegations in its records.

Here, when Mother answered and filed an affidavit controverting Father's habeas corpus petition, Step-Grandparents were not parties. Therefore, the orders from the habeas proceeding were not the proper subject of judicial notice. Moreover, if the trial court relied on the factual findings in the prior orders, that was also an abuse of discretion.

A person who satisfies the standing requirements to file an original suit may also intervene. Tex. Fam. Code § 102.003(a)(9) grants standing to file an original suit to a person other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition. This section does not require the care, custody, and control to be exclusive. A petitioner filing a petition under this section need only allege that she meets the requirements of this section. If a party challenges the standing of the petitioner, the petitioner must submit evidence raising a fact issue on the challenged elements to avoid dismissal. If there is a question of fact, the trial court may not dismiss for lack of standing.

Step-Grandparents' alleged they had actual care, control, and possession of the Children for at least six months ending not more than 90 days preceding the date of the filing of the petition. Because Tex. Fam. Code § 102.003(a)(9) does not require the care, control, and possession be exclusive, the fact that Mother also lived with Step-Grandparents was insufficient to establish as a matter of law that they lacked standing.

Further, Tex. Fam. Code § 156.002(a) provides that a party affected by an order may file a suit for modification. Because the prior agreed order had granted Step-Grandparents telephone visitation with the Children at least three days a week and permitted them to enforce the order in their own names, Grandparents had sufficient interest to intervene under Tex. Fam. Code § 156.002(a).

Finally, Mother's argument that the parental presumption should have been applied was without merit because Chapter 153's parental presumption does not apply in a Chapter 156 modification.

Editor's comment: *Remember that not every court of appeals in our State subscribes to the proposition that section 102.003(a)(9) on SAPCR standing "does not require that the care, custody, and control be exclusive." Other courts of appeal have held the exact opposite. Make sure you know what the precedent is in your region before making these kinds of arguments to the trial judge. R.T.R.*

Return to Table of Contents

DALLAS COUNTY COURT WITHOUT JURISDICTION TO SET ASIDE BRAZOS COUNTY COURT'S ORDER BECAUSE BRAZOS COUNTY ORDER NOT VOID; TEXAS COURT NOT REQUIRED UNDER UCCJEA TO COMMUNICATE WITH OKLAHOMA COURT BECAUSE ONLY PENDING ISSUE IN TEXAS WAS CHILD SUPPORT.

¶15-3-20. *In re S.J.G.*, No. 05-13-01351-CV, 2015 WL 1611833 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (04-09-15).

Facts: Father and Mother divorced nearly ten years ago in Brazos County. Pursuant to the final decree, they were named joint managing conservators, with Mother being granted the exclusive right to determine their Children's primary residence, and Father being ordered to pay child support. Soon after the divorce, Mother remarried and moved to Oklahoma with the Children. A few years later, Father moved to Dallas County.

Father filed an original SAPCR in Brazos County, along with a motion to transfer the case to Dallas County. Mother responded with a motion asking the Texas court to decline jurisdiction because she and the Children lived in Oklahoma. After a hearing, the Brazos court signed a transfer order to transfer the issue of child support to Dallas County and stay the custody issues on the condition that the parties filed a custody suit in Oklahoma. Mother subsequently filed the divorce decree in Oklahoma along with a motion to modify. Father thereafter filed a motion in the Dallas County court to set aside the Brazos County transfer order. The Dallas County court denied Father's motion and, after hearing evidence, entered an order modifying child support. In addition, the Dallas County court awarded Mother attorney's fees.

Father appealed, arguing the Dallas County court erred in failing to set aside the Brazos County court's transfer order. Father contended that the Brazos County court lacked subject matter jurisdiction to retain the custody issues and make a forum determination because it had a ministerial duty to transfer the entire case to Dallas County. Additionally, Father argued the Dallas County court erred in awarding Mother attorney's fees because he claimed the only statute authorizing an award of attorney's fees is Tex. Fam. Code § 156.005, which only allows such an award if a suit was filed frivolously or was designed to harass. Finally, Father argued the Dallas County court abused its discretion by failing to communicate with the Oklahoma court as required by the UCCJEA.

Holding: Affirmed

Opinion: A court may not set aside a judgment of a court of equal jurisdiction unless that order is void. Here, the Brazos County court obtained continuing, exclusive jurisdiction when it entered the parties' final decree of divorce, and the Brazos County court maintained its continuing, exclusive jurisdiction on the day it entered the transfer order. Thus, the order was not void and not subject to collateral attack.

Tex. Fam. Code § 156.005 permits a court to tax attorney's fees as costs if a modification suit is filed frivolously or designed to harass a party. Tex. Fam. Code § 106.002 allows a court to render a judgment for reasonable attorney's fees to be paid directly to an attorney in any SAPCR proceeding. Here, the trial court did not assess attorney's fees as costs, but rather found good cause to award attorney's fees to Mother based on Father's actions. Father did not argue why an award under Tex. Fam. Code 106.002 would constitute error.

Tex. Fam. Code § 152.110(d) (UCCJEA) requires that if proceedings involving the same parties are ongoing in Texas and another state, the Texas court must inform the other state's court of the ongoing proceedings. The UCCJEA applies to child-custody proceedings, not child-support proceedings. Here, the only issue addressed in the Dallas County court was a modification of child support, so the requirement of Tex. Fam. Code § 152.110.(d) did not apply.

SAPCR
Termination of Parental Rights

MOTHER FAILED TO PRESERVE HER COMPLAINT THAT RULE 11 AGREEMENT WAS BASED ON MUTUAL MISTAKE BY FAILING TO RAISE ISSUE WITH TRIAL COURT; MOTHER'S APPELLATE COMPLAINT THAT DECREE DID NOT COMPLY WITH RULE 11 AGREEMENT WOULD HAVE BEEN PROPERLY RAISED IN A MOTION TO MODIFY OR CORRECT JUDGMENT.

¶15-3-21. ***In re A.B.,*** ___ S.W.3d ___, 2015 WL 967727 (Tex. App.—Dallas 2015, no pet. h.) (03-03-15).

Facts: While Mother was incarcerated, her two Children were under her friend's care. TDFPS received a referral alleging neglectful supervision and filed a petition to terminate Mother's and Father's parental rights. The trial court appointed attorneys to represent Mother and Father in addition to appointing a guardian ad litem attorney to represent the Children. The day before trial, the guardian ad litem, the attorneys for Mother and Father, and TDFPS signed a Rule 11 agreement in which the parents agreed to have their rights terminated pursuant to Tex. Fam. Code § 161.001(1)(O) (failure to comply with a court order). The agreement provided that TDFPS would send cards, pictures, and letters sent to the parents twice a year until the Children were adopted. TDFPS further agreed to try to find adoptive parents who would agree to continue sending cards, pictures, and letters. At trial, Mother's counsel requested a continuance because Mother had a criminal hearing the next day and might be placed on probation through a mental health program. Mother believed that with the aid of the mental health program, she would be in a better position to complete the court-ordered services and provide a stable environment for her Children. The trial court denied the motion. The only evidence presented at trial was the testimony of a TDFPS caseworker, who testified that the parties had entered into a Rule 11 agreement. The trial court terminated Mother's parental rights based on the agreement. Mother appealed, arguing the Rule 11 agreement was void because it was based on a mutual mistake, in that there was no order with which she had failed to comply.

Holding: Affirmed as Modified

Opinion: The appellate record did not contain specific orders "establishing the actions necessary for the [Mother] to obtain the return of the child[ren]…." However, Mother did not argue on appeal that the evidence was insufficient to support a finding that she committed the ground described in Tex. Fam. Code § 161.001(1)(O). Rather, she argued the Rule 11 agreement was void because of mutual mistake. However, Mother did not raise her mutual mistake argument at trial, in a motion for new trial, or in another post-judgment motion. Thus, she waived the issue for appeal.

Mother also pointed to errors in the decree that were inconsistent with the Rule 11 agreement, including the attorneys' names, the gender of one of the Children, and terms of the Rule 11 agreement. The court of appeals modified the decree to reflect the correct attorneys' names and Child's gender. However, the court of appeals lacked information necessary to make substantive changes to the judgment concerning the Rule 11 agreement. Such errors would be properly brought to the trial court's attention through a motion to modify or correct the judgment.

TRIAL COURT PERMITTED TO CONSIDER EVIDENCE FROM PRIOR TERMINATION PROCEEDING ORDER DENYING TERMINATION BECAUSE TRIAL COURT FOUND THAT THE CIRCUMSTANCES HAD MATERIALLY AND SUBSTANTIALLY CHANGED SINCE THE PRIOR PROCEEDING.

¶15-3-22. ***In re A.A.M.,*** ___ S.W.3d ___, 2015 WL 1247268, 01-14-00798-CV & 01-14-00801-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (03-17-15).

Facts: TDFPS received a report of violence in Father's home, where he lived with Mother and their two Children. Upon investigation, TDFPS found inoperative kitchen appliances, little furniture, and no food. During the visit, Father got angry and told the caseworker to take the Children. Father admitted to smoking marijuana and tested positive for marijuana the next day. TDFPS filed a petition for managing conservatorship of the Children and sought to terminate the parents' parental rights. The trial court denied the request for termination but appointed TDFPS as the sole managing conservator of the Children. During those proceedings, a third Child was born and tested positive for marijuana at birth. TDFPS filed a separate proceeding seeking conservatorship. The trial court appointed the Child's grandmother as sole managing conservator. TDFPS amended its petition to seek termination of Father's parental rights. The trial court consolidated the two cases, and after a bench trial, it terminated Father's rights to all three Children. Father appealed, arguing that the trial court erred in relying on evidence from the first termination hearing, in which the trial court denied TDFPS's petition to terminate his parental rights. Father challenged the trial court finding that he had endangered the Children and that he had failed to comply with the court-ordered family services plan. Father did not challenge the finding that termination was in the Children's best interest.

Holding: Affirmed

Opinion: Tex. Fam. Code § 161.004(a) allows a termination after a rendition of a prior order denying termination if the circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the order denying termination have materially and substantially changed since the date that the order was rendered. Tex. Fam. Code § 161.004(b) permits a court to consider evidence presented at a previous hearing to terminate the parent-child relationship of the parent with respect to the same child.

Here, although TDFPS did not cite Tex. Fam. Code § 161.004 by name, its petition did allege that the circumstances of the children, a conservator, or other party affected by the order have materially and substantially changed. Further, because Father did not specially except to the petition, he waived any complaint about a perceived lack of notice for TDFPS's failure to cite Tex. Fam. Code § 161.004 by name. Moreover, the trial court found that the circumstances of the parties had materially and substantially changed since the prior orders and that evidence from the prior proceedings us admissible pursuant to Tex. Fam. Code § 161.004.

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. Tex. Fam. Code § 161.001(1)(E) permits termination if the 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." Courts may consider parental conduct that did not occur in the child's presence, including conduct before the child's birth. Illegal drug use creates the possibility that the parent will be impaired or imprisoned and thus incapable of parenting.

Here, TDFPS presented evidence of Father's criminal record both before and after the birth of the Children, including a conviction for assault of a family member. Additionally, during the time the Children were in TDFPS's care, Father tested positive for marijuana and cocaine multiple times. Although TDFPS's expert admitted that errors can occur during drug testing, Father presented no evidence of any error relating to his specific drug tests.

Return to Table of Contents

TERMINATION IN CHILDREN'S BEST INTEREST BASED ON MOTHER'S HISTORY OF DRUG USE, FAILURE TO COMPLETE COURT-ORDERED SERVICE PLAN, AND FAILURE TO FIND EMPLOYMENT AND MAINTAIN A HOME.

¶15-3-23. ***In re X.R.L.,*** ___ S.W.3d ___, 2015 WL 1546261, 06-14-00090-CV (Tex. App.—Texarkana 2015, no pet. h.) (04-01-15).

Facts: Mother was in an "on-again off-again" relationship with the father of her first two Children. She had a third Child with another man. TDFPS received an intake that alleged Mother checked herself into a hospital and left the Children in the care of their great-grandmother, who suffered from "Alzheimer dementia" and had a history of drug use. Upon investigation, TDFPS found the Children dirty, malnourished, and uncared for. About five months later, TDFPS received another intake from a women's shelter expressing concern for the condition and well-being of the Children. The TDFPS investigator stated that the Children were dirty, malnourished, and smelled of urine.

Mother suffered from depression and bipolar disorder but was not taking her medication. Mother had told the TDFPS investigator that she had no money, had no place to go, was overwhelmed, and had been experiencing suicidal thoughts. Although Mother refused to take a drug test, she admitted to using methamphetamine ("meth") and synthetic marijuana. TDFPS removed the Children from Mother's care. The oldest Child (five years old) tested positive for cocaine and meth. The middle Child (four years old) tested positive for cocaine. The Children were placed in foster care. After the oldest Child made an outcry of sexual abuse against her father, she was placed in therapeutic care.

Mother was ordered to complete a service plan that included attending weekly visitation with the Children, maintaining a stable home, submitting to random drug tests, attending court hearings, attending drug treatment and mental health treatment sessions, obtaining and maintaining employment, attending counseling, maintaining sobriety, completing a psych evaluation, and maintaining consistent contact with TDFPS. Mother submitted to a psych evaluation, attended one counseling session, submitted to only 5 of 8 drug tests, tested positive for cocaine, meth, and marijuana throughout the case, and only visited the Children 2-3 times out of 25-30 available opportunities to do so. Mother also failed to maintain a consistent address, obtain employment, or maintain contact with TDFPS. Further, Mother continued to be in a relationship with the older two Children's father, despite the oldest Child's outcry.

A TDFPS investigator, a TDFPS caseworker, and a CASA volunteer testified at the final trial. The trial court terminated Mother's parental rights, finding termination was in the Children's best interest and citing endangerment grounds, constructive abandonment, failure to comply with a court order, and use of a controlled substance. Mother appealed, challenging only the best interest 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. When determining whether termination is in a child's best interest the court will consider the *Holley* factors.

Desires of the Child. No evidence of the Children's desires was presented.

Emotional and physical needs of the Child now and in the future. Due to the Children's young ages, their needs were great. The TDFPS caseworker testified that the Children were dirty, their clothes didn't fit, and the oldest Child had made an outcry of sexual assault against her father. Further, Mother had no income, no employment, no reliable transportation, and no stable residence.

Emotional and physical danger to the Child now and in the future. There was some evidence Mother attempted to be a good parent. However, Mother admitted to using drugs while the Children were in her care. She failed numerous drug tests, even after the Children had been removed. Mother had moved a lot with the Chil-

dren. Mother continued to be in a relationship with the oldest two Children's father, even after evidence suggested he had sexually abused the oldest Child. In addition, the CASA volunteer testified that termination was in the Children's best interest.

Parental abilities of the individuals seeking custody. Mother failed to remain drug free, was either unwilling or unable to complete counseling, and appeared disinterested in visiting the Children.

Programs available to assist these individuals or by the agency seeking custody. Although the department provided programs to assist Mother, she was either unwilling or unable to participate.

Stability of the home or proposed placement. To promote the Children's best interest, Mother needed to overcome her drug addiction, find stable housing, and locate employment, but she showed little desire to achieve these goals. Further she failed to show up for visitation and numerous drug tests and did not complete the required counseling and evaluations.

Stability of the home or proposed placement. Mother did not attend trial, and there was no evidence she had any plans for the Children if they were returned to her. Mother failed to maintain a consistent address and told TDFPS that she had nowhere for the Children to stay. All three Children had been placed in foster care, and there was evidence the oldest Child was improving in therapeutic placement.

Acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and Any excuse for the acts or omissions of the parent. Mother had limited means and a lack of family support. However, Mother had a history of drug use; continued her relationship with the oldest two Children's father even after sexual misconduct allegations against him; had no income to support the Children; lacked a suitable home; neglected the Children's hygiene; and failed to visit the Children during the pendency of the suit.

¶15-3-24. ***In re D.M.B.,*** ___ S.W.3d ___, 2015 WL 1938652, 04-14-00767-CV (Tex. App.—San Antonio 2015, no pet. h.) (04-29-15).

Facts: TDFPS filed a petition to terminate Mother's and Father's parental rights to their two Children. In the petition TDFPS included an address for Father where he had previously lived. TDFPS obtained an order for substituted service and filed a return of service indicating citation was posted on the door of the house listed as Father's address in the petition. The trial court held an adversary hearing as required by Tex. Fam. Code § 262.201, at which Father's appointed ad litem attorney appeared. Father's attorney ad litem announced "not ready" and informed the court that he had spoken to Father the day before the hearing. The trial court proceeded with the hearing, and Father's attorney ad litem asserted objections on Father's behalf. Some months later, the termination matter was tried to the court. Attorneys for TDFPS, Mother, and the Children appeared, but neither Father nor his attorney ad litem appeared. Mother's and Father's parental rights were terminated as to both Children.

About three months later, Father filed a notice of restricted appeal, arguing that the trial court lacked personal jurisdiction over him. Father asserted that he was not properly served with citation because TDFPS did not strictly comply with Tex. R. Civ. P. 106, which violated his state and federal due process rights. In its reply, TDFPS countered that because Father made a general appearance in the proceedings, he waived his complaint about any alleged defective service.

Holding: Dismissed for want of Jurisdiction

Majority Opinion: (J. Banard, J. Pulliam)

Because the parties agreed that the first three jurisdictional elements of a restricted appeal were met, the only disputed issue here was whether error was apparent on the face of the record. Error must be apparent and not inferred from the record. Here, if Father made a general appearance, then he waived his complaint regarding service, error would not have been apparent on the face of the record, and he would not be entitled to a restricted appeal.

Although there were no affirmative pleadings on file, Father's attorney ad litem appeared at the Chapter 262 hearing and participated. He announced not ready but made repeated objections to TDFPS's request for a TRO throughout the hearing. At no point did the attorney ad litem object to lack of service. At the end of the

hearing, the attorney ad litem re-emphasized his objection to the requested TRO. The conduct of Father's attorney ad litem was more than that of a mere bystander or silent figurehead. Through his objections to the admission of evidence, Father's attorney ad litem invoked the judgment of the court on a question other than jurisdiction. Therefore, Father waived his complaint regarding lack of service and was not entitled to a restricted appeal.

Dissenting Opinion: (J. Martinez)

Because involuntary termination suits involve constitutional rights, the utmost care must be given to acknowledge and protect parents' rights. Termination proceedings must be strictly scrutinized and termination statutes must be strictly construed in favor of the parent.

Father had no live pleadings on file. At the Chapter 262 hearing, Father's ad litem attorney announced not ready, but the trial court proceeded with the hearing. The trial court twice invited Father's ad litem attorney to cross-examine witnesses "without appearing," but Father's ad litem attorney declined. Father's ad litem attorney objected to TDFPS's request for a TRO because TDFPS had not pleaded for such relief. The trial court made no ruling on Father's ad litem attorney's objection. Father's ad litem attorney made no closing argument and urged no prayer for relief. In closing, TDFPS and the Children's ad litem attorney requested genetic testing to confirm Father's paternity of the younger Child. The trial court responded that it would not make such orders until Father "show[ed] up."

By not agreeing or acquiescing to the restraining order, Father's ad litem attorney avoided an implicit acknowledgment of the trial court's jurisdiction over Father and any recognition that an action was properly pending. Further, raising hearsay objections does not rise to a plea. Father's ad litem attorney's conduct throughout the record was consistent with a challenge to the court's jurisdiction. The facts of this case did not fit within the guidelines of a general appearance, especially considering that this was a parental termination suit. Thus, because there was error on the face of the record, the court of appeals should have retained jurisdiction to review the merits of Father's complaints regarding service.

FATHER WAIVED APPELLATE FACTUAL SUFFICIENCY COMPLAINT IN TERMINATION CASE BECAUSE HE FAILED TO RAISE COMPLAINT TO TRIAL COURT.

¶15-3-25. ***In re E.M.,*** ___ S.W.3d ___, 2015 WL 3485317, 10-14-00313-CV (Tex. App.—Waco 2015, no pet. h.) (05-28-15).

Facts: Mother and Father had a history of drug use and violent behavior toward one another. Their 6-year-old Child told her therapist that Mother had frequently hit her on legs, butt, and back, slapped her in the face, and threw her against a wall. The 6-year-old also reported that she was not always fed or bathed. She attempted to clean her own clothes by hand because her parents did not do it, and she could not reach the washer. The therapist reported that the 6-year-old had been "parentified" due to her parents' neglect and had felt responsible for taking care of herself and her little brother. On the day the Children were removed, the police had responded to a domestic disturbance during which the parents had been physically fighting over possession of the Children. One of the parents had head-butted the other, and Mother's hand had been cut by a butcher knife that she was using in an attempt to slash Father's tires. Father drove off with the younger Child, while the 6-year-old remained in the front lawn, crying and frightened. Both parents' parental rights were terminated, and each appealed separately.

Holding: Affirmed

Opinion: In addition to numerous other complaints, both parents argued that the evidence was factually insufficient to support the trial court's finding that termination was in the best interest of the Children. Following its own precedent, the Waco Court of Appeals held that in order to preserve a factual sufficiency complaint in a termination case for appellate review, a party must make that complaint in the trial court in a motion for new

trial. While Mother filed a motion for new trial raising this issue to the trial court, Father did not. Thus, Mother preserved her factual sufficiency complaint, but Father did not.

MISCELLANEOUS

DENIAL OF FATHER'S JURY DEMAND HARMLESS ERROR BECAUSE DIRECTED VERDICT WOULD HAVE BEEN JUSTIFIED.

¶15-3-26. *Nelson v. Nelson*, No. 01-13-00816-CV, 2015 WL 1122918 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (03-12-15).

Facts: Mother and Father had two Children during their marriage. Mother was the primary caregiver and financial provider for the family. When Father earned money, he considered those earnings to be his own private money and spent it on things for himself, such as a two-seat sports car while Mother was pregnant with their second Child.

Father filed a pro-se divorce alleging insupportability as his sole ground. Mother filed a counter-petition soon after. In his pleading, Father stated that he believed he and Mother would reach an agreement regarding the Child issues, but if not, he asked the court to make decisions on those issues. Mother sought sole managing conservatorship and alleged that Father had a history of family violence and of neglecting the Children. Father filed an affidavit of inability to pay costs, which was challenged by the district clerk. The trial court found that Father was able to pay all filing fees. Subsequently, Father requested a jury and paid the requisite fee.

The trial court appointed an amicus attorney and ordered each parent to pay security for the amicus attorney's fees. Mother paid, but Father did not. Rather, despite the prior finding that he was not indigent, Father filed an affidavit on inability to pay amicus attorney's fees. At a pretrial hearing, the trial court twice warned Father that if he didn't pay the amicus attorney's fees, his pleadings and jury request could be struck. Father indicated he understood. When Father continued to fail to pay the fees, the amicus attorney filed a motion for sanctions based on Father's litigation conduct, including his failure to pay amicus attorney's fees. After a hearing, the trial court struck both Father's jury demand and his pleadings. Nevertheless, the trial court repeatedly invited Father to participate at trial. During the trial, Mother presented evidence supporting her request to be named sole managing conservator. Father, on the other hand, refused to put on any evidence, in part because he believed the nonjury proceeding violated his right to a jury trial. After the bench trial, the court awarded Mother sole managing conservatorship. Father appealed, challenging the trial court's order striking his jury demand and pleadings.

Holding: Affirmed

Opinion: To invoke the right to a jury trial, a party must make a written request for a jury and pay the jury fee or file an oath of inability to pay within a reasonable time. Here, it was undisputed that Father requested a jury and paid the jury fee.

Mother conceded that striking Father's jury demand was error. However, a wrongful denial of a jury trial is harmless if there was no material issues of fact and an instructed verdict would have been justified. Here, Father presented no evidence and relied solely on his objection to the proceeding taking place without a jury. Further, about a month before trial, Father sent an email to Mother indicating he no longer wished to proceed with prosecuting the divorce and that he was willing to agree to Mother's terms. At trial, Mother presented evidence of her ability to care for the Children and of Father's domestic violence, psychological problems, and an incident in which he hid the Children from her for three months. Father presented no evidence to controvert any of her evidence. Because there was no material fact question presented, a directed verdict would have been proper.

Mother additionally argued that Father waived his right to a jury by including a request in his pleadings for the trial court to determine issues of custody, visitation, and child support if the parties could not agree. She argued that the request was for the court, as opposed to a jury, to act as factfinder. However, the court of appeals

held this was not an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.

Father argued he lacked sufficient notice of the sanctions and that lesser sanctions should have been issued. However, Father was warned twice on the record that if he failed to pay the amicus attorney, the trial court could strike his pleadings, and both times, Father indicated he understood. Moreover, because Father had no affirmative pleadings on file, other than a request for a no-fault divorce, the only effect that striking his pleadings had was to position him as the respondent instead of petitioner. Further, a lesser sanction of fines would have been inappropriate since he had shown, by failing to pay the amicus attorney, that such an imposition would be ineffective.

Finally, Father's first affidavit of indigency was successfully challenged, and the trial court found he was able to pay costs. Father's subsequent unchallenged affidavits did not entitle him to an indigent finding as a matter of law.

NO EVIDENCE SUPPORTED AWARD OF ATTORNEY'S FEES BECAUSE DETERMINATION OF THE FEE AWARD WAS CONDUCTED IN-CHAMBERS AND OFF-THE-RECORD; FATHER DID NOT "INVITE THE ERROR" BY ACQUIESCING TO THE OFF-THE-RECORD CONFERENCE.

¶15-3-27. *In re A.K.S.*, No. 05-14-00233-CV, 2015 WL 1182867 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (03-16-15).

Facts: After Mother and Father were divorced, Mother filed a motion to modify the parent-child relationship. The parties entered a mediated settlement agreement resolving all issues except attorney's fees. On the day of trial, the trial court held an in-chambers, off-the-record conference with the attorneys. After the conference, the trial court issued an order stating that Mother incurred reasonable and necessary attorney's fees and awarded Mother's attorney a judgment for fees.

Subsequently, Mother's attorney filed a motion for new trial on the issue of attorney's fees because the evidence was legally and factually insufficient to support the award. The trial court denied the motion for new trial. Father appealed. Mother responded that because Father acquiesced to the procedure used to determine fees, he invited the error and was estopped from seeking relief on appeal.

Holding: Reversed and Remanded in Part

Opinion: An attorney seeking an award of fees must show that those fees were reasonable and necessary. Because there was no record of any agreements between the attorneys, there was no record for appellate review. Thus, the record failed to show that Mother incurred attorney's fees or that any fees were reasonable and necessary.

The invited error doctrine applies to situations where a party requests the court to make a specific ruling, then complains about it on appeal. An appellant is estopped from asserting a position in appellate court based on actions taken in the trial court if those actions were clearly adverse to his position on appeal. Here, there was no evidence that Father requested the in-chambers, off-the-record discussion. Moreover, on appeal, Father did not complain about the in-chambers, off-the-record discussion. Father complained that the evidence did not support the award. Further, even if Father agreed to the in-chambers, off-the-record discussion, that position would not be adverse to his position on appeal.

Editor's comment: *Always beware of the in-chambers conference. It does not preserve error or constitute evidence. M.M.O.*

THE DISMISSAL FOR WANT OF PROSECUTION OF FATHER'S FIRST BILL OF REVIEW DID NOT SERVE AS A BASIS FOR RES JUDICATA BARRING A SECOND BILL OF REVIEW.

¶15-3-28. ***Barnes v. Deadrick,*** ___ S.W.3d ___, 2015 WL 1247004, 01-14-00271-CV (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (03-17-15).

Facts: When the Child was about ten-years old, his mother died, and his older Sister filed a SAPCR, seeking conservatorship of the Child. Father was served by substituted service but did not appear. The trial court granted Sister a default judgment, appointed Sister as sole managing conservator and Father as possessory conservator. Father was given supervised visitation and ordered to pay monthly child support. About a year and a half later, Father filed a bill of review, alleging that he had never been served. In the bill of review proceeding, a docket entry noted that neither Father nor his counsel appeared at a scheduled hearing. The docket sheet further stated "Bill of Review denied." Despite this notation indicating a denial, the trial court subsequently signed an "Order for Dismissal for Want of Prosecution."

About two years later, Father filed a second bill of review that asserted that Father "was served via substitute service at an incorrect address and thus never received notice of the pending action." Sister filed an answer and asserted the affirmative defense of res judicata in addition to filing special exceptions. She alleged that Father's second bill of review was barred by res judicata because there was a prior final judgment in the first bill of review and that the second bill of review was based on the same claims as the first bill of review or on claims that could have been raised in the first action. At the hearing, the trial court overruled Sister's special exceptions and, without prompting by the parties, stated that the affirmative defense of res judicata "may have some merit." After dialogue with counsel, the trial court agreed that the second bill of review was barred by res judicata and signed an order denying the second bill of review. Father filed a motion for new trial. Sister asserted that Father's motion for new trial was improper and sought sanctions. The trial court agreed and awarded Sister attorney's fees as sanctions. Father appealed the order denying his second bill of review and the award of sanctions.

Holding: Reversed and Remanded

Majority Opinion: If a bill-of-review plaintiff can establish that he was not properly served, he is not required to show either that he had a meritorious defense or that fraud, accident, wrongful act, or official mistake prevented the plaintiff from presenting such a defense. The only issue to determine is whether he was served. A bill of review must be filed within four years after the entry of the order that it is challenging.

Unless otherwise stated in the order, a dismissal for want of prosecution is presumed to be without prejudice. A dismissal without prejudice places the parties in a position as if the suit had never been brought and does not serve as a final judgment on the merits for purposes of res judicata.

Here, Father's inattentiveness in the SAPCR or the first bill of review was not at issue. Father was not obligated to show anything except that he was not properly served in the underlying SAPCR. Moreover, Father's conduct during the first bill of review proceeding was irrelevant to whether he was properly served in the underlying SAPCR. Father's second bill of review was properly filed within the four-year limitation of the challenged judgment. The court of appeals remanded the case to provide Father with the opportunity to establish whether he had received service of the underlying SAPCR.

Dissenting Opinion: (J. Keyes) A party who fails to timely avail himself of available legal remedies is not entitled to relief by bill of review. If a motion to reinstate, motion for new trial, or direct appeal is available, a failure to pursue one of those available forms of relief is likely negligence that would preclude subsequent relief through a bill of review.

Following a dismissal for want of prosecution, Tex. R. Civ. P. 165a provides the exclusive mechanism for reinstating a case by requiring a party to set forth grounds for reinstatement within thirty days. Here, Father failed to appear at his first bill of review hearing, which justified the trial court's dismissal of the first bill of review for want of prosecution under Rule 165a. After the dismissal, Father filed no motion to reinstate his first bill of review, nor did he appeal the trial court's dismissal. Thus, the order dismissing his first bill of review became a final, unappealable judgment.

Return to Table of Contents

The majority's holding permitted Father to bring the exact same bill of review on exactly the same grounds despite Rule 165a providing the exclusive mechanism for reinstating a case. Moreover, the record clearly established Father's conscious indifference throughout all of the proceedings. Father's first bill of review was not filed until a year and a half after the final order, and he did not attach any evidence to his petition to disprove the recital in the order that he had been "duly and properly cited" with service. Father failed to appear at his own bill of review hearing. Father did not timely file a motion to reinstate his bill of review, nor did he appeal the trial court's order dismissing the first bill of review. When Father filed his second bill of review, he again failed to attach any evidence to show that he had not been served with notice of the underlying SAPCR.

Editor's comment: *I tend to agree with Judge Keyes's dissent here. Father's complete lack of diligence should not be rewarded. G.L.S.*

COMPANY PROVIDING COURT-ORDERED DRUG TESTING ENTITLED TO JUDICIAL IMMUNITY BECAUSE IT ACTED AS AN "ARM OF THE COURT" AND DID NOT EXCEED THE ORDER'S SCOPE.

¶15-3-29. *B.W.D. v. Turnage*, No. 05-13-01733-CV, 2015 WL 869289 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (03-02-15).

Facts: Pursuant to an agreed order in a SAPCR proceeding, Father was ordered to undergo random supervised weekly urinalysis training conducted by Forensic DNA and Drug Testing Services, Inc. ("Forensic") for a specified period of time. If Father failed a urinalysis test, the ordered testing would continue beyond the original time period as necessary until Father had not failed a test for a six-month period. The order included provisions defining what constituted a failed urinalysis test, including a positive test result, a determination that the sample was diluted, or a failure to appear for a test. Further, the order provided that if Father failed a test during one of his periods of possession, the current 50/50 possession schedule would immediately be modified to a standard possession schedule.

The test samples were collected by Forensic and sent to Medtox Scientific, Inc. ("Medtox") for testing. One test sample was determined by Jim Turnage of Forensic to have been diluted, which can sometimes indicate an intent to hide drug use. Turnage made this determination by relying on the sample's creatinine level. However, Medtox did not reach the same conclusion because it relied on guidelines from the Substance Abuse and Mental Health Services Administration (SAMHSA) and the U.S. Department of Health and Human Services (HHS) that consider both creatinine levels and the specific gravity of the sample. As a result of Turnage's conclusion, the duration of Father's weekly random testing was extended and a breathalyzer was installed in Father's car.

Father sued Turnage and Forensic, alleging they failed to carry out the duties assigned to them. Turnage and Forensic filed a motion for summary judgment, claiming judiciary immunity by extension of the trial court's appointment. The trial court granted the motion for summary judgment. Father appealed, arguing that Turnage and Forensic were not entitled to judicial immunity, had acted beyond the scope of their appointment, and did not prove they were entitled to summary judgment.

Holding: Affirmed

Opinion: When judges delegate their authority or appoint other to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment. Whether a delegate or appointee is protected by judicial immunity is determined by whether the delegate or appointee exercises discretionary judgment or merely performs ministerial or administrative tasks. For example, judicial immunity has been extended to court-appointed trustees, receivers, and psychologists, but it has not been extended to court reporters. Derived judicial immunity is lost when the court officer acts in the clear absence of all jurisdiction and outside the scope of his authority.

Here, the agreed order provided that if Father failed a test or a test returned a positive result and such result was not "satisfactorily explained…*to the person charged with the responsibility of analyzing the test results*," Father's random weekly drug tests would be extended past the end date originally contemplated in the agreed order. Further, per the agreed order, Father would be deemed to have failed a test if "*the person charged with the responsibility of interpreting the results*" determined the sample was diluted or altered, if Father tested positive for alcohol or an illegal substance without a "satisfactory explanation (*satisfactory to Jim Turna*ge)," or if Father failed to appear within 5 hours of a sample "request by Jim Turnage." Additionally, the order did not specify the method or methods to be used in interpreting the test results. That matter was left to the discretion of "the person charged with the responsibility of interpreting the test results." Moreover, while the order provided that satisfactory explanation of positive results was to be given to Jim Turnage, the order contained no mention of Metdox.

EXPERT WITNESS WITH BACKGROUND IN CUSTODY EVALUATIONS AND PARENTING FACILITATION PERMITTED TO TESTIFY TO EXPLAIN TO JURY FACTORS TO CONSIDER IN DETERMINING WHETHER MODIFICATION OF CONSERVATORSHIP AND RELOCATION OF THE CHILDREN WAS APPROPRIATE.

¶15-3-30. *In re B.J.M.*, No. 04-14-00300-CV, 2015 WL 1244804 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (03-18-15).

Facts: In their final divorce decree, Mother and Father were appointed joint managing conservators of their twin boys. The parents had nearly equal periods of possession, and both parents were required to remain in Val Verde County. Less than a year later, Mother filed a petition to modify the custody order because she wanted to move with the Children to New York, where her family lived. During the trial, over H objection to the testimony claiming it was not relevant before the jury as it was not tied specifically to the facts of the case, that it was not reliable and that the subject matter of the expert's proposed testimony did not require any specialized knowledge or experience, Mother's designated expert witness testified on when sole managing conservatorship is appropriate and when it is appropriate to lift a geographical restriction. After a jury trial, the geographical restriction was removed, and Mother was named sole managing conservator of the Children. Father appealed, arguing, among other complaints, that the trial court erred in allowing Mother's expert witness to testify. Father argued that the testimony was not relevant or probative to any issue the trial court would consider because the expert's opinions were not tied to the facts of the case; that the testimony was not reliable because the methods, procedures, or theories forming the basis of her opinion had not been subjected to peer review; and that the subject matter about which the expert proposed to testify did not require any specialized knowledge or experience.

Holding: Affirmed

Opinion: A two-part test governs whether expert testimony is admissible: (1) the expert must be qualified; and (2) the testimony must be relevant and based on a reliable foundation. Here, the expert testified that she had a bachelor's degree in psychology, a master's degree in counseling psychology, and 21 years' experience in the area of counseling psychology. Further, the expert testified that nearly 100% of her practice involved child custody evaluations in high conflict cases and parenting facilitation. The expert explained what constituted a "high conflict" custody case and how parenting facilitators were normally utilized in such situations. The expert explained factors the jury should consider in determining whether joint or sole managing conservatorship would be appropriate and whether relocation would be appropriate. The expert did not offer any opinion on whether sole or joint managing conservatorship would be appropriate in this case.

Based on the expert's testimony, the jury could have determined that this case was a high conflict case. Father did not contend that the expert was not qualified to testify on the factors relating to conservatorship and relocation. Additionally, the expert's testimony was not the type of opinion for which a peer review of methodologies would apply. The expert testified that she had vast experience in the subject matter, which provided the basis for her knowledge of the relevant factors. Moreover, the expert's testimony was germane to the jury's

considerations. Although a jury may have general knowledge on the effects of a change in conservatorship or relocation of the children, the expert's testimony provided the jury with specialized knowledge that would assist it in understanding the evidence and in making necessary findings.

Editor's comment: *This case liberally expands the use of an expert in custody cases under TRE 702 (to a jury no less!). In citing the expert's qualifications there is no mention that she was licensed in any capacity but only held a bachelors and master's degree with 21 years of experience. She was not a lawyer but was allowed to testify on the factors a jury should consider in appointing conservators and deciding relocation cases!! S.S.S.*

Editor's comment: *I don't understand this opinion. I hope an appeal to SCOTX is on the way. M.M.O.*

MOTHER'S EXPERT'S TESTIMONY WAS INADMISSIBLE BECAUSE SHE FAILED TO FULLY DISCLOSE THE EXPERT'S MENTAL IMPRESSIONS AND OPINIONS AND SUPPORTING DOCUMENTS PURSUANT TO TEX. R. CIV. P. 194.2(f).

¶15-3-31. *In re D.W.*, No. 02-13-00293-CV, 2015 WL 1262820 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (03-19-15).

Facts: Mother and Father's divorce decree included a provision relating to international travel with their Children. This provision restricted travel to countries that were compliant members of the Hague Convention on the Civil Aspect of International Child Abduction. Further, the decree specifically stated that neither Dubai nor other countries from the United Arab Emirates were compliant with this Hague Convention.

About three years later, Mother filed a SAPCR seeking to modify the travel provision so she could travel with the Children to Dubai. Over Father's objections, the trial court allowed Mother's expert to testify regarding Dubai, its history of cooperation with the U.S., the enforceability of a Texas judgment in Dubai, and the enforceability of a contract executed by parties concerning traveling from the U.S. to Dubai. Father contended that the expert's testimony was inadmissible because Mother failed to provide in a response to disclosure her expert's opinion as required by Tex. R. Civ. P. 194. The trial court signed an order permitting Mother to travel to Dubai with numerous terms and conditions. Father appealed.

Holding: Reversed and Remanded in Part; Affirmed in Part

Opinion: Tex. R. Civ. P. 194.2(f)(2) permits a request for the disclosure of "the subject matter on which the expert will testify." Tex. R. Civ. P. 194.2(f)(3) permits a request disclosure of "the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information." Further, under Tex. R. Civ. P. 194.2(f)(4)(A), if the expert is employed by the other party, a party may request disclosure of "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony."

Here, Mother provided the name of her expert and the subject matter on which he would testify. However, Father requested additional information, as permitted under the Texas Rules of Civil Procedure, namely the general substance of Mother's expert's mental impressions and opinions and a brief summary of the basis for them, in addition to any documents, data, or reports provided to the expert, reviewed by him, or prepared by or for him in anticipation of his testimony. Mother failed to provide any of this information. Thus, Mother failed to respond.

A failure to respond to a request for disclosure results in the automatic exclusion of witness testimony. To allow the expert to testify was to allow trial by ambush. Father was not provided with the information necessary to prepare his cross-examination or to rebut Mother's expert's testimony with his own experts.

Further, the trial court found that pursuant to "Law 225 of the Law of Legal Procedures in the United Arab Emirates" Mother and Father could enter a settlement agreement that would be enforceable in the Dubai courts.

The trial court indicated that it had taken judicial notice of this law. However, there was no record of this law being presented to the trial court. Thus, the trial court's only basis for judicially noticing this law would have been Mother's expert's testimony, which was improperly admitted. Therefore, the admission of the expert's testimony probably caused the rendition of an improper judgment.

HUSBAND FAILED TO ESTABLISH PRIMA FACIE PROOF HE WAS ENTITLED TO BILL OF REVIEW.

¶15-3-32. ***Morris v. O'Neal,*** ___ S.W.3d ___, 2015 WL 1622184, 14-14-00252-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (04-07-15).

Facts: Mother and Father entered a mediated settlement agreement ("MSA") in their SAPCR proceeding. The trial court subsequently signed a final order in the SAPCR incorporating the MSA. About three months later, Mother filed a motion for judgment nunc pro tunc on the basis that the final order omitted terms provided for in the MSA. The trial court entered a judgment nunc pro tunc that included the omitted terms and omitted certain other terms that had been included in the original final order.

One year later, Father filed a petition for bill of review, alleging the judgment nunc pro tunc improperly corrected a judicial error after the expiration of the court's plenary power. Father further argued that he did not find out about the judgment nunc pro tunc until after the time for appeal. Father attached a copy of the judgment nunc pro tunc to his petition. Both parties filed bench briefs regarding whether the judgment nunc pro tunc was void. The trial court issued a letter ruling denying Father's petition for bill of review and a few weeks later, signed an order denying the bill of review. Father appealed, arguing the trial court erred in denying his bill of review and in denying him a hearing or an opportunity to amend his pleadings.

Holding: Affirmed

Opinion: A bill of review is brought as a separate suit that seeks to set aside a prior judgment that can no longer be challenged by a motion for new trial or direct appeal. To be entitled to relief on a bill of review, a petitioner must show that (1) he has a meritorious defense to the underlying action, (2) he was prevented from making that defense by fraud, accident, or wrongful act of the opposing party, or due to official mistake, and (3) those actions were unmixed with any fault or negligence of his own. When the petitioner has participated in the underlying suit, he must show a meritorious ground for appeal, rather than a meritorious defense. To succeed on a bill of review, the petitioner mush present prima facie proof to support his defense or ground for appeal.

Because there was no reporter's record, there was no record of any oral objections by Father. Additionally, the clerk's record contained no written motion filed by Father. Thus, Father failed to preserve any error regarding the trial court's denial of an evidentiary hearing.

A trial court may correct a *clerical* error in the record of a judgment and render judgment nunc pro tunc at any time, even after its plenary power has expired. However, once the court's plenary power has expired, it may not render a judgment to correct a *judicial* error; such an order would be void. The only evidence Father presented was a certified copy of the judgment nunc pro tunc. He did not present a copy of the trial court's original final order. Father did not ask the trial court to take judicial notice of the original order, which, because a bill of review is a separate proceedings, was a part of the record of a different case. Because there was no proof before the court regarding the original order, there was no prima facie evidence that the judgment nunc pro tunc improperly corrected a judicial error. In addition, even if the court of appeals considered the original order as evidence, nothing in that order indicated that the trial court did not make any oral renditions preceding the original final order. Thus, there is no way to determine whether the judgment nunc pro tunc merely incorporated a prior oral rendition that should have been incorporated into the original final order.

FATHER'S APPEAL WITH RESPECT TO PROPERTY ISSUES WAS MOOT BECAUSE HE ACCEPTED THE BENEFITS OF THE JUDGMENT AND FAILED TO SHOW THAN ANY EXCEPTION APPLIED.

¶15-3-33. *Thottam v. Joseph*, No. 01-13-00377-CV, 2015 WL 1632454 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (04-09-15).

Facts: Mother and Father had one Child during their marriage. During their divorce proceedings, they entered into an MSA that addressed the child-related issues. The trial court referred the parties to arbitration to address the property-related issues. The trial court subsequently signed a final divorce decree incorporating the MSA and arbitration award. Father filed a motion to correct, modify, and/or reform the judgment, which the trial court granted. The trial court ordered the parties back to arbitration to address certain child-related provisions in the decree. After the second round of arbitration, the trial court signed an amended final divorce decree that incorporated the MSA and arbitration awards.

Father appealed, arguing that the decree impermissibly modified the MSA. In the MSA, Mother was granted the right to establish the legal residence *and domicile* of the Child with certain restrictions. However, the final decree gave Mother the exclusive right to designate the primary residence of the Child with certain restrictions. Father objected to the omission of the word "domicile" and argued it substantially changed the restriction by allowing Mother to move the Child "at her whim." Father also argued that while the MSA provided for a visitation schedule before the Child entered kindergarten, the decree omitted such provisions. Father additionally argued that the arbitrator impermissibly exceeded his authority by determining issues related to possession and support.

Father further appealed certain property-related provisions of the decree as well as an award to Mother for attorney's fees. During the arbitration proceeding, Father filed a voluntary Chapter 7 bankruptcy petition. The bankruptcy court granted the trial court in the divorce proceeding permission to sign the amended final divorce decree. In conjunction with the amended final decree, the Chapter 7 trustee filed a motion to settle claims for and against the bankruptcy estate. Subsequently, the bankruptcy court signed a settlement order authorizing the trustee to enter into settlement with a number of the bankruptcy estate's creditor's, including Mother. The settlement authorized the trustee to sell assets awarded to Father to satisfy his obligations to creditors. Thus, property was sold and the proceeds were used to discharge Father's debts. As a result of the actions taken by the bankruptcy trustee, Mother argued that Father's was barred from appealing the property-related provisions of the decree under the Acceptance of Benefits Doctrine.

Holding: Dismissed in Part; Affirmed in Part

Opinion: The Texas Family Code addresses "primary residence of the child" but does not mention a child's "domicile." Further, Father failed to clearly articulate how the omission of the word "domicile" from the decree modified or altered the terms in the parties' MSA. In addition, although the decree failed to include terms from the MSA providing for possession of the Child before the Child entered kindergarten, the decree was signed after the Child entered kindergarten, so Father's complaint regarding the missing terms was moot. Regarding Father's complaints involving the arbitrator, Father failed to provide a transcript of the arbitration and failed to point to specific evidence in the appellate record where alleged errors occurred.

With respect to the Acceptance of Benefits Doctrine, Father acknowledged that he had accepted the benefits of the judgment but argued the exceptions to the doctrine applied, in that (1) his acceptance was not voluntary because of financial duress or other economic circumstances, and (2) a reversal of the judgment could not possibly affect his right to the accepted benefits. However, aside from a conclusory statement, Father failed to identify any evidence in the record to support his claim that his acceptance was due to financial duress or other economic circumstances. Father argued the second exception applied because he would have had to file for bankruptcy regardless of the divorce proceedings. However, this claim did not explain how it would prevent the trial court from awarding the property differently on remand. Because the second exception is extremely

narrow and does not tolerate chance or uncertainty, Father failed to meet his burden. Because Father failed to establish that either exception applied, Father's appeal regarding property issues was moot.

ALTHOUGH WIFE WAS IDENTIFIED AS HUSBAND'S SPOUSE ON THEIR JOINT CAR INSURANCE AND HUSBAND'S LIFE INSURANCE POLICIES, NO INFORMAL MARRIAGE. FINANCIAL RECORDS OBTAINED FROM HUSBAND'S BANK WERE LIKELY ADMISSIBLE AS HUSBAND'S BUSINESS RECORDS.

¶15-3-34. *Castillon v. Morgan*, No. 05-13-00872-CV, 2015 WL 1650782 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (04-14-15).

Facts: Husband and Wife were unmarried, but they lived together in a jointly owned house with their one Child. The couple eventually married formally, but Wife alleged that they had entered into an informal marriage more than a year before their formal ceremony. During their divorce proceedings, Husband and Wife reached an agreement regarding most of the property division; however, they could not reach an agreement regarding the characterization or division of the house or certain financial accounts in Husband's name. During trial, Husband offered account statements prepared by his financial institutions. However, the trial court sustained Wife's hearsay objection and excluded the statements. After trial, the court divided the property and found that the couple had entered into an informal marriage about a year before their formal marriage. Husband appealed, arguing that the evidence was legally and factually insufficient to sustain the finding that the parties were informally married and that the court erred in excluding the financial account statements.

Holding: Affirmed as Modified.

Opinion: The element of holding themselves out to be married requires more than occasional references to each other as "wife" and "husband." Although Wife was identified as Husband's spouse on their joint car insurance and Husband's life insurance policies, there was no indication that anyone in the community saw those documents. Wife testified that they represented themselves as married but did not state to whom or how frequently they made that representation. Wife used her maiden name until the couple was formally married. Wife did not receive an engagement ring until ten months after they supposedly entered an informal marriage and did not wear a wedding ring until after they were formally married. Moreover, Wife filed taxes as a single person in the years the couple were allegedly informally married. Trial court's judgment modified to delete finding of informal marriage.

Pursuant to Tex. R. Evid. 803(6), records of regularly conducted activity are hearsay, but they are admissible in evidence if a qualified witness testifies:

(1) the documents were made and kept in the course of a regularly conducted business activity;
(2) it was the regular practice of the business activity to make the documents;
(3) the documents were made at or near the time of the event that it recorded; and
(4) the documents were made by a person with knowledge who was acting in the regular course of business.

The witness laying the predicate need not be the creator of the evidence or have knowledge of the records' contents. The witness must have personal knowledge of the manner in which the records were prepared. Generally, documents received from another entity are not admissible under Rule 803(6); however, such documents may be admissible business records upon proof by the party that:

(1) the records are incorporated and kept in the course of the party's business;
(2) the party typically relies upon the accuracy of the records' contents; and
(3) the circumstances otherwise indicate the documents' trustworthiness.

Here, even if the trial court erred by denying admission of Husband's exhibits, Husband failed to establish that their exclusion probably caused the rendition of an improper judgment because Husband failed to fully trace the separate-property portions of the accounts and to isolate them from community property commingled in the accounts.

Editor's comment: *It's always good to file the common law marriage cases like this one away in a file somewhere because each one is so factually driven that you'll want to review them all when your next common law*

marriage case walks in the door. This case is also helpful to keep on hand when you're trying to get bank records in through your party without a business records affidavit or representative from the bank present to authenticate them. R.T.R.

BOYFRIEND'S TEXT MESSAGES AUTHENTICATED WHEN GIRLFRIEND TESTIFIED THAT BOYFRIEND CALLED HER IN BETWEEN MESSAGES FROM THE SAME NUMBER.

¶15-3-35. ***Butler v. Texas,*** ___ S.W.3d ___, 2015 WL 1816933, PD-0456-14 (Tex. Crim. App. 2015) (04-22-15).

Facts: Boyfriend and Girlfriend lived together. When Girlfriend went on a road trip with her family to visit her dying grandmother, Boyfriend began harassing her over the phone, accusing her of using the trip as an opportunity to have an affair. While Girlfriend was gone, Boyfriend took Girlfriend's car and sent her a text saying she could find the car on the side of the highway. Girlfriend found her car and took it to her mother's house. Boyfriend apologized and convinced Girlfriend to return home with him. Once they arrived at their home, Boyfriend began accusing Girlfriend again of infidelity and spent the evening and night beating her. The next afternoon Girlfriend's mother found her and called an ambulance to take Girlfriend to the hospital, where a police report was filed. Boyfriend was arrested and charged with aggravated kidnapping.

In the week before trial, Boyfriend and Girlfriend exchanged text messages in which Boyfriend harassed Girlfriend and threatened "to come and hurt [her] or [her] family" if she testified against him. At trial, the State offered photographs of Girlfriend's Blackberry displaying the messages. The State laid the predicate for the text messages with the following testimony:

Q. What is [Boyfriend's] phone number?
A. ###-###-####
Q. Does that number appear on all the pages of the exhibit?
A. Yes.
Q. How do you know that that is [Boyfriend's] telephone number?
A. Because that's where he called me from and that's what's on the same exhibit in front of me.
Q. You've read the text messages in the exhibit?
A. Yes.
Q. Who sen[t] you those text messages?
A. He did.
Q. How do you know that it was him?
A. Because he was the one texting me back and forth and he had even called in between the conversations talking mess.

The jury found Boyfriend guilty, and he was sentenced to fifty years' confinement and a fine of $10,000. Boyfriend appealed, and the court of appeals reversed the verdict, finding that the State's predicate was insufficient to establish that Boyfriend was the author of the text messages. The court of appeals held that the State should have further developed Girlfriend's testimony to include other circumstantial evidence linking the text messages or the phone number to Boyfriend, such as how Boyfriend identified himself, how she knew it was Boyfriend calling her, or how she recognized his voice when he called.

The State appealed to the Court of Criminal Appeals.

Holding: Reversed

Opinion: To satisfy Tex. R. Evid. 901(a), a party wishing to authenticate text messages as evidence must produce evidence sufficient to support a finding that the matter is what the proponent claims, which can be achieved through testimony of a witness with knowledge or through evidence showing distinctive characteristics. Knowledge may be obtained because the witness is the author of the text message, he observed the author actually type or send the message, or he knows the text message came from a phone number known to be

associated with the purported sender. The association of a cell-phone number with a particular individual can be quite strong evidence; however, that evidence by itself might be too tenuous. Because "cell phones can be purloined," additional evidence, whether direct or circumstantial, is necessary. Such evidence might be the message's "appearance, contents, substance, internal patterns, or other distinctive characteristics," or such "circumstances in which it is reasonable to believe that only the purported sender would have access to the…cell phone." Additionally, the purported sender may respond in such a way as to indicate his authorship of the message, or the content or context of the message may create an inference supporting the conclusion that the purported author sent them.

Here, Girlfriend recognized Boyfriend's cell phone number as the number from which the messages were sent. Girlfriend testified that Boyfriend called her in between text messages from the same number. Further, the content of the text messages themselves created a reasonable inference that they were from Boyfriend. The sender called Girlfriend a snitch for going to the police, for "f***[ing] him over" by "run[ning] to the cops." In the week before Boyfriend's trial, the sender threatened Girlfriend and her family if she testified against him in the upcoming trial. The record failed to suggest anyone else who would have a similar motive to threaten Girlfriend at that particular time. While the State could have taken extra steps to remove any ambiguities, there was sufficient evidence to support a jury finding that the text messages were what the State purported them to be.

Editor's comment: *Interesting case on the predicate for admitting text messages into evidence. M.M.O.*

CHILD'S PETITION FOR ENFORCEMENT OF AGREED DIVORCE DECREE'S COLLEGE TUITION PROVISION TIMELY FILED WITHIN TEN-YEAR DORMANCY STATUTE APPLICABLE TO CONSENT JUDGMENTS.

¶15-3-36. ***Abrams v. Salinas,*** ___ S.W.3d ___, 2015 WL 2124786, 04-14-00104-CV (Tex. App.—San Antonio 2015, no pet. h.) (05-06-15).

Facts: Mother and Father divorced in 1988, when their only Child was 4-years old. The agreed decree provided that each parent would pay one-half of the Child's college tuition and related expenses until she turned 30, provided that the Child was in school full-time to obtain a bachelor's degree, maintained a C average, and provided her grades to her parents within 10 days of receiving them. The Father stopped seeing the Child when she was 5- or 6-years old; however, he saw her once more when she was 12, at which time he told her that she was dead to him. When the Child was 16, Father was held in contempt for failing to provide the OAG with his current contact information. Although the OAG subsequently received Father's new address, it would not provide the address to Mother, as the information was protected under the Sailors and Soldiers Release Act.

The Child, who was homeschooled, obtained a GED in 2004 and enrolled as a full-time college student. When the Child graduated from college she began gathering documents necessary to pursue a master's degree. At that time, she discovered the 1988 divorce decree with the college expense tuition that provided that she could enforce the provision in her name. Within 10 days of discovering the provision, the Child sent Father a certified letter requesting reimbursement with a copy of the decree, her itemized school expenses, and proof she had maintained a C average. Father acknowledged receiving the letter, but rather than following up with the Child, he contacted the college to request information regarding the Child. The college refused to provide any information without a release from the Child. Father took no further action.

Unaware that Father had received her first letter, the Child sent Father two more certified letters with the same information, the last of which was returned not deliverable. The Child and Mother filed a petition to enforce the college tuition provision of the divorce decree. Father filed an original answer with a general denial. Subsequently, Father filed an amended answer, contending the claim was barred by the four-year statute of limitations applicable to a breach of contract claim. The trial court awarded the Child and Mother one-half of the Child's college expenses. Father appealed, arguing again that the claim was barred by the four-year statute of limitations and that the Child's failed to satisfy the condition precedent of the agreement by failing to timely provide him with her grades. The Child and Mother responded that Father's prolonged absence from the Child's life affirmatively and consciously relinquished his right to complain about the Child's failure to fulfill the conditions precedent in the decree.

Holding: Affirmed

Opinion: When a court approves an agreement made by divorcing parties and incorporates that agreement in full or by reference in the final decree, the agreement becomes a part of the judgment and is no longer merely a contract between private individuals. While a four-year statute of limitations applies to an action for breach of a written divorce agreement, a ten-year limitation applies to enforcement of a consent judgment. Further, when a judgment orders payments predicated on future conditions, the limitations period does not begin to run on the date the judgment becomes final, but rather when payment becomes due.

Here, the consent judgment did not specify when Father was required to make payments. The only reference to timing required the Child to complete her bachelor's degree before she turned 30. The Child went to college from about age 20 to age 24, and she filed her enforcement action when she was 28. The court of appeals further reasoned that because the consent judgment required Father to pay one-half of the Child's tuition provided that she maintain a C average, then the earliest date Father would have been required to make a payment would have been when the Child received her first semester report card with a GPA of C or greater, which was within 10 years of the date the Child filed her petition. Therefore, the Child's suit was not barred by a statute of limitations.

Father failed to raise his claim regarding the conditions precedent in any of his trial court pleadings. Father only filed a general denial and alleged the affirmative defense that the claim was barred by the statute of limitations. Father never specially excepted to the Child's claim in her petition that all conditions precedent had been met.

★★★TEXAS SUPREME COURT ★★★

ACCRUAL OF PRE-/POSTJUDGMENT INTEREST DETERMINED BY DATE TRIAL COURT COULD HAVE ENTERED RENDERED FINAL JUDGMENT; POST-JUDGMENT INTEREST ON CONDITIONAL APPELLATE ATTORNEY'S FEES ACCRUES ON DATE APPEAL RESOLVED IN PARTY'S FAVOR.

¶15-3-37. ***Ventling v. Johnson,*** ___ S.W.3d ___, 2015 WL 2148056, 14-0095 (Tex. 2015) (05-08-15).

Facts: In 1995, Husband initiated a divorce proceeding to end his common-law marriage to Wife. Within a few months, the parties agreed to a property division that required Husband to pay Wife a lump sum upon divorce plus monthly contractual alimony payments for 7 years. The trial court signed a final decree of divorce incorporating the parties' agreement. In 1997, Husband took the position that he and Wife were never common-law married and stopped making the alimony payments. Thus, Wife filed a motion to enforce the payments as ordered in the final decree.

In 1998, the trial court denied Wife's enforcement motion without prejudice but granted her motion for attorney's fees and ordered the parties to mediation. Wife did not appeal this judgment. Mediation was unsuccessful.

In 2001, the trial court signed an order denying all relief sought by Wife, including her enforcement motion, and granted a motion by Husband to nonsuit the divorce based on his claim that the parties were never married. Wife appealed this judgment. The court of appeals determined the final divorce decree was a valid final judgment, and the trial court's plenary power had expired 30 days after it was signed. Thus, Husband's attempt to challenge the validity of the underlying marriage was an impermissible collateral attack on the decree, and the trial court had no authority to modify the property division. Therefore, the 2001 order was void.

Wife subsequently obtained a judgment from an Iowa court, where Husband was living at the time, for the lump sum owed her under the final divorce decree. The Iowa court ruled that the monthly payment payments were not enforceable in Iowa and granted Husband a stay as to those amounts.

After receiving the Iowa judgment, the Wife renewed her enforcement motion in Texas to recover the monthly payments due to her, as well as postjudgment interest, damages for adverse tax consequences, and

attorney's fees. In 2009, the trial court rendered a judgment denying all relief requested by Wife. Wife appealed. The court of appeals reversed the trial court's judgment, finding that the contractual alimony payments were binding on the parties. The court of appeals remanded the case and instructed the trial court to grant Wife's enforcement motion and award her the unpaid contractual alimony, appropriate prejudgment interest, and reasonable attorney's fees and court costs.

Upon remand, the issue of attorney's fees and pre- and postjudgment interest was tried to the trial court. The trial court granted Wife prejudgment interest from the date she filed her initial enforcement motion through the date the trial court held its initial hearing on her motion, and postjudgment interest on Wife's entire award (including both the alimony and attorney's fees) beginning on the date of its contemporaneous 2012 judgment. The trial court awarded Wife past-due attorney's fees but did not award Wife any appellate attorney's fees. Wife appealed a third time.

The court of appeals held that because the trial court should have rendered judgment for the unpaid alimony in 1998, postjudgment interest began to accrue as of that judgment. Further, because no judgment for attorney's fees was rendered until 2012, the postjudgment interest on the fees award began to accrue as of that judgment. Finally, the court of appeals reversed the denial of Wife's request for conditional attorney's fees and ordered that interest would begin to accrue on that award on the date Wife's appeal was perfected.

Husband filed a petition for review with the Texas Supreme Court arguing that postjudgment interest could not begin to accrue prior to 2012 because no final judgment was rendered until that date. Additionally, Husband argued that Wife was not entitled to conditional appellate attorney's fees because such an award is only available upon the prevailing party's successful *defense* of a judgment.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Prejudgment interest accrues from the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed and runs until the day before judgment. Postjudgment interest begins accruing on the date judgment is rendered. When an appellate court's remand results in multiple trial court judgments, there must be a determination of which judgment controls for the purpose of pre- and postjudgment-interest accrual.

If the appellate court renders, or could have rendered, judgment, then the postjudgment interest accrues from the date of the trial court's original, erroneous judgment. However, if on remand, the trial court determines that it must reopen the record, postjudgment interest will begin to accrue on the date the subsequent judgment is rendered. A claimant is entitled to postjudgment interest from the judgment date once the trial court possesses a sufficient record to render an accurate judgment. A party may affect the accrual of postjudgment interest through severance, offers of proof, and bills of exception.

Here, the 1998 judgment was interlocutory, not a final judgment. Wife did not appeal the judgment, but rather, the parties continued to litigate the enforcement motion. Moreover, Wife conceded the judgment was interlocutory. Additionally, the 2001 judgment was declared void by the appellate court, and thus, it could not under any circumstances be a final judgment. However, the 2009 judgment disposed of all claims of the parties, with the exception of attorney's fees. Upon remand, the trial court's only task with respect to the claim for alimony was the ministerial act of entering the judgment as instructed. While the court of appeals did not use the term "sever," for all practical purposes, in its disposition, it did sever the claims for attorney's fees from Wife's alimony claim. Thus, postjudgment interest on Wife's alimony award began accruing from the date of the erroneous 2009 judgment, while the postjudgment interest on Wife's award of past-due attorney's fees began accruing on the date of the subsequent judgment in 2012 following the presentation of additional evidence on that issue.

Further, because the 2009 judgment was the final judgment with respect to Wife's claims for alimony, she was entitled to prejudgment interest on her alimony claim until the day before that judgment was rendered.

Next, Tex. Civ. Prac. & Rem. Code § 38.001 provides that a prevailing party may recover attorney's fees on a breach-of-contract claim as additional damages. Under this section, the trial court has no discretion to deny attorney's fees, including conditional appellate attorney's fees, when presented with evidence of same. Although the more common scenario involves a prevailing party seeking attorney's fees for successfully defending an appeal, no precedent supported a conclusion that Wife should be precluded from recovering attorney's fees for pursuing this appeal. Because the trial court erred in denying Wife prejudgment interest for 14 years and in denying Wife in postjudgment interest for 3 years, Wife at least partially prevailed on her appeal. Thus, while

the trial court had discretion as to the amount of reasonable and necessary appellate attorney's fees, it had no discretion not to award Wife appellate attorney's fees.

However, contrary to the court of appeal's holding in this case, because Wife's appellate attorney's fees were conditional upon her prevailing on appeal, postjudgment interest on those fees would not begin to accrue until after the appeal was resolved in her favor. Here, Wife's postjudgment interest on appellate fees associated with the appeal to the district court of appeals began accruing when it issued its judgment in 2013, and her postjudgment interest on appellate fees associated with the appeal to the Texas Supreme Court began accruing when it issued its judgment in 2015.

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

¶15-3-38. *In re Wiese*, No. 03-15-00062-CV, 2015 WL 2183551 (Tex. App.—Austin 2015, orig. proceeding) (mem. op.) (05-08-15).

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

Holding: Writ of Mandamus Conditionally Granted

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

Editor's comment: *There needs to be more cases like this one! Time and time again I see attorneys arguing for and judges granting attorney's fees in a SAPCR or modification, at a temporary orders hearing, under section 105.001 despite ZERO evidence being presented that the fees are necessary to protect the safety and welfare of the children. Yet, so few cases are taken up on mandamus so there are only a handful of decisions that give some guidance. Here, since section 109.001 on temporary orders pending an appeal has almost identical language, we can see, again, that a party testifying that the other party has more resources, and that her incurring attorney's fees would divert resources away from the children, is simply not enough. "Safety and welfare of the children" is strong language that requires strong proof, and I hope we see more cases like this one that remind us of that fact. R.T.R.*

Return to Table of Contents

WIFE ENTITLED TO RESTRICTED APPEAL BECAUSE INCONSISTENCIES ON RETURN OF SERVICE COULD NOT ESTABLISH WIFE WAS PROPERLY SERVED.

¶15-3-39. *In re R.E.C.*, No. 05-14-01003-CV, 2015 WL 2205654 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (05-12-15).

Facts: After the parties' divorce, Husband filed a petition to enforce the property division. After the process server attempted to serve Wife ten times, the trial court granted a motion for alternate service. A return of service was filed, and the trial court granted Husband's requested relief and ordered Wife to pay Husband's attorney's fees. A little over 5 months later, Wife filed a restricted appeal.

Holding: Reversed and Remanded

Opinion: Because the parties agreed that Wife established the other 3 requirements for a restricted appeal, the only question was whether error was apparent on the face of the record. In a direct attack on a default judgment, there is no presumption in favor of proper service. Further, service of process must be performed in strict compliance with the appropriate statutory provision to support a default judgment. Any deviation will be sufficient to set aside a default judgment in a restricted appeal.

Here, because the trial court ordered substituted service, the only authority for the service was the order itself, which provided that service would be effected by mailing one true copy of the citation with a copy of the petition to Wife's address and posting a second of each on the front door of the home at Wife's address. The return of service stated that citation was delivered to Wife "in person" with a true and correct copy "of the document attached hereto" and further indicated that a "true and correct copy" was posted on the front door of and mailed to Wife's address. However, the paragraph indicating that copies were mailed and posted did not indicate whether the "cop[ies]" were of the petition and citation, the order for substituted service, or some other document. Further, the return of service was inconsistent with itself by stating in one paragraph that service was made on Wife "in person" and in another by mail and posting on her front door. Thus, it was impossible to determine from the return of service whether Wife was properly served.

TRIAL COURT RETAINED PLENARY POWER TO GRANT MOTION FOR NEW TRIAL 30 DAYS AFTER MOTHER'S MOTION FOR NEW TRIAL HAD BEEN DENIED BY OPERATION OF LAW.

¶15-3-40. *Jones v. Jones*, No. 03-14-00110-CV, 2015 WL 2375970 (Tex. App.—Austin 2015, no pet. h.) (mem. op.) (05-13-15).

Facts: Mother filed a petition for divorce, and Father filed a counterpetition for divorce. After obtaining temporary orders appointing Mother the sole managing conservator of the parties' Children, Mother's attorney filed a motion to withdraw, in which she provided Mother's current Georgia address to the court. Subsequently, Father set the divorce for trial. The trial court sent Mother a notice of trial by certified mail to the Georgia address, but it was returned unsigned. Sometime before trial, Mother returned to Texas with the Children to live with her mother. Mother did not appear at trial. Father testified that he had spoken to Mother's mother about the trial, but he had not spoken to Mother. He also stated that he was aware Mother had moved in with her mother. The trial court signed a final decree, reciting that Mother had made a general appearance and had been notified of final trial but failed to appear and defaulted. The final decree appointed Father the sole managing conservator. Father promptly took a copy of the final decree to Mother's mother's house and took possession of the Children.

Mother, representing herself, filed timely motions to set aside the default judgment and for new trial. Mother asserted she had not received notice and was not aware of the trial setting. She attached an affidavit to her motion, in which she averred that she did not know that the proceedings would continue before she had obtained new counsel, which she was in the process of doing. After a hearing on Mother's motions, the trial court agreed Mother was entitled to notice yet had not received proper notice. The trial court orally granted Mother's motion for new trial, but did not sign an order granting a new trial before the motion was overruled

by operation of law after 75 days. One week later, Mother presented the trial court with a proposed order reflecting the ruling granting her motion for new trial. However, the trial court refused to sign it, stating that the time to enter an order on a motion for new trial had expired. Mother appealed.

Holding: Reversed and Remanded

Opinion: Per Tex. R. Civ. P. 329b(e), when a motion for new trial is timely filed, the trial court's plenary power does not expire until 30 days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first. Thus, even though Mother's motion for new trial was overruled by operation of law because the trial court did not reduce its ruling to a written order within 75 days after signing the final decree, the trial still had jurisdiction to grant a new trial when it refused to do so. Therefore, because Mother established she was entitled to a new trial based on her lack of notice, the trial court abused its discretion in refusing to grant her motion for new trial.

WIFE NOT ENTITLED TO SUMMARY JUDGMENT DISPOSING OF ALL OF HUSBAND'S CLAIMS BECAUSE SHE DID NOT ADDRESS ALL OF THE CLAIMS IN HER MOTION FOR SUMMARY JUDGMENT.

¶15-3-41. ***Philips v. McNease,*** ___ S.W.3d ___, 2015 WL 2452525, 14-14-00161-CV (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (05-21-15).

Facts: In their 1998 divorce, Husband and Wife reached a settlement agreement that included a provision for contractual alimony for the remainder of Wife's life. The trial court incorporated the parties' agreement into a final decree.

A few years later, Husband filed a petition to modify the contractual alimony, describing it as "maintenance and support." Husband asked the court to modify the payments due to a material and substantial change of circumstances. Husband additionally asked the trial court to terminate the contractual alimony on the basis of lack of consideration and unconscionability. The trial court denied Husband's request to terminate the payments but found a material and substantial change and reduced Husband's obligation. (The court of appeals did not "comment on whether the trial court acted properly or improperly.")

Nearly ten years later, Husband filed a second petition to modify, again alleging modification was available under Chapter 8 of the Tex. Fam. Code (the "family law claim"). He additionally asked the trial court to set aside his obligation on the bases of frustration of purpose, lack of consideration, unconscionability, undue influence, duress, extrinsic fraud, and mistake of fact (the "contract law claims"). In response, Wife filed a plea to the jurisdiction alleging the trial court had no authority to act under the Family Code because the payments were not subject to Chapter 8. Wife also filed a no evidence motion for summary judgment alleging no evidence supported any of Husband's contract claims. Additionally, in a traditional motion for summary judgment, Wife contended that each of Husband's contract claims, with the exception of frustration of purpose, were barred by res judicata. In the alternative, she argued that each theory, including frustration of purpose, failed as a matter of law. Wife did not seek summary judgment on the family law claim. Subsequently, the trial court granted Wife's motions for summary judgment and signed a final judgment dismissing the entirety of Husband's petition to modify. Although the judgment included a Mother Hubbard clause, the trial court did not expressly address Wife's plea to the jurisdiction.

Husband appealed, arguing the trial court erred in dismissing the family law claim because Wife had not sought such relief. Husband further argued that the "perpetual" contractual alimony obligation was against public policy.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Because Wife's motion for summary judgment only addressed the contract claims, the trial court had no basis on which to dispose of the family law claim. Further, Husband's failure to object to the scope of the trial court's judgment did not waive his issue for appeal, because no objection is necessary if the grounds for summary judgment are insufficient as a matter of law. Even if the trial court ultimately could not modify contractual alimony based on contract law, the trial court still had jurisdiction to consider the merits of Husband's family law claim. Thus, to the extent that the trial court granted summary judgment on the family law claim, such judgment was improper.

To establish "frustration of purpose," Husband was required to show supervening circumstances made his performance impossible. However, at best, Husband showed that performance had become more difficult. Husband's performance could not be excused merely because it had become burdensome.

Further, in Husband's first modification proceeding, Husband raised the claims of lack of consideration and unconscionability. In his second modification, in addition to claims of lack of consideration and unconscionability, husband also alleged undue influence, duress, extrinsic fraud, and mistake of fact. Because each of the additional claims could have been raised in the first modification proceedings, all six of these claims were barred by res judicata. Moreover, because Husband raised no fact issues as to any of these claims, Wife was entitled to summary judgment as a matter of law.

Finally, with respect to Husband's public policy argument, he was free to negotiate different terms during the pendency of the divorce, but he did not. Thus, the contractual alimony was not void for being against public policy.

ORDER GRANTING NEW TRIAL VOID BECAUSE SIGNED AFTER TRIAL COURT'S PLENARY POWER EXPIRED.

¶15-3-42. *In re Preston*, No. 09-15-00137-CV, 2015 WL 3406994 (Tex. App.—Beaumont 2015, orig. proceeding) (mem. op.) (05-28-15).

Facts: About 40 years after their divorce, Mother filed a petition to enforce Father's child support obligation. Father was served with notice at an address provided by Mother. Father filed no responsive pleading, and the trial court awarded Mother an arrearage judgment. Subsequently, Father timely filed a verified motion for new trial, alleging that Mother had been aware of his current address but delivered notice to his family's home instead. Father further alleged that a family member had signed the return on his behalf, but Father did not receive actual notice until a few weeks later.

About four months after the trial court had rendered the arrearage judgment, the court orally granted Father's motion for new trial. About three months after that, the trial court signed an order granting Father's motion for new trial. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A timely filed motion for new trial extends a trial court's plenary power to 75 days after the judgment was rendered. If the motion for new trial is overruled by operation of law, the court's plenary power continues an additional 30 days after that date. Here, although Father's motion for new trial was timely filed, the trial court did not grant his motion until about two weeks after the trial court's plenary power ended. Moreover, the trial court did not sign the order granting a new trial until about three months after its plenary power had ended. Thus, the order granting a new trial was void.

SUPREME COURT WATCH

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

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

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

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

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.

13-0409
In the Interest of M.G.N. and A.C.N.
from Bexar County and the San Antonio Court of Appeals
REVERSED AND REMANDED, per curiam opinion:

The issue in this child-custody case is whether the trial court properly substituted an alternate for a regular juror whom it found to be disqualified by statute, then proceeded with 11 jurors after one of the 12 was constitutionally disabled. The court of appeals reversed, concluding that the dismissal of the disqualified juror ultimately led to an eleven-member jury in violation of the constitutional right to a jury trial. The Supreme Court HOLDS the appeals court failed to examine the two dismissals properly under their appropriate standards: whether the substitution for an alternate was proper because of a statutory disqualification and whether continuing with eleven jurors was proper because of the constitutional disability. Under the state constitution and procedural rules, district court juries shall be composed of 12 members and as few as nine may render a verdict if, during trial, as many as three jurors "die, or become disabled from sitting." If a trial court's dismissal of a juror results in fewer than 12 jurors, the dismissal must either be based on the juror's constitutional disability or the trial court must declare a mistrial if there was no constitutional disability. Taking the statute and constitution together, a trial court may substitute a regular juror with an alternate if the regular juror is unable to fulfill or is disqualified from fulfilling his duties, but a trial court may only dismiss a juror and proceed with fewer than 12 jurors if the dismissed juror is constitutionally disabled. The court of appeals conflated these provisions.

Return to Table of Contents

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.

13-1026/14-0109
Royston, Rayzor, Vickery & Williams, L.L.P. v. Lopez
from Nueces County and the Corpus Christi/Edinburg Court of Appeals
Oral argument held on March 26, 2015
A principal issue is whether the appeals court erred by rejecting a law firm's effort to compel arbitration with a client by deciding the arbitration agreement was one-sided and legally unconscionable based only on the firm's contract. In this case Lopez sued for malpractice, unhappy with the mediated result of the underlying suit. His agreement with the firm specified that any claim he brought against it would be subject to arbitration, but that the firm could litigate any dispute to collect its fees. The trial court refused the firm's arbitration motion. In a split decision the court of appeals affirmed.

Return to Table of Contents