SECTION REPORT
FAMILY LAW

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MESSAGE FROM THE CHAIR

The holiday season is upon us! I hope you all filled up beyond capacity on your favorite Thanksgiving fare. I know that I will be exercising the rest of the year to make up for the various holiday feasts that I intend to partake in, and hope that my suits will still fit come the New Year. With Turkey Day behind us, and on-line shopping and college football bowl games to look forward to, I encourage all of you to take some time off and enjoy your families and friends before the hustle and bustle of January begins.

LEGISLATIVE COMMITTEE

Although the Legislature is not scheduled to convene for its next regular session until 2017, the Legislative Committee of the Family Law Section has already been working diligently in preparation since August, having regular committee meetings, as well as a variety of subcommittee meetings, all addressing the very important task of making their best effort, on behalf of the Family Law Section, to assure that the Family Code is tailored to protect litigants and the children of litigants to the greatest extent possible. I extend my thanks to the Members of the Legislative Committee for their continued dedication, hard work and willingness to commit their very valuable time to this task.

IN MEMORIUM

I am sad to report that the Family Law Section lost one of the founding fathers of Texas family law, Joe McKnight, this November. As so perfectly stated by Brian Webb:

IN MEMORIUM JOSEPH W. McKNIGHT

> *…he was our living link to the very beginning of modern family law in Texas - Joe was 90 years old and had been teaching at SMU for 60 years - his last night in the classroom was November 17th - he was truly a giant and will be greatly missed - he loved Family Lawyers and Family Law and to the very end he had a keen interest in what was going on with our legislative efforts and the practice in general - he was a great man and he was largely responsible for inventing our field of practice - he was a great friend to all of us and proud to be a Family Lawyer - we are very fortunate to have had him amongst us for so long .*

UPCOMING CLE

Upcoming Live CLE seminars include:

Texas Academy of Family Law Specialists 2016 Trial Institute
January 14-15, 2016 at the Francis Marion Hotel in Charleston, SC
Course Directors: Kristal Thomson and Sherri Evans.

Marriage Dissolution Institute 2016
April 7-8, 2016, Moody Gardens Hotel, Galveston
Course Director: Charla Bradshaw
101 Course Director: Leigh De La Reza

Advanced Family Law 2016
San Antonio August 1-4, 2016
Course Directors: Chris Nickelson & Jimmy Vaught
101 Course Director: Jessica H. Janicek

New Frontiers in Marital Property Law, Louisville, KY, October 13-14, 2016
Course Directors: Joe Indelicato & Natalie Webb

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UPCOMING COLLABORATIVE CLE

The upcoming Collaborative CLE seminars include:

- February 25-26, 2016 – the Annual Collaborative Law Course presented by the State Bar of Texas, the Collaborative Law Section of the State Bar, and the Collaborative Law Institute of Texas in Austin at the Highland Hotel in Dallas.

- January 28-29, 2016 – A two-day overview of the basics of collaborative practice for lawyers, financial professionals and mental health professionals. Presented at the Offices of Dufee + Eitzen in Dallas.

Have a fantastic holiday and a Happy New Year (and take some off)!!!

Heather L. King
Chair, Family Law Section

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In the Law Reviews and Legal Publications

TEXAS ARTICLES

2015 Legislative Update: Family Law, Aaron M. **Reimer**, 53-Oct Hous. Law 22 (Sept./Oct. 2015).

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

Marriage for All: The Legal Impact of Obergefell v. Hodges *in Texas*, Elizabeth **Brenner**, 78 Tex. B.J. 622 (Sept. 2015).

Family Law [Legislative Update], Brian L. **Webb** & Brant M. **Webb**, 78 Tex. B.J. 652 (Sept. 2015).

LEAD ARTICLES

Best Practices in Handling Family Law Cases Involving Children with Special Needs, Margaret "Pegi" S. **Price**, 28 J. Am. Acad. Matrim. Law 163 (2015).

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

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

The Oedipus Hex: Regulating Family After Marriage Equality, Courtney Megan **Cahill**, 49 U.C. Davis L. Rev. 183 (Nov. 2015).

Obergefell's Conservatism: Reifying Familial Fronts, Clare **Huntington**, 84 Fordham L. Rev. 23 (Oct. 2015).

Race, Dignity, and the Right to Marry, R.A. **Lenhardt**, 84 Fordham L. Rev. 53 (Oct. 2015).

Call of Duty: Family Warfare Edition, Note, Amy M. **Privette**, 27 Regent U.L. Rev. 433 (2014–2015).

Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?, Paula **Gerber** & Phoebe Irving **Lindner**, 18 N.Y.U.J. Legis. & Pub. Pol'y 225 (2015).

The Marriage Equality Cases and Constitutional Theory, William N. **Eskridge, Jr.**, 2015 Cato Sup. Ct. Rev. 111 (2014–2015).

Obergefell v. Hodges: *The Effect of the Decision and Estate Planning for LGBT Couples*, Joan M. **Burda**, 87-SEP N.Y. St. B.J. 10 (Sept. 2015).

Shared Physical Custody: Does it Benefit Most Children?, Linda **Nielsen**, 28 J. Am. Acad. Matrim. Law 79 (2015).

The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention, Andrew A. **Zashin**, Christa G. **Heckman**, & Amy M. **Keating**, 28 J. Am. Acad. Matrim. Law 249 (2015).

Hail Marriage and Farewell, Ethan J. **Leib**, 84 Fordham L. Rev. 41 (Oct. 2015).

Challenges in Handling Imprecise Parentage Matters, Jeffrey A. **Parness**, 28 J. Am. Acad. Matrim. Law 139 (2015).

Polygyny and Violence Against Women, Rose **McDermott** & Johnathan **Cowden**, 64 Emory L.J. 1767 (2015).

Parental Alienation: Overview, Management, Intervention, and Practice Tips, Richard **Warshak**, 28 J. Am. Acad. Matrim. Law 181 (2015).

Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security, Margaret E. **Johnson**, 60 Vill. L. Rev. 145 (2015).

Crossing Paths with a Trust, Kathleen **Hogan**, 38-FALL Fam. Advoc. 3 (Fall 2015).

Know Thy Trust, Deborah **Rysso**, 38-FALL Fam. Advoc. 6 (Fall 2015).

Premarital Agreements & Trusts, Anne W. **Coventry** & Linda J. **Ravdin**, 38-FALL Fam. Advoc. 10 (Fall 2015).

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IN BRIEF

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

Adult child support: A California appellate court affirmed a trial court's decision to require adult child support when a 19-year-old with several issues lived in a residential treatment center, but it reversed the trial court's order that the money be paid directly to the child's mother because the child did not live with her and she was not his "conservator, guardian, or legal representative." *In re Marriage of Drake*, 241 Cal.App.4th 934, 194 Cal. Rptr.3d 252 (2015). In *In re Marriage of Cecilia & David W.*, 194 Cal Rptr.3d 559 (Cal. App. 2015), the court reversed a finding that a 24-year-old could not find work or become self-supporting despite his having Tourette's syndrome and ADHD and once having suffered cardiac arrest as a result of anxiety, reasoning that there was no direct evidence of his employability.

Child support income: A North Dakota district court erred when it calculated income for child support purposes without considering the effect of tax breaks on an obligor's negative farming income, instead basing child support solely on the farmer's wages from outside employment. *Klein v. Klein*, 869 N.W.2d 750 (N.D. 2015). In *Stekr v. Beecham*, 869 N.W.2d 347 (Neb. 2015), the Nebraska Supreme Court affirmed a district court's decision to deviate from the child support guidelines when it took into account the obligor's non-income-producing assets. The Georgia Supreme Court considered a husband's use of his parents' truck plus his parents' payment of his electric bill to be fringe benefits of employment and thus includable in income for child support purposes, but not the use of a house owned by his parents or his parents' payment of his cell-phone bill. *Scott v. Scott*, No. ___ S.E.2d ___, 2015 WL 5853863 (Ga. Oct. 5, 2015).

"Downright creepy": A California appellate court affirmed the termination of a father's parental rights, in part because of the "negative emotional effects" of the father's cyber-stalking of the mother, including showing up at a medical appointment he would not have known about unless he had hacked into the mother's cell-phone; emailing an attorney whom the mother was consulting at the very moment of the consultation; and telephoning the mother's boyfriend while she was out of town with him, asking the boyfriend to hand his phone to the mother so that he could talk to her. *In re Adoption of T.K.*, 240 Cal.App.4th 1392 (2015).

Grandparents: A divided Mississippi Supreme Court affirmed a trial court decision awarding custody of a child to her grandparents upon evidence "that the child's mother was sexually promiscuous, that she had failed drug tests, and that she planned to move with the child to Chicago to live with a convicted sex-offender," the dissent arguing that there had been no material change of circumstances during the thirty-five days that elapsed between an agreed order granting custody to the mother and the grandparents' petition to modify. *Irle v. Foster*, 175 So.3d 1232 (Miss. 2015). Stating that the "fuzziness" of *Troxel v. Granville*, 530

U.S. 57 (2000), "yielded little guidance for lower courts," the Utah Supreme Court applied a strict scrutiny test to reverse a trial court's order of visitation for grandparents, holding "that a child's 'best interests' may be advanced by an award of visitation is insufficient." *Jones v. Jones*, 359 P.3d 603 (Utah 2015).

Placement: The Nebraska Supreme Court held that foster parents lacked standing to intervene in the Nebraska Department of Health & Human Services' case against the child's mother when the Department decided to place the child with her out-of-state aunt: "Foster care is generally a short-term placement: It is a temporary measure for maintaining the child until the court can make a permanent disposition." *In re Interest of Enyce J.*, 870 N.W.2d 413 (Neb. 2015). The West Virginia Supreme Court of Appeals reversed a trial court placement returning a child to his mother after she had remained sober for a year and completed probation, stating that the child should remain with his grandparents because "the home provided for this young boy by his paternal grandparents has been the only stable home he has known." *In re S.W.*, ___ S.E.2d ___, 2015 WL 6829760 (W. Va. 2015).

Realty: According to the Supreme Court of Virginia, the mere fact that a divorcing wife did not object to or appeal a divorce decree, which awarded her a one-half interest in a tract of real estate upon which only the husband had signed a deed of trust, did not judicially estop the wife from denying that the deed of trust encumbered her interest in the realty. *Wooten v. Bank of America, N.A.*, 777 S.E.2d 848 (Va. 2015). The Vermont Supreme Court upheld an injunction that encumbered all real property held by a deceased ex-husband's estate when the ex-husband had failed to pay his ex-wife $2.2 million of the $2.25 million due in lieu of alimony, noting that while contempt ordinarily would be an appropriate remedy, the family court "correctly observed that it could not hold deceased husband in contempt." *Simendinger v. Simendinger*, ___ A.3d ___, 2015 WL 5458363 (Vt. 2015). A California appellate court held that, because a divorcing wife had filed for bankruptcy, state law required an equal distribution to the ex-spouses of proceeds from a sale of real estate rather than allowing a disproportionate share to the bankrupt spouse. *In re Marriage of Walker*, 240 Cal.App.4th 986 (2015).

Retirement: When an ex-wife attempted to enforce an award to her of an ex-husband's VA disability compensation and retirement pay for physical disability, an Alaska trial court correctly held that under federal law disability benefits are "not divisible marital property," but the Alaska Supreme Court reversed and remanded the property division because of "exceptional circumstances." *Guerrero v. Guerrero*, ___ P.3d ___, 2015 WL 5474348 (Alaska 2015). As against an ex-husband's argument that his ex-wife profited from the increase in value of IRAs by waiting more than four years to obtain a QDRO dividing them, the Georgia Supreme Court reversed the trial court, noting that nothing in the parties' settlement agreement would deprive the ex-wife of any increase in value no matter when the trial court signed a QDRO. *Mermann v. Tillitski*, ___ S.E.2d ___, 2015 WL 5778852 (Ga. 2015).

Taxes: A Montana district court erred by ignoring the tax consequences of a ranch's sale when it ordered a husband to sell a ranch within 120 days unless he made an equalization payment to his wife in the meantime, the only source of which would be proceeds of the ranch's sale. *In re Marriage of Clark*, 357 P.3d 314 (Mont. 2015). A New Hampshire trial court erred when it took tax consequences of sale into account when valuing property because the trial court's divorce decree did not require sale of that property and the record did not show "that a sale or liquidation was certain to occur within a short time after the divorce decree." *In the Matter of Wolters*, ___ A.3d ___, 2015 WL 5390550 (N.H. 2015).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

Please pardon me a moment while I wax philosophical and veer away from family law. As I sit writing this, the horrible attacks in Paris have just occurred, and who knows what abomination waits in store? What many of us feel, I think, is an impotent anger, a desire to lash out at someone, something, somewhere, to "get back" at the perpetrators. But you, and I, are only individuals, and what can we do in the face of evil?

Not much, truth be told. Certainly not enough. But there is one thing that occurs to me, fragile as it may seem when faced with guns, bombs, and a nihilistic world view. We can be civilized.

After all, so much of the violence and destruction we face in this world is designed specifically to destroy civilization. Does anyone think ISIS, ISIL, or whatever name we call it today, is intended to replace our civilization with something better, in which people are free to follow their dreams and raise their families and live their lives as they see fit? If so, Raqqa and Helmand Province and Mosul would be paradises on Earth. No, these are the forces of destruction. They build nothing of value. They are the opposite of civilization.

And no, I am not speaking only of American, European, or Western civilization. I mean any society that is dedicated to providing for the health, safety and welfare of its citizens and allowing them, even helping them, to lead happy, productive lives. We should remember that societies like that have always been the exception in the history of humanity, and they still are. It is no argument to say that civilizations such as I'm describing also have their faults and have imposed themselves in horrible ways on people around the world. This is a question of ideals, not success rates. Of course our civilization can do better than it has, but the mere fact that we think about doing better, and discuss and debate among ourselves the best way to do that, is to the good.

So, back to us, the individuals, and, in a narrower sense, us lawyers. How we conduct ourselves is our way of fighting against the forces of nihilism and death. By adhering to rules of law and codes of conduct, we affirm that we are not like them. This should not be a religious issue, nor a political one, but instead a question of how we settle our disputes, how we live with each other despite our differences of opinion and lifestyle, how we work it out. That's what it all comes down to: people all over the world, of all races and religions, disagree on how best to run a tribe, a village, a nation.

How we resolve those differences is what will distinguish us, or not.

Every day, as we practice law and as we go about our general business, let us do our best to provide an example of how a civilized society works out its conflicts. Disagree, argue, zealously advocate, but remain civil, if only to show how it is done. Remember, when we fight terrorists, this is what we are fighting for.

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

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CHALLENGE MH EXPERTS' RECOMMENDATIONS

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

Recommendations of mental health experts are the practical side to experts' testimony—how experts envision that their conclusions and opinions should apply to litigant/examinees' lives. When cross-examining mental health experts, make sure that you challenge their recommendations to ensure that the court clearly understands the recommendations' impact. Sometimes recommendations are impractical or merely boilerplate. Even so, experts don't readily budge from recommendations they offer. Not a surprise. Cognitive psychology research indicates that when people commit to a conclusion, they are likely to believe arguments that support it even when those arguments are unsound.

Consider three steps to clarify or challenge the practicality of an expert's recommendations. Although the examples are family law-oriented, the steps apply to recommendations in any mental health testimony.

1. Keep in mind that good recommendations arise from reliable, well-based conclusions, a basic principle from *Daubert* and from the American Psychological Assn.'s *Ethics Code*. Experts should be able to show how they developed their conclusions, from the reliability of the methods used to gather data to the reasoning applied to that data. Unfortunately, some experts have difficulty describing that sifting process—either they lock into favored explanations of the data early-on without considering alternative explanations (confirmatory bias), or they don't know the professional literature well enough to be aware of reasonable explanations that they should have considered.

2. View recommendations (e.g., the need for counseling for one year; parenting access schedules; supervised visitation for two years followed by a phased-in nonsupervised schedule over the following six months) as probability-based predictions rather than as conclusive assertions. Any predictions—forecasting weather, betting horses, picking stocks—may be improved or worsened with new information (good or bad) or old information reconsidered. The same applies to experts' recommendations.

3. Consider three lines of questions that address the bases and practicality of an expert's recommendations:
• What generally-accepted professional literature supports or cuts against the recommendations?
• How realistically can the litigant's life adapt to the recommendation? (e.g., In a high-conflict family, is the expert recommending that the child alternate nights in each parent's home and engage in three times per week counseling while maintaining a full schedule of school and extracurricular activities?)
• If the conditions structured by the recommendations fall apart in ten months, what circumstances unaccounted for by the recommendations might have caused the problems? (Prepare to offer your own case-based scenarios for how the conditions might fall apart if the expert is reluctant to discuss possible future problems with her recommendations regimen.)

Recommendations represent an expert's plan for how the court may apply her conclusions and opinions—where the rubber meets the road in much expert testimony. Recommendations should arise from reliably derived information, and they should be practical—not a set-up for failure. Apply these three steps to ensure that the expert doesn't set-up your client for failure.

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

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DO YOU NEED A PRE-NUP FOR YOUR BUSINESS
By Christy Adamcik Gammill, CDFA[1]

How a buy-sell agreement can save a closely held business if something happens to an owner

What is a buy-sell agreement? *A legally binding contract that establishes under what conditions, to whom and at what price an owner, partner or shareholder can or must sell his or her interest in the business.*

You hear about pre-nuptial agreements between soon-to-be husbands and wives. But what about people going into business together? It's actually a really smart idea. For closely held or family businesses, a properly designed and funded **buy-sell agreement** can save time, hassle and money, similar to a pre-nup for some couples. In the end, could actually save the business itself too.

That's because…

- Less than 1/3 of family businesses survive the transition from 1st to 2nd generation ownership.*
- Another 50% don't survive the transition from 2nd to 3rd generation.*

Why is it so difficult to make a smooth transition?
Maybe because the owners didn't have a plan in place to continue the business after an owner's retirement, disability, divorce or death. This is what a buy-sell agreement is for.

Benefits of a well-designed buy-sell agreement Not only will a buy-sell agreement describe the terms under which ownership interest in the business can and will be transferred, it can also establish:

- A market value for the business, or the way in which the value will be determined in the future. This can eliminate huge hassles (and arguments) later.
- A funding source for the purchase of the ownership interest, and the payment terms for the sale of the business. Without proper funding, the buyer could have to sell assets, take out loans or even file for bankruptcy.
- Restrictions, such as who can own the business or how to transfer or sell ownership interests.

Why fund a buy-sell agreement with life insurance? You can purchase interest in a business by borrowing from a bank, or making installment payments. However, many people choose to fund a buy-sell agreement with permanent, cash value life insurance because if offers:

- *Proceeds Paid Quickly* – The death benefit or cash values are available (generally income tax free) when they are needed, to fund the business sale.
- *Cost efficiency* – The premiums are significantly lower than the benefit itself, and can be much lower than the cost of a loan, so there's no large outlay from the business.
- *Stability* – A life insurance death benefit is guaranteed, so you know it will be available when you need it.

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

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ARTICLES

The QDRO Corner: Chapter 1
The Emperors of Apportionment Have No Clothes

By James M. Crawford, Jr.[1]

Introduction.

Some 40 years ago the Texas Supreme Court held in *Cearley*[2] that pension rights, whether contingent or mature[3] as of the date of divorce, are community property to the extent they derive from employment during marriage:

> The portion that [the employee spouse] earned during the months of coverture became contingent earnings of the community which may or may not bloom into full maturity at some future date. We hold that such rights, prior to accrual and maturity, constitute a contingent interest in property and a community asset subject to consideration along with other property in the division of the estate of the parties….[4]

But while *Cearley* clearly articulated the basic principle by which all retirement benefit apportionments are to be governed, it offered no real direction as to how that concept should be applied in the context of a traditional defined benefit plan[5] in which the benefit payable at retirement is defined by plan rights typically earned over a 20- or 30-year career, many of which may not "bloom" into additional benefits until the final years of employment.

This guidance was first provided by *Taggart*,[6] which involved a pension that was still in the process of being defined as of the date of divorce, but had matured by the time of trial.[7] With very little discussion, the court explained that because the community had provided 246 of the 360 months of service necessary to define the benefit payable at retirement, it followed that the community property portion derived from employment during marriage was 246/360ths.[8]

However, it was not long thereafter that the court realized that this approach was overly simplistic. Thus in *Berry*,[9] the court clarified that its *Taggart's* analysis was actually correct only when the pension is not subject to post-divorce increase, i.e., it was fully mature at the time of divorce. Otherwise, reasoned the court, awarding the community a *Taggart* fraction of the benefit as it was ultimately defined would

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[1] Mr. Crawford's practice in limited to Employee Benefits, ERISA, and Fiduciary Law and is located in The Woodlands, TX. He can be reached at jcrawford@ERISAsite.com. The author wishes to gratefully acknowledge the editing assistance of Charla Bradshaw and John Eck in the preparation of this paper.

[2] *Cearley v. Cearley*, 544 S.W.2d 661 (Tex.1976). In forging this fundamental proposition, the Court relied heavily upon the California Supreme Court's analysis in *Brown v. Brown*, 15 Cal.3d 838 (1976), which has similarly concluded that "to the extent that [contingent pension] rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding. *Brown*, 15 Cal.3d at 843, *quoted in Cearley*, 544 S.W.2d at 663-64.

[3] A pension is "mature" when the right to it has been defined such that its value is no longer in issue. *Cearley*, 544 S.W.2d at 666 n.4. While typically pension rights do not mature until the employee's retirement or other termination of service, maturity may also be triggered by any other event that precludes the accrual of additional benefits as a result of additional service, such as a properly noticed plan termination or an amendment freezing accruals. *See* ERISA § 204(h), I.R.C. § 4980F.

[4] *Cearley*, 544 S.W.2d at 665-66.

[5] A "defined benefit" plan is one in which the benefit payable at retirement (known as the "accrued benefit") is determined or "defined" by a formula based upon length of accrual service, highest average compensation, and a multiplier. In contrast, a "defined contribution" plan is any plan in which the promised benefit is defined by the contributions allocated to each participant's account, adjusted for any subsequent investment gains, losses and expenses. *See generally*, I.R.C. § 411, ERISA § 3. A well-known example of a defined contribution plan is the ubiquitous "401(k)."

[6] *Taggart v. Taggart*, 552 S.W.2d 422 (Tex.1977).

[7] *Id.* at 423.

[8] *Id.* This fraction is often referred to as the "*Taggart* fraction", "*Taggart* percentage", or "*Taggart* formula", and can be based on months, quarters, or years, depending upon service is credited under the plan.

[9] *Berry v. Berry*, 647 S.W.2d 945 (Tex.1983).

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improperly award to the community a *Taggart* fraction of post-divorce earnings, which are separate property:

> It is clear from the record in this case that twelve additional years of work following divorce, which included some twelve to fourteen pay raises, plus union contract negotiations for an improved benefits plan, brought about the increase in retirement benefits paid to Mr. Berry. These post-divorce increases cannot be awarded to Mrs. Berry, for to do so would invade Mr. Berry's separate property, which cannot be done.[10]

The Supreme Court thus agreed with the trial court's decision to avoid this result by applying the *Taggart* fraction as if Mr. Berry had terminated employment *as of the date of divorce*,[11] since that effectively treated the pension as if it had matured on that date, and automatically barred the community from having a fractional *Taggart* interest in any additional benefits that might later be accrued. Curiously, however, rather than point out that *Taggart* (which also involved a pension that was immature at the time of divorce) had perhaps been decided incorrectly, the court went out of its way to declare that *Taggart* was still good law *except* when the pension is immature at the time of divorce:

> We are not to be understood as overruling [*Taggart*], or disapproving of its progeny, insofar as those opinions approve an apportionment formula for determining the extent of the community interest in retirement benefits. When the value of such benefits is in issue, however, the benefits are to be apportioned to the spouses based upon the value of the community's interest at the time of divorce.

With this "clarification" the current rule (sometimes, the "*Berry/Taggart Rule*") was born. Boiled to its essence, it holds that:

> *The community interest in a defined benefit plan is equal to the Taggart fraction of the pension benefit as it is defined as of the date of divorce, whether or not the pension is actually mature at that time.*

But while this simple rule has since made it very easy for practitioners and courts alike to determine the extent to which a pension is derived from contractual rights earned during marriage and is therefore community property, like the Emperor's splendid new attire in Mr. Anderson's fairy tale, its ability to satisfy its stated purpose is, well, delusive. This article will expose just how poorly the *Berry/Taggart Rule* performs in reality, and then will utilize that insight to craft a proposal for a revised rule—the new *Cearley Rule*—that will actually produce apportionments that are true to the principle established in that case.

The Fly in the Ointment.

The starting point for this analysis is the fact that, as the *Berry* court itself recognized, the *Taggart* fraction is predicated on the false assumption that every increment of credited service is an equal contributor to benefit accrual.[12] In a plan in which additional benefits can be accrued by earning an increase in compensation and by earning additional service credit, a span of employment that increases both will obviously contribute more than any prior period of equal length. Accordingly, the extent to which retirement benefits derive from a given period of service, which under *Cearley* is what determines their character, cannot faithfully be determined by looking only at its relative contribution to the total credited service.

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[10] *Id.* at 947 (citations omitted).

[11] In this case 26/26ths, because all of Mr. Berry's 26 years credited service as of the date of divorce was a part of the community estate.

[12] As was noted in *May v. May*, 716 S.W.2d 705, 709 (Tex. App.--Corpus Christi 1986, no writ). "[*Berry's* holding] points out a limitation of the *Taggart* formula. Valuing retirement benefits as of the date of retirement and then multiplying by half of the community's proportional share assumes that the community's interest in the benefits is equally earned during each month of employment, so that the non-employee spouse is entitled to a straight percentage of the whole benefit. … Such was not the case in *Berry*, and is not the case in most, if not all, retirement plans." *Id.*

But while *Berry* correctly recognized that this shortcoming of the *Taggart* fraction could result in an invasion of separate property if it is applied to a matured benefit that includes benefits derived from raises earned post-divorce, inexplicably it seemed not to have realized that when the pension instead matures during marriage, such that those same raise-based benefits are derived from community effort, the opposite is true.[13] As a consequence, the court disapproved the application of the *Taggart* fraction to a matured pension only when it includes additional benefits derived from raises earned by the separate estate, and not when it includes additional benefits derived from raises earned by the community estate.

The effect of this inconsistency can readily be seen by applying the *Berry/Taggart Rule* in two scenarios in which the only difference is whether the final compensation increases are provided by the separate estate or by the community:

Scenario 1: H retired after 30 years in the Orange Company Defined Benefit plan, with a matured pension that is defined as a single life annuity equal to "2% of Final Average Compensation (FAC) per year of credited service, not to exceed 30 years."

H was married to W for his first 15 years in the plan, after which he divorced and remained single until his retirement 15 years later. At the time of divorce H's FAC was $100,000, which was increased to $200,000 post-divorce. H accordingly retired at the end of year 30 with a matured pension of $120,000 per year (2% x $200,000 FAC x 30 years = $120,000).

As in *Berry*, H and W did not get around to dividing this plan until it matured. In the trial on that issue, the court determined that under the *Berry/Taggart Rule* the community interest was $30,000 or 25%, which it calculated by multiplying the *Taggart* fraction as of the date of divorce (15/15 years) by the $30,000 benefit that H would hypothetically have received had he terminated his employment at that time (2% x $100,000 FAC x 15 years = $30,000). Under this ruling, the benefit derived from H's final 15 years of employment was $90,000 or 75%.

Scenario 2: Assume the same facts as in Scenario 1 except that H did not marry until year 16, and that he was divorced 15 years later at the end of employment year 30. On these facts, since there was no issue as to the value of H's matured pension at the time of divorce, the trial court applied the community's *Taggart* fraction (15/30 years) to the matured benefit of $120,000, and concluded that the portion of H's pension that was earned during his final 15 years of employment as community property was not $90,000 but only $60,000 (15/30 x $120,000 = $60,000). Under this ruling each 15-year period earned 50% of the total benefit.

Somehow, whether the separate estate's 15 years came before marriage or after, in each case that estate was found to have earned 25% ($30,000) *more* of the total benefit than did the community when providing the very same service for the same compensation.

Of course, that "somehow" is not really a mystery at all. Under the *Berry/Taggart Rule*, when additional benefits are accrued due to raises received after marriage, those benefits are always treated as separate property in their entirety. However, when these same additional benefits are accrued by the community they are required to be shared *pro rata* under the *Taggart* fraction.[14]

In fact, so ineluctable is the bias of such a rule, that it can work to the benefit of the separate estate even when it does not participate in the plan for a single day:

Scenario 3. Assume the same facts as in Scenario 1, except that upon his divorce from W1, H immediately marries W2 to whom he stays married until the end of year 30, such that all of his service is community in character.

As in Scenario 1, the *Berry/Taggart Rule* would award to the first community $30,000, (15/15 x 2% x $100,000 FAC x 15 years = $30,000); and, just as in Scenario 2, $60,000 would be awarded

[13] *See Albrecht v. Albrecht*, 974 S.W.2d 262, 264 (Tex. App.--San Antonio 1998, no pet.), noting this anomaly.

[14] Mathematically, that pro rata portion is equal to the additional benefit accrued when the separate estate's credited service is multiplied by raises subsequently earned by the community. For example, if the separate estate provided 10 of 30 total years of service credit, then one-third of the additional benefits accrued as a result of raises earned during the marriage would be treated as separate property earnings.

the second community (15/30 of $120,000). With the community property portion of the plan thus totaling $90,000, the remaining $30,000 or 25% becomes H's separate property by default, compliments of the *Berry/Taggart Rule*.

And not surprisingly, in a situation in which the separate estate provides service both pre-marriage and post-marriage, this bias is only compounded:

Scenario 4. Assume the same facts as in Scenario 1 except that H did not marry until after he had been in the plan for 8 years, at which time his FAC was $50,000, and his accrued benefit was $8,000 (2% x $50,000 FAC x 8 years = $8,000). When H was divorced at the end of year 15 (after seven years of marriage), his accrued benefit was, as before, $30,000 on FAC of $100,000.

Applying the community's *Taggart* fraction of 7/15 to this benefit results in a community property award of $14,000 (7/15 x $30,000 = $14,000). But while this was the amount of H's benefit that was accrued *on account of* the community's seven years (2% x $100,000 FAC x 7 years = $14,000), it was $8,000 less than the benefit that was accrued *during* those seven years, which was $22,000 ($30,000 - $8,000 as of date of marriage = $22,000). As a result, the $16,000 that the separate estate was awarded for its 8 years of pre-marriage service under the *Taggart* fraction (8/15ths of $30,000 = $16,000) was comprised of the $8,000 that was accrued before marriage and $8,000 that was accrued *during* the marriage.

On the flip side, since H later retired in year 30 with 15 years of post-divorce service, just as in Scenario 2, his separate estate still received $90,000 as the amount accrued *during* that period, even though the benefit accrued *on account of* those last 15 years under the formula was only $60,000 (2% x $200,000 FAC x 15 years = $60,000).

As these scenarios illustrate, not only is the *Berry/Taggart Rule* incapable of satisfying *Cearley*, it all but guarantees[15] that in every case it will be the community that is shorted.

There is more to the fly than meets the eye.

Underlying the anti-community bias of the *Berry/Taggart Rule* is the fact that in virtually every plan some portion of the benefit will be accrued when prior service credit is multiplied by a compensation increase earned in subsequent service, such that the derivation of that portion cannot be fully attributed to either period of employment. While under *Cearley* this jointly-earned piece should be apportioned, no service-only-based fraction is capable of doing that.[16] Awarding a jointly derived benefit based only on which estate supplies the service component will invariably give the entire benefit to the service component provider, i.e. to the estate that did not contribute the compensation increase. As a consequence, even if we were to return to the pre-*Berry* days in which the victim of the limitations of the *Taggart* fraction could be *either* the community or the separate estate depending upon the sequence of employment, *Cearley* would still not be satisfied. In order to do that, we must find another tool.

Back to basics.

One of the distinguishing features of traditional defined benefit plans is that the pension rights that are accrued by a participant as of any given date include both the right to receive the "accrued benefit" defined by the participant's credited service and compensation as of that date, and the right to accrue an additional benefit on account of that same credited service *if* he or she should subsequently receive an

[15] The only exception to this truism being a situation in which there is no change in pensionable compensation as between the periods of marital and non-marital employment, which is a circumstance that the author has yet to encounter in over 30 years of QDRO practice.

[16] Apportionment is appropriate because such additional benefits only result from the cross-fertilization of service credit supplied by one period and an increase in compensation earned in a future period, and therefore cannot properly be said to derive entirely from either period. In the above scenarios, the cross-fertilization component is the $30,000 in additional benefits that was derived from the multiplication in the benefit formula of the service credit H earned in the first 15 years and the increase in plan compensation he earned in the second 15.

increase in compensation. It is because of this latter form of accrual that the additional benefits that accrue as a result of rights earned *during* a particular period of service are not necessarily the same as the additional benefits that accrue *on account of* rights earned during that period.

This phenomenon was on display in *Berry*, where by the time of his divorce Mr. Berry had already earned 26 years of service credit, and then went on to earn another 12 before retiring, so that the plan calculated his pension based on 38 years. Because he received the benefit of the 26 years of community-earned service credit in this calculation, he was able to accrue an additional benefit *during* his 12 years of post-divorce employment that was substantially higher than the additional benefit he otherwise would have accrued *on account of* that service.[17] While to be sure, this increase was not entirely attributable to his service during marriage, neither was it entirely attributable to all the raises that Mr. Berry earned in post-divorce service. In fact, remove either contribution and the jointly-derived benefit would not have accrued at all. However, because the only tool in the court's belt at that time was the Taggart fraction, which as we have seen is incapable of apportioning such benefits, the court was forced to choose between awarding all of these joint accruals to the community as the service component provider (by applying the Taggart fraction to the matured benefit) or awarding them all to the separate estate (by only applying the Taggart fraction to the benefits accrued as of the date of divorce). Again, while the court chose the latter option and could just as easily have chosen the former,[18] neither provided the apportionment required by *Cearley*.

It's all in the wrist.

Fortunately, although the apples and oranges character of the contract rights that combine to accrue such jointly-derived benefits may preclude a *quantitative* approach to their apportionment, such can be accomplished through a more *qualitative* analysis that looks to the purpose these rights serve under the plan, which is to encourage employment longevity[19] in two very different ways.

First, by providing that whenever the employee receives a cost of living increase in salary, that same increase will automatically increase the benefit accrued on account of all prior years of service in the same percentage, this feature helps to ensure that whatever benefits are accrued in the early years will not decline in value due to inflation as the employee continues to work to normal retirement age, often decades hence. Similar in effect to the post-retirement COLAs discussed in case law,[20] the benefit protection afforded by such pre-retirement cost of living increases (or COLI) is not unique to defined benefit plans,

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[17] Because he earned a right to 26 years of service credit during marriage, in determining his final benefit the plan multiplied Mr. Berry's post-divorce raises by 38 years rather than 12, resulting in an increase of 38/12ths or about 317%. Note that a similar phenomenon can be seen in Scenario 1, in which the $90,000 accrued during the separate estate's 15 years of service would have been only $60,000 but for the separate estate receiving credit for the community's 15 years of prior service (2% x $200,000 FAC x 15 years = $60,000).

[18] Indeed, the former has been adopted in several other jurisdictions, most notably California, which routinely determines and applies the *Taggart* formula (known there as the "Time Rule") as of the date the benefit matures, regardless of whether the estate contributing the final raises is separate or community. *See generally*, *In re Marriage of Lehman*, 18 Cal. 4th 169 (Cal. 1998). For an extreme example of what can happen under this approach, see *In re Marriage of Gowan*, 54 Cal. App. 4th 80, 89-90 (Cal. Ct. App. 1997) (application of the Time Rule fraction to the matured benefit gave the community more than 13 times the benefit that was actually accrued during the marriage).

[19] In fact this feature, virtually unique to traditional defined benefit plans, is often cited as one of the principle reasons why such plans are adopted in lieu or in addition to a 401(k) or other individual account plan *See, e.g.*, Keith Brainard, *Working Toward Retirement Security: Policies to Facilitate Employment of Older Americans* (January 18, 2008), *available at* http://www.ssab.gov/documents/Paper-4BrainardSSABForum1-18-08.pdf. Only defined benefit plans that utilize the traditional service/compensation formula offer this particular type of benefit accrual structure.

[20] *See, e.g.*, *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 610 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Burchfield v. Finch*, 968 S.W.2d 422, 424-25 (Tex. App.--Texarkana 1998, pet. denied); *Harrell v. Harrell*, 700 S.W.2d 645, 647-48 (Tex. App.—Corpus Christi 1985, no writ); *Phillips v. Parrish*, 814 S.W.2d 501, 505 (Tex. App.—Houston [1st Dist.] 1991, writ denied). *See also Sutherland v. Cobern*, 843 S.W.2d 127, 131 (Tex. App.—Texarkana 1992, writ denied) (COLAs are a means of offsetting an otherwise declining value of retirement benefits accrued during marriage and are therefore community property).

and in fact can be found in one form or another in the design of virtually every other type of retirement plan.[21]

What *is* unique to traditional defined benefit plans, however, is a second feature, which encourages longevity by offering what is commonly referred to as the "brass ring."[22] This aspect of the plan results from the fact the more credited service that an employee accumulates, the greater will be his or her effective rate of benefit accrual per dollar of compensation increase received. Because of this "back-loading" of the benefit structure, an employee who earns an increase in salary late in his or her career in excess of that necessary to keep pace with inflation will often see an increase in the value of the pension that dwarfs the amount of the raise itself.[23]

Of course, in order to ensure that both forms of longevity encouragement (i.e., the COLI accruals and the brass ring accruals) are only available to career employees, the rights that make these additional accruals possible are forfeited if and to the extent they have not have not bloomed into additional benefits by the time employment is terminated:[24]

> **Scenario 5.** Assume the same facts as in Scenario 1, except that H has an identical twin brother, B. H and B joined Orange at the same time with the same salary, but at the end of year 15, B left Orange to take a job at Tangerine, which had offered him the same salary and an identical pension plan, but was closer to home. After another 15 years, H and B then retired with identical FAC of $200,000.
>
> As before, H's 30-year pension from the Orange plan was $120,000 (2% x $200,000 x 30 years = $120,000). But because B had divided his 30 years equally between the Orange and Tangerine plans, his total pension was not as large. From the Orange plan he received a $30,000 pension (2% x $100,000 FAC x 15 years = $30,000), and from Tangerine's plan he received another $60,000 (2% x $200,000 FAC x 15 years = $60,000), for a total of only $90,000. The $30,000 in benefits that B lost was the longevity enhancement that he left behind when he terminated from Orange, forfeiting 15 years of prior service credit.
>
> Thus, even though B's benefit formula under the Tangerine plan was identical to the Orange Plan, in actuality it was considerably less generous because his effective rate of benefit accrual was not enhanced by virtue his prior service credit with Orange. In order for B to have received the same total benefit that H received, the Tangerine plan would have had to increase its benefit formula multiplier by 50%, from 2% to 3% (3% x $200,000 FAC x 15 years = $90,000 plus $30,000 from Orange = $120,000).[25]

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[21] For example, in a defined contribution plan such as a 401(k), the value of the accrued benefit (i.e., the account balance) is preserved pending retirement through the crediting of trust earnings received from the investment of that account in the market; while in the so-called hybrid plans (*see, e.g.*, Al Reich, *Overview of Hybrid Plans (Cash Balance and Pension Equity Plans), available at* http://www.irs.gov/pub/irs-tege/2013cpe_hybrid_plans.pdf), equivalent protection is provided in the form of deemed earnings or interest credits.

[22] An example of the power of such rights can be found in Scenario 1, in which H's accrual rate as a long-term employee in the final 15 years was three times what it was in his first 15 years, even though his raises during each period were the same (i.e., $100,000).

[23] *See, e.g.*, Employee Benefits and Executive Compensation, *Proceedings of the New York University 59th Annual Conference on Labor*, 157 (Samuel Estreicher & David J. Reilly eds., 2010) ("[The] defined benefit structure was well-adapted to an economy in which employers valued experienced workers, work was often physically taxing, and many young workers stood ready to take the places of their elders. The traditional defined benefit plan is often characterized as "back-loaded" since late-career participation is particularly lucrative, bringing the employee to the proverbial brass ring that is the plan's early and/or normal retirement benefit. The employee, incented to remain with a single employer through this late-career, back-loaded period, provides continuity to the employer's workforce.") (*citations omitted*). *See also*, JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 156 (3d ed. 2000).

[24] Although forfeitable in the event of termination and therefore contingent, brass ring rights are otherwise protected under federal law. *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir.1992); I.R.C. § 411(a)(7)(C) (prior service may not be disregarded for benefit accrual except in limited circumstances).

[25] This scenario also reveals why *Berry* was in error in assuming that the value of Mr. Berry's interest in the plan as of the date of divorce was equal to the value of what he would have received from the plan had he terminated employment on that date, forfeiting the value of its 26 years of credited service.

It's an ill wind that blows no good.

From the above it is apparent that longevity accruals that derive from the cross fertilization of pension rights earned in temporally distinct periods of employment may be fairly divided based upon the purpose they serve within the plan. Under this practical and common sense approach, the first period of employment (i.e., the period that supplies the service credit component) would receive any additional benefits that are accrued as a COLI increase to offset to the loss in value of the benefits already accrued on account of that earlier service; and the balance of the longevity accruals (the brass ring component) would then go to the last period for having subsequently earned a compensation increase in excess of that necessary to keep pace with inflation.

As to the remainder of the plan, which by definition is the portion of the benefit that each period accrued independently of the efforts of the other, *Cearley* demands that this be divided strictly according to the employee's marital status at the time of accrual. And while the *Taggart* fraction could correctly and accurately be used for this limited purpose, exactly the same result can be achieved by simply plugging into the benefit formula the service credit and final plan compensation that each period supplied on its own, since that is the effect of applying the *Taggart* fraction when no joint-accruals are involved.[26] This step ensures that each estate at a minimum will receive exactly what it would have earned had the other not participated in the plan.[27]

For the sake of simplicity, these two steps can be collapsed into one—the *Cearley Rule*—under which the first period of service is awarded the benefit accrued as of the end of that period (which is necessarily independent of any later service or compensation increase), plus any additional benefits that are subsequently accrued on account of that first period of service as COLI protection. The remaining portion of the pension (consisting of the benefits independently earned during the subsequent period plus any additional accruals attributable to over-COLI raises earned in that period) is then awarded to the subsequent estate. In this way, regardless of what benefits were accrued *during* an estate's employment period, each will receive the benefits, and only the benefits that were derived *on account of* those efforts, and *Cearley* will be satisfied.

Simply stated, the *Cearley Rule* thus holds that:

> *Defined benefit plan pensions are apportioned by first awarding to the estate that provides the first period of employment, whether community or separate, the sum of (i) and (ii); where (i) is the benefit accrued as of the end of the first period, and (ii) is the COLI enhancement to that benefit computed under the plan formula using the credited service earned by the first period*

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[26] In Scenarios 1, for example, when only the service and FAC from the first 15-year period is considered, the accrued benefit per the plan formula is $30,000, which is the same number that is obtained by applying the *Taggart* fraction of 15/15ths to the accrued benefit as of the end of that period. Similarly, when in Scenario 2, the service and FAC from the last 15-year period is plugged into the plan formula, the result is $60,000—the same as that obtained by applying a *Taggart* fraction of 15/30ths to the matured benefit. Note that because these two periods independently accrued a total of $90,000, the remaining $30,000 is the portion of the benefit that was jointly-derived longevity enhancement.

[27] This portion would of course include any subsequent enhancements that are not service-based, such as post-retirement COLA increases. Although neither *Berry* nor *Taggart* specifically addressed this issue, the principle that such enhancements have the same character as the benefits to which they are attributable is well established in *Stavinoha et al*., as noted in FN 21. Similar treatment is anticipated for other such enhancements as the early retirement subsidy, which is an additional benefit that some plans offer to enhance the accrued benefit if the employee takes early retirement in order to offset the actuarial reduction in payments that would otherwise apply due to the fact that benefits commenced early increase the period over which the benefits must be paid. *See generally, Drafting a Qualified QDRO, Appendix D, available at* http://www.dol.gov/ebsa/Publications/qdrosappD.html. Although the author is not aware of any reported case that has specifically addressed the issue of how this form of enhancement should be handled, the reasoning that supports including the post-retirement cost of living index enhancement in the *Taggart* percentage should apply equally to early retirement subsidies. While the right to have the accrued benefit enhanced in this way is contingent in that it will not mature into an addition to the accrued benefit until the employee satisfies all prerequisites to that accrual (*See, e.g.,* ERISA §206(d)(3)(E)(3) and IRC § 414(p)(4)(A), providing that a QDRO may not assign an early retirement subsidy prior to the time the participant has retired and accrued the additional benefit), like the right to prior service credit, it cannot arbitrarily be taken away before it matures, and if forfeited, must be restored if a terminated employee returns to employment. *See generally,* ERISA §204(g), I.R.C. §411(d)(6).

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and any subsequent COLI increase in plan compensation. The remainder of the pension is then awarded to the estate that provides the final period of employment.

It's the knowing that is difficult, not the doing.

As is evident from the above and Appendix A, [28] the plan information that is required to apply the *Cearley Rule* is the same as that necessary to apply the *Berry/Taggart Rule*, with the addition of:

1. The employee's credited service and (if the final period is community) plan compensation as of the end of the first period of employment;
2. The increase in the cost of living index during the final period of employment; and (in case of a change in the plan formula)
3. The benefit formula applicable to each period. [29]

When this data is at hand, the calculation of the respective share of each estate for a traditional-formula defined benefit plan is a simple matter of plugging in the applicable numbers as directed in Appendix A:

> **Scenario 6:** Assume that in a traditional defined benefit plan, the period of employment provided by each estate is 15 years. Assume further that at the end of the first period FAC was $100,000 and that during the final 15 year period the employee earned COLI raises of $30,000 (30%), and additional merit raises of $70,000, such that FAC at retirement is $200,000. Assume also that the benefit formula is the same as it was in previous scenarios, i.e., "years of service x FAC x 2%", such that the total matured benefit is $120,000 (30 yrs. x $200,000 FAC x 2% = $120,000).
>
> On these facts, the benefit accrued as of the end of the first period is $30,000 (15 yrs. x $50,000 FAC x 2% = $30,000); and the subsequent COLI enhancement of that benefit was $9,000 (15 yrs. of first period service x COLI raises of $30,000 x 2% = $9,000),[30] which means that the total benefit attributable to the first period of employment is $39,000 and that attributable to the second period is $81,000.

If a so-called hybrid defined benefit plan, such as the "cash balance" plan, is involved, the calculation becomes even easier. A cash balance plan is one in which the formula benefit payable at retirement is defined not by credited service and final compensation, but by a hypothetical account. If, as is often the case, such a plan results from the conversion of a traditional defined benefit plan, the opening balance of that account is the benefit accrued pre-conversion under the old formula. Cash-balance conversions are often implemented in situations where the employer desires to save future costs because the "brass ring" feature is replaced with pre-defined pay credits, and the pre-retirement COLI protection for prior accruals is limited to a pre-set system of interest credits. In all events, once the hypothetical account is created, it is then increased by the addition of annual "pay credits" and "interest credits." Like the defined contribution plans that such plan's mimic, new accruals are based on a percentage of pay that is typically unaffected by the amount of prior service, and the pre-retirement COLI-protection for these accruals is provided in the form interest credits that are tied to some index of inflation (rather than trust earnings). Accordingly, the community portion is its share of any pay credits earned during its period of employment, plus any interest credits attributable thereto.

In practical terms, then, the most notable difference between applying the *Berry/Taggart Rule* and applying the *Cearley Rule* is that in order to ensure the accuracy of the division, a *Cearley Rule*

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[28] A *Worksheet* that provides an easy-to-use tool for the application of the *Cearley Rule*.

[29] All of this information (other than the cost of living index information (COLI), which can be found on-line) is usually contained in the plan document, the participant's benefit statements, and the SPD—all of which should be available upon request from the plan administrator. If the plan is subject to ERISA, recalcitrant plan administrators may be assessed a penalty of up to $110 per day for any unexcused failure to comply. *See* ERISA §502(c).

[30] Note that without the COLI enhancement, by the time the first period's benefit became payable in year 30 later, it would have depreciated in value by about 30% to approximately $21,000. With the COLI enhancement, however, the value of the benefit attributable to the first 15 years in inflation-adjusted dollars was held constant at $30,000.

apportionment cannot be done until the amount of the matured benefit is known. Accordingly, in any case involving a contested pension that is not fully matured as of the date of divorce (as in *Berry*), the trial court may have to elect between (a) reserving jurisdiction to apportion the benefit once it is mature (as was ultimately done in *Berry*), or (b) ruling in advance that the pension is to be divided in accordance with the *Cearley Rule* once it matures and becomes payable (an option that was approved in *Cearley*):

> The administration of justice will best be served if contingent interests in retirement benefits are settled at the time of the divorce, even though it may be necessary in many instances for the judgment to make the apportionment to the nonretiring spouse effective if, as, and when the benefits are received by the retiring spouse. We approve this method of apportionment and award of contingent interests in [ ] retirement benefits because of the uncertainties affecting the accrual and maturity of such benefits. This method will forego the difficulty of computing a present value and will fairly divide the risk that the pension may fail to mature.[31]

For the things we have to learn before we can do them, we learn by doing them.[32]

Testing the *Cearley Rule* using the facts in Scenarios 1, 2, and 3 produces the kind of unbiased results that one should expect from a *Cearley* apportionment. For example, in **Scenario 1** (first period community, final period separate), assuming the FAC at the end of 15 years was increased by cost of living raises post-divorce of 3% per year uncompounded (for a total COLI increase over 15 years of 45% or $45,000), the calculation is as follows:

> The first period of 15 years of service receives $30,000 (2% x $100,000 FAC x 15 years = $30,000), plus a preretirement COLI enhancement of $13,500 to cover the second 15 years (2% x $45,000 COLI increase x 15 years = $13,500), for a total of $43,500. The balance of the matured benefit, $76,500, is then awarded to the final 15-year period. This award includes the $60,000 that it earned independently (2% x $200,000 FAC x 15 years = $60,000), plus the brass ring enhancement of $16,500 that was attributable to the earning of an over-COLI increase in plan compensation of $55,000, (2% x 15 years prior service x $55,000 = $16,500).
>
> In total then, the first period's percentage of the matured benefit is about 36%, with the final period receiving about 64%.

With respect to **Scenarios 2** and **3,** because *Cearley Rule* apportionments do not discriminate based upon which estate bats first or last, the same service and compensation factors will always produce the same result, which in this case is a 36% award to the first period and a 64% award to the final period.

Recalling that the track record obtained using *Berry/Taggart* was 25% community and 75% separate when the first period of service was during marriage (**Scenario 1**), 50% community and 50% separate when the first period was instead separate (**Scenario 2**), and 75% community and 25% separate estate when all service was community (**Scenario 3**), the improvement is obvious.

Figure 1 compares these results graphically:

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[31] *Cearley*, 544 S.W.2d at 666.
[32] Aristotle, The Nicomachean Ethics.

Figure 1

	Scenario 1		***Scenario 2***		***Scenario 3***		
	Comm.	Sep.	Sep.	Comm.	Comm. A	Comm. B	Sep.
Yrs of Service	15	15	15	15	15	15	0
Final Average Comp. (FAC)	$100,000	$200,000	$100,000	$200,000	$100,000	$200,000	$0
Independent Accrual	$30,000	$60,000	$30,000	$60,000	$30,000	$60,000	$0
COLI Component of Joint Accrual *Berry Rule*	$0	$13,500	$13,500	$0	$0	$0	$13,500
COLI Component of Joint Accrual *Cearley Rule*	$13,500	$0	$13,500	$0	$13,500	$0	$0
Brass Ring Component *Berry Rule*	$0	$16,500	$16,500	$0	$0	$0	$16,500
Brass Ring Component *Cearley Rule*	$0	$16,500	$0	$16,500	$0	$16,500	$0
***Berry Rule* Division**	$30,000	$90,000	$60,000	$60,000	$30,000	$60,000	$30,000
***Cearley Rule* Division**	$43,500	$76,500	$43,500	$76,500	$43,500	$76,500	$0

And finally, for "real world" test of the *Cearley Rule*, let us revisit the facts in *Berry* where, according to the court, Mr. Berry's FAC after 38 years of service was $21,184, and his matured benefit was $964 monthly or $11,572 per year.[33] Although the court did not divulge the formula used by the plan to compute this pension, it appears to have used his FAC, credited service, and a multiplier of about 1.5%, which in the author's experience is not atypical.[34] Assuming for purposes of argument that this assumption is correct, and assuming further that the accrued benefit as of the date of divorce was equal to 12 times the stated monthly benefit of $221 or about $2,652 annually,[35] then Mr. Berry's FAC of the date of divorce can be calculated as $6,800.[36]

[33] Numbers are rounded for clarity.

[34] The reason the multiplier cannot be known for certain is that the phrase "accrued benefit" sometimes improperly equated to the monthly pension amount payable. In a defined benefit plan, the accrued benefit is normally expressed as the amount payable monthly or annually commencing at the participants normal retirement age. However, it is often the case that actuarial value of this income stream is paid in some other form, such as a joint and survivor annuity, in which case the monthly amount payable must be adjusted to account for the fact that the pension is projected to be paid over a longer period of time, or with more certainty (e.g. a life annuity with 10 years certain). Thus, without knowing the form of the benefit that Mr. Berry was to receive, it cannot be known whether the court was discussing the accrued benefit, or the amount payable on account of the accrued benefit, both of which would have the same actuarial value. For simplicity, this analysis assumes that Mr. Berry's retirement benefit was his accrued benefit.

[35] This assumption is necessary because it not clear whether the $2,652 per year that the plan said Mr. Berry would have received had he been able to retire at the time of divorce was the accrued benefit at that time, or the accrued benefit payable at 65 actuarially reduced to account for the fact that it was deemed to have been commenced 12 years earlier than normal (and was thus projected to be paid for a longer period of time). If the latter, then the actual accrued benefit was more likely about 60% larger than stated, since the typical adjustment factor for an unsubsidized early retirement is about 5% per year). On these facts, Mr. Berry's FAC at time of divorce would have been about 60% greater, or $354 per month. Unless Mr. Berry's compensation more

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Using these numbers and if we (arbitrarily) assume the total COLI increase post divorce was 5% per year, uncompounded, the *Cearley Rule* would award to the first period (i.e., the community) the $2,652 that it accrued alone, plus the preretirement COLI enhancement of that benefit, which was $1,591, (FAC of $6,800 x 5% x 12 yrs. = $4,080 COLI increase x 1.5% x 26 yrs. = $1,591). The total award to the community is therefore $4,243 ($2,652 + $1,591 = $4,243).

The remainder of the total benefit, $7,329, ($11,572 - $4,243 = $7,329) is then awarded to the separate estate. This amount consists of the $3,813 benefit that was independently derived from the final 12 years of employment ($21,185 FAC x 1.5% x 12 yrs. = $3,813) plus the portion of the brass ring longevity enhancement that was jointly derived from the over-COLI raises earned post-divorce and the 26 years of service credit provided by the community, which was $3,516.[37]

Notably, the difference between the *Cearley Rule* award to the separate estate of $7,329 and the $8,920 it received under *Berry*[38] is the COLI protection benefit that was assigned to the community to offset what would otherwise have been a 60% reduction in the value of its accrued benefit due to increases in the cost of living while Mr. Berry was earning his separate property pension. Given this, and the fact that but for the community having earned 26 years of service credit, those 12 years of post-divorce employment would have earned only $3,813 in additional benefits; it would seem that awarding to the community the COLI protection that Mr. Berry received on its benefits is both just and fair, and in fact essential if *Cearley* is to be honored.

If we don't change direction soon, we`ll end up where we`re going.[39]

The first step toward adopting the *Cearley Rule* may already have been taken. As noted earlier, in each of *Berry's* progeny that dealt with the award of *post-retirement* COLI increases, the courts had no difficulty accepting the principle that to the extent these post-divorce increases were not attributable to post-divorce employment, the timing of their accrual is irrelevant to their character. Longevity benefit enhancements, to the extent derived from the combined efforts of both estates, should be no different in this regard because they are not attributable solely to any one period of employment. Similarly, and more fundamentally, C*earley*, *Taggart* and *Berry* all were unanimous in recognizing that the fact that contingent pension rights acquired during marriage are community property even when they do not bloom into retirement benefits until long after the community is dissolved.

However, rather than wait for the courts to agree that this principle requires that the Emperors of Apportionment be dethroned and replaced with a more noble system, it may be more appropriate to implement this needed change legislatively, for instance, by amending section 3.007 of the Texas Family Code to restore and amend subsections (a) and (b) to provide:

> *(a) In general, the community interest in any employee pension benefit plan including but not limited to a plan described in ERISA §§ 3(2) and 3(3) or IRC § 414(i) - (k), whether or not tax qualified, is that portion of the matured benefit derived from pension rights earned by the employee spouse during the marriage, regardless of when such benefit accrues, vests or is paid.*
>
> *(b) In the case of an employee pension benefit plan in which the benefit accrued is based upon a formula that takes into account both credited service and plan compensation, and except as provided in (c) the community interest in such property, whether or not vested, shall be equal to the accrued benefit attributable solely to service during the marriage and plan compensation as of the date of divorce, plus either (1) or (2):*

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than tripled in his 12 years of post-divorce employment, the latter figure is probably closer to being correct, in which case the *Berry* court made yet another error by dividing the benefit at maturity as if it had been paid commencing on the date of divorce rather than when it was actually commenced, some twelve years later.

[36] $6,800 FAC x 1.5% x 26 yrs. = $2,652.

[37] Total benefit of $11,572, minus the community's independent accrual of $2,652 community minus the separate estates independent accrual of $3,813 = $5,107 – the $1,591 COLI award = $3,516)

[38] Total benefit of $11, 572 – community award of $4,243 = $8,920.

[39] Quip attributed to that famous authority "Professor Corey."

1. *The additional benefit, if any, derived by multiplying (i) credited service during marriage by (ii) any subsequent increase in plan compensation prior to the commencement of benefits up to the increase in the applicable cost of living index (COLI) or Consumer Price Index (CPI) for such period of employment; or*
2. *The additional benefit, if any, derived by multiplying (i) credited service prior to marriage and (ii) any increase in plan compensation during the marriage and prior to the commencement of benefits in excess of the applicable cost of living index (COLI) or Consumer Price Index (CPI) for such period of employment.*
3. *For purposes of (1) and (2), above, the Court may use any generally accepted COLI, CPI or similar indicator, such as the Applicable Federal Rate published in accordance with section 1274(d) of the Internal Revenue Code.*

(c) Notwithstanding the foregoing, the additions to the community interest provided for in (b)(1) or (2) above may, in appropriate circumstances be determined in any alternative manner that complies with the requirements of (a).

This amendment would immediately establish the need for trial courts and parties to consider the entire bundle of rights earned during marriage when determining the value of the community interest in a defined benefit plan, without unnecessarily tying their hands as to how this should be accomplished given the particular circumstances and complexities of the case.

A solid step forward speaks louder than a hundred empty, fair words.[40]

Under *Cearley*, a matured benefit is to be divided based upon the relative contribution to its accrual made by the separate and community estates. Where a jointly- derived longevity enhancement is included as a part of a pension, this division cannot be accomplished by merely giving to each estate the portion that was accrued *during* its period of employment. That is the curse of the Taggart fraction. And while the *Berry/Taggart Rule* may be marginally simpler to apply, there is no virtue in a rule that will always yield an incorrect result.

Appendix A

Cearley Rule Worksheet for Traditional DB Formulae

Defined benefit plan pensions are apportioned by awarding to the estate that provides the first period of employment, whether community or separate, the sum of (i) and (ii); where (i) is the benefit accrued as of the end of the first period, and (ii) is the COLI enhancement to that benefit computed under the plan formula using the credited service earned by the first period and any subsequent COLI increase in plan compensation. The remainder of the pension is then awarded to the estate that provides the final period of employment.

First Period of Employment _____ through _____		
a	PLAN COMPENSATION (e.g. FAC) as of end of period	$
b	Total CREDITED SERVICE worked during First Period (in yrs.)	YRS
c	Applicable Formula Multiplier (e.g. 2%)	%
d	First Period Initial award: (a) x (c) x (d)	$

[40] Adage attributed to Master Sheng Yen.

Final Period of Employment _____ through _____		
e	PLAN COMPENSATION as of end of period	$
f	Total CREDITED SERVICE worked during Final Period (in yrs.)	YRS
g	Applicable Formula Multiplier (e.g. 2%)	%

COLI Award to First Period		
h	Total COLI percentage increase in compensation during Final Period (e.g., 5% per year x 12 years = 60%)	___%
i	Total COLI Increase in First Period FAC: (a) x (h)	$
j	Actual Increase in First Period FAC: (a) – (e)	$
k	Lesser of (i) and (j)	$
l	COLI allocation to First Period: (b) x (g) x (k)	$

m	**Total Award First Period: (d) + (l)**	$
n	**Total Matured Benefit** (exclusive of early retirement incentives)[41]	$
o	**Total Award to Final Period: (n) – (m)** **[must be equal to or greater than (e) x (f) x (g)]**[42]	$

[41] Since early retirement incentives (such as an award of additional fictive years of service credit) are not attributable to any period of service, they are excluded from the calculation; and any resulting benefit enhancement is shared pro rata between the two estates in the same fashion as post-retirement COLI increases are shared.

[42] Because the portion allocable to the final period of employment must always at least equal the benefit accrued independently by that period, this minimum award is computed here as a check.

Completely Unfair and Against Their Wishes: How Dying During a Divorce Can Wreak Havoc on a Decedent's Estate

By Gregory B. Godkin[1]

This same story has been played out thousands and thousands of time. Wendy herself had seen it happen with a number of friends and acquaintances through the years with increasing frequency as everyone's children began getting older. But as she walked down the aisle twenty-five years ago to what was a reception of copious amounts of hugs, smiles, and well-wishes, she never thought it would be her. But who does?

Harry, on the other hand, saw things a little differently. After spending what seemed like an eternity in school and more hours at work than he could count in ten lifetimes, he had built a very successful medical practice. He had also started taking better care of himself. In fact, he had gone so far as to hire a young and attractive personal trainer and their relationship had quickly escalated from professional to personal. He was no longer happy at home with his wife Wendy, the kids were soon leaving for college, and he "deserved" the happiness his trainer, Tina, brought him. So, he began the process of preparing for his divorce.

The first thing he did was change the beneficiary of his life insurance policy to Tina. While she was not his wife, yet, the destination wedding was already being planned and it would take place as soon as possible after the divorce became final. Harry clearly did not want his wife to be the beneficiary should something happen to him during the pendency of the divorce.

Unfortunately for Wendy, upon service of the divorce also came standard Temporary Orders, which specifically prohibited her from changing the beneficiary on any life insurance policy in which her husband was a beneficiary. This did not seem fair considering that her insurance policy was purchased with her income after marriage when Harry was still in school so as to make sure that her husband would not be burdened with significant student loan debt (that had long since been paid off) should she die. She frankly wasn't that concerned about her children financially since their college funds were more than capable of paying for both graduate and post-graduate education. Instead, her concern was for her parents who, for the last few years, had essentially relied on her and Harry's money to survive since her father had suffered a stroke a few years back. Wendy certainly wanted to make sure that should something happen to her, the life insurance proceeds would go to her parents. But with the Temporary Orders restricting the change in beneficiary, she was stuck.

After several months, the case was moving along at a snail's pace. "These things can take what seems like forever" said Wendy's family law attorney. Not exactly what Wendy wanted to hear, but she understood these things could take some time. At least the parties were going to mediation the following week in an effort to work out a division of the community estate.

The following week, that is exactly what happened. After a very emotionally exhausting day, the parties entered into an Agreement Incident to Divorce pursuant to Texas Family Code Section 7.006. While she did not feel she got all that she deserved for Harry's transgressions, at least she got the house, her car, some cash, and what turns out to be her largest asset, her life insurance policy enabling her to assign her parents as beneficiaries. At the mediation, she was reminded by her lawyer that she should update her will to address all of the changes impacted by the settlement. She promised to do exactly that. Unfortunately, she never got the chance.

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The following day, her friends insisted that she go celebrate what would hopefully be the start of a new, happy chapter in her life. As she was driving to her favorite restaurant to meet her group of friends, she was thinking positively about the future for the first time in a long time. And it was at that moment that a delivery truck ran a red light and crashed into the driver's side of Wendy's car. She was immediately rushed to the emergency room where all efforts are made to keep her alive. While they were successful in that regard, there was no brain activity and she was placed on life support. The physicians explained that there was nothing more they could do and that a decision needed to be made as to whether to pull the plug on life sustaining measures.

Since she had no advanced directive, pursuant to Section 166.039(b) of the Texas Health & Safety Code, the hospital looked to Harry to make the decision. Needless to say, it was an easy decision for him to make and Wendy died shortly after her ventilator was removed.

Her parents were beside themselves. How could this happen? Will this mean that Harry will get all of Wendy's community property? That seemed terribly unfair. However, they were assured by Wendy and Harry's oldest son, David, that an agreement had been reached at mediation, prior to Wendy's death, and Wendy's Estate would now garner the benefits of the Agreement Incident to Divorce.

Unfortunately for David and for Wendy's parents, Wendy's wishes met with the reality of the law. Wendy's will was never updated and it left all of her estate to her husband. When Harry's divorce lawyer told Harry the good news: "You're gonna get it all!" Harry asked "What about the Agreement Incident to Divorce?" Whereas his lawyer explained, because it was never part of a rendered Final Judgment, and now that Wendy was dead, it cannot be entered. On top of receiving all of the community estate, Harry also benefitted from Wendy's life insurance since she was prohibited from changing the beneficiary. Harry could not believe his luck, and everyone else involved could not believe this is the reality of how the law protects those who are in the midst of a divorce and die.

According to the Texas Vital Statistics Unit, Texas averages approximately 80,000 divorces per year. While there are no statistics available, the law of averages tells us that a number of these people will die during the pendency of a divorce. In a large number of Texas counties, Temporary Orders are mandatory. The temporary orders almost always contain a prohibition of changing the beneficiary of a life insurance policy. As addressed in the Wendy and Harry scenario, it is often the non-filing spouse who gets caught in the Temporary Order prohibiting of changing the beneficiary since the filing spouse had an opportunity to plan ahead and make said change prior to the filing. Because the benefits of a life insurance policy are often one of the largest, if not the largest, asset of a person going through divorce, the beneficiary of those proceeds is of critical importance. Unfortunately, there is nothing codified in Texas that protects this critical asset and instead, due to the Temporary Orders, actually restrict protection of said asset by the non-filing party.

Further, even an Agreement Incident to Divorce is of no help. The death of either party to the divorce action prior to entry of the divorce decree withdraws the court's subject matter jurisdiction over the divorce decree. *See Pollard v. Pollard*, 316 S.W.3d 246, 250-51 (Tex. App.—Dallas 2010, no. pet.). This includes all prior orders of the court including Temporary Orders and Custody Orders. For all intents and purposes, the community estate is treated as if the divorce was never filed. So no matter how despicable the behavior of the surviving spouse has been, if the deceased spouse dies intestate or failed to update his or her will prior to dying (assuming the will left the estate to the surviving spouse), all the community property goes to the surviving spouse. I am sure many of you are thinking because Wendy and Harry had reached an Agreement Incident to Divorce, which should be enforceable and resolve these issues. Unfortunately for Wendy and her survivors, that is not the case. Because the Agreement Incident to Divorce was drafted in accordance with Texas Family Code Section 7.006, the agreement is not binding unless the Court renders a Final Judgment of divorce. *See* Texas Family Code Section 7.006 (a); *Milner v. Milner* 361 S.W.3d 615, 618 (Tex. 2012). As stated above, because Wendy died prior to the entry of divorce, the court has no jurisdiction over the case and cannot enter a Final Judgment including the terms of the Incident to Divorce.

So what can we do as lawyers to deal with the serious issues faced by clients so as to avoid what happened to Wendy and her surviving family? Having an updated will certainly would have helped as it would have provided her with control over her one-half of the community property. Also, her family lawyer could have utilized the provision of the Family Code, Texas Family Code Section 6.602, which allows for a settlement agreement that is immediately binding on the date it is signed. As demonstrated in the case of *Spiegel v. KLRU Endowment Fund*, 228 S.W.3d 237 (Tex. App.–Austin 2007, pet. denied), the parties reached a Settlement Agreement pursuant to Texas Family Code Section 6.602 and, the day before the hearing to enter the Final Divorce Decree, the wife died. The wife's will, which was executed five years prior to the Settlement Agreement, left her husband the homestead and her vehicle as well as various personal and household effects. The court ruled that, even though the entry of the Final Divorce Decree could not occur because of her death, the Settlement Agreement met the specific terms of Texas Family Code Section 6.002 and was, therefore binding, and the distribution of community assets should occur under said Settlement Agreement and not the wife's prior executed will. Thus, drafting a settlement agreement pursuant to Texas Family Code Section 6.602 which is immediately binding, as opposed to Section 7.006 which is not binding prior to final entry of divorce, would have prevented the Wendy and Harry scenario. Another protection that those who practice wills and probate can afford their clients is explaining to a client who is drafting a will that, should any circumstances in the marital relationship change, the will should be updated as soon as possible to avoid the Wendy & Harry Scenario.

On a final note, as the reader can see absent the recommendations set forth in this article, there is no "magic bullet" fix to these issues. I recently represented a party in a case that had facts almost identical to the Wendy & Harry scenario. In our case, emergency hearings at the probate court yielded no real solution. The parties found themselves in the twilight zone of probate and family law with no real help afforded by either. In our case, like Wendy's family, the parties were left with frustration and disbelief that the system failed to protect what the deceased wanted.

DEVELOPMENTS IN AWARDS OF APPELLATE ATTORNEY'S FEES UNDER SECTIONS 6.709 AND 109.001 OF THE TEXAS FAMILY CODE

By David Weiner*

A. Sections 6.709 and 109.001 of the Texas Family Code

Under section 6.709 of the Texas Family Code, a "trial court may render a temporary order necessary for the preservation of the property and for the protection of the parties during the appeal, including an order to . . . (2) require the payment of reasonable attorney's fees and expenses."[1] Section 109.001 of the Family Code contains a similar provision, but it applies in suits affecting the parent-child relationship where appellate attorney's fees and expenses may be awarded "to preserve and protect the safety and welfare of the child during the pendency of the appeal as the court may deem necessary and equitable.[2]

An award of appellate attorney's fees under section 6.709 must be conditioned on the outcome of the appeal.[3] Thus, if a trial court awards appellate fees under section 6.709 and requires immediate payment to the receiving party, the paying party may obtain relief through a writ of mandamus to compel the trial

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[1] Tex. Fam. Code Ann. § 6.709(a)(2) (2015). The temporary order may be rendered on the motion of a party or on the court's own motion, and after notice and hearing, but not later than the 30th day after the date an appeal is perfected. *Id*.

[2] Tex. Fam. Code § 109.001(a)(5) (2015). As with section 6.709, the temporary order may be rendered on the motion of a party or on the court's own motion, and after notice and hearing, but not later than the 30th day after the date an appeal is perfected. Tex. Fam. Code § 109.001(a).

[3] This requirement accords with the general principle that an award of attorney's fees to an appellee must be conditioned upon the appellant's unsuccessful appeal. *See Sundance Minerals, L.P. v. Moore*, 354 S.W.3d 507, 515 (Tex. App.—Fort Worth 2011, pet. denied) (noting that unconditional award of attorney's fees to appellee has a chilling effect on a paying party's exercise of legal rights); *Siegler v. Williams*, 658 S.W.2d 236, 241 (Tex. App.—Houston [1st Dist. 1983, no writ) (noting that a trial court may not penalize a party for taking a successful appeal by taxing him with attorney's fees if he takes such action).

court to condition payment of the fees on the outcome of the appeal.[4] And, until recently, the courts had also been holding uniformly that an award of appellate attorney's fees under section 109.001 to an appellee must be conditioned on the appellant's unsuccessful appeal.[5] The important recent developments in the section 109.001 cases are discussed below.

In the sections 6.709 and 109.001 cases, the decision to grant relief by mandamus from a temporary order requiring immediate payment of appellate attorney's fees has not always rested simply on the principle that payment must be conditioned on an appellant's unsuccessful appeal. In *Halleman v. Halleman*, the trial court, acting under sections 6.709 and 109.001, had ordered relator to pay $95,000 into the court's registry for real party in interest's attorney's fees on appeal.[6] The Fort Worth Court of Appeals granted mandamus relief, ordering the trial court to vacate the order requiring the immediate deposit of $95,000 into the court's registry.[7] The court held that, because the record reflected that relator did not have the funds available to pay $95,000 or any other amount into the trial court's registry, the trial court's order would, in effect, preclude relator's right to appeal.[8] The implication is that the decision would have been different had there been evidence of relator's ability to pay all or some portion of the fees ordered by the trial court. In basing the appropriateness of an order requiring immediate payment of appellate fees on the appealing party's ability to pay, *Halleman* suggested a relaxation of the general rule that an award of appellate attorney's fees must be conditioned upon the outcome of the appeal.

B. Review of orders requiring immediate payment of appellate attorney's fees under section 109.001 "safety and welfare of the child" standard

Recently, a clear shift away from conditioning payment of appellate attorney's fees upon the outcome of the appeal has started taking place in the section 109.001 cases. To be sure, review by mandamus is still available when a trial court requires immediate payment of appellate attorney's fees in these cases. The trend, however, is toward basing the decision on whether to grant relief by mandamus on a standard that mirrors the statutorily expressed purpose for awarding appellate fees in these cases: preserving and protecting the safety and welfare of the child during the pendency of the appeal. While this standard has begun to emerge, two cases decided in 2015 reveal its inconsistent application.

In *In re Wiese*, the Austin Court of Appeals reviewed a trial court's temporary order under section 109.001 that required the relator, the appellant in the direct appeal of an order that modified the parent-child relationship, to immediately pay $25,000 in appellate attorney's fees to counsel for real party in interest, the appellee in the direct appeal.[9] After stating that the party requesting temporary orders under section 109.001 had the burden of demonstrating to the trial court that the requested attorney's fees were necessary to preserve and protect the safety and welfare of the children during the pendency of the appeal, the court found that the requesting party did not present any evidence to meet this burden.[10] As a result, the court held that the trial court abused its discretion in ordering relator to pay the appellate attorney's fees to real party in interest's attorney, mandamus relief was conditionally granted, and the trial court was directed to vacate its order compelling relator to pay appellate attorney's fees.[11] Significantly, the court stated that it did not have to reach relator's alternative argument that the trial court abused its discretion by failing to condition the award of appellate attorney's fees on real party in interest's success on ap-

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[4] *See In re Merriam*, 228 S.W.3d 413, 416 (Tex. App.—Beaumont 2007, orig. proceeding) (holding that mandamus relief from a section 6.709 order is available for an erroneous temporary order that requires immediate compliance during the appeal, but denying relief because temporary order did not require relator to pay the appellate attorney's fees until the conclusion of an unsuccessful appeal).

[5] *See Marcus v. Smith*, 313 S.W.3d 408, 418 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (consolidated appeal and orig. proceeding); *In re Garza*, 153 S.W.3d 97, 101 (Tex. App.—San Antonio 2004, orig. proceeding).

[6] No. 02-11-00238-CV, 2011 WL 5247882, *2 (Tex. App.—Fort Worth Nov. 3, 2011, no pet.) (consolidated appeal and orig. proceeding).

[7] *Id.* at 5.

[8] *Id.* at *4-5.

[9] No. 03-15-00062-CV, 2015 WL 4907030, at *1 (Tex. App.—Austin Aug. 12, 2015, orig. proceeding) (mem. op.).

[10] *Wiese*, 2015 WL 4907030 at *2.

[11] *Id.* at *3.

peal.[12] In other words, the court reached a decision on the merits – and not just the conditioning – of the appellate attorney's fees award.[13]

Earlier in 2015, in denying mandamus relief from a section 109.001 attorney's fees award, the Dallas Court of Appeals employed much different reasoning than did the court in *Wiese*. In *In re Jafarzadeh*, the temporary orders pending appeal issued under section 109.001 included an award of appellate attorney's fees that were not conditioned upon relator's unsuccessful appeal and that were to be paid immediately.[14] Based on the unconditional nature of the award and the requirement of immediate compliance, the court of appeals considered mandamus review to be appropriate.[15]

In denying the petition, however, the court in *Jafarzadeh* did not address whether the requesting party had presented evidence establishing that the award of appellate attorney's fees was necessary to preserve and protect the safety and welfare of the children during the pendency of the appeal.[16] Instead, the court focused on the best interest of the child as the guiding principle in a suit affecting the parent-child relationship.[17] Using this standard, the court emphasized that "conditioning the award of fees in a suit affecting the parent-child relationship may defeat the ability of the parent who prevails in the trial court to defend the order being appealed as one that is in the best interest of the child."[18] Thus, the court continued, "the trial court may, without abusing its discretion, fashion an order concerning payment of appellate attorney's fees that protects the best interest of the child."[19] As for considering the evidence in support of the fees award, the court stated that there was *no evidence* "suggesting that the trial court's temporary order pending appeal was not in the best interest of the children in this case . . ."[20]

The court in *Jafarzadeh* did not apply the "safety and welfare of the child" standard embodied in section 109.001, opting instead for a best interest of the child standard. Nor did the court indicate that the requesting party has *any* burden to support the request for appellate fees; if anything, there is, in effect, a presumption that an award of fees is proper and that the burden is on the paying party to establish that such an award is not in the best interest of the children. Thus, *Jafarzadeh* provides an easier path for those who seek awards of appellate attorney's fees for their clients who have prevailed in the trial court. The author submits, however, that judges and lawyers who seek to adhere faithfully to the specific requirements of section 109.001 will find better guidance in *Wiese* than in *Jafarzadeh*.

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[12] *Id.* at *3, n.4.
[13] In the course of its decision, the court considered and rejected the argument that the award of appellate fees could be supported by the trial court's determination that relator was in a better position financially to pay the fees, as well as the argument that the award of appellate fees was in the children's best interest, rather than necessary for their safety and welfare during the pendency of the appeal. *Id.* at *2-3.
[14] No. 05-14-01576-CV, 2015 WL 72693, at *1 (Tex. App.—Dallas Jan. 2, 2015, orig. proceeding) (mem. op.).
[15] *Id.* The court took a circuitous path just to resolve this preliminary matter: "Because . . . the payment of interim fee awards during the pendency of appeal cannot in most instances by their very nature be deferred until the conclusion of appeal without defeating their purpose and because a large unconditional fee award may raise the possibility that a party's ability to continue litigation will be significantly impaired, . . . an order that requires payment of fees before the completion of the appeal may provide the circumstances in which review of the award during the pending or imminent appeal does not provide an adequate remedy by appeal in conjunction with the final judgment in the case." *Id.* (internal citation omitted).
[16] *See In re Wiese*, 2015 WL 4907030 at *2 (party requesting appellate attorney's fees under section 109.001 has burden of establishing that fees are necessary to preserve and protect the safety and welfare of the children during the pendency of the appeal).
[17] *In re Jafarzadeh*, 2015 WL 72693 at *2.
[18] *Id.*
[19] *Id.*
[20] *Id.* at *3.

Editor's Note: *Although the issue of same-sex marriage has now been resolved by* ***Obergefell v. Hodges****, the following article reminds us once again how best interest of the children should always control and that not all issues regarding the children have been resolved even with the recognition of same-sex marriage.*

"But What About the Children?": *DeBoer v. Snyder*[1] and the Implications of (Inevitable) Same-Sex Marriage Equality on Children Within the "Stable Family Unit"

By Jaime M. DeWees*

Part I: Introduction

"The pace of change on same-sex marriage, in both popular opinion and in the courts, has no parallel in the nation's history."[2] With less than fifty years since the United States Supreme Court summarily rejected same-sex marriage,[3] marriage equality advocates have now favorably positioned themselves for a ruling on the merits in the consolidated appeal of *DeBoer v. Snyder*.[4] The Court's potential to extend marriage to same-sex couples comes swiftly after the federal "traditional" definition of marriage in the Defense of Marriage Act (DOMA) was struck down in *United States v. Windsor*.[5] Even the divided Sixth Circuit appellate majority conceded that "the question is not whether American law will allow gay couples to marry; it is when and how that will happen."[6] With zealous legal scholarship and political advocacy on both sides of the debate, what could tip the Supreme Court's proverbial scales of justice in favor of marriage equality?

As children's constitutional rights scholars have predicted,[7] the Court is poised to apply a child-centered focus in forthcoming marriage equality decisions like *DeBoer*. Though the same-sex marriage debate has previously focused on the substantive rights of adults, the arguments on both sides are now fixated on children.[8] The state respondents in *DeBoer* assert that their interest in marriage "has always been" to induce opposite-sex couples with inherent procreative capability to enter marriages, which promotes family stability.[9] The plaintiffs and their *amicus curie* supporters contend that state marriage bans

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[1] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (cert. granted) (Daughtrey, Circuit J., dissenting).

[2] Adam Liptik, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. Times (Jan. 16, 2015), http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html?emc=edit_na_20150116&nlid=58920075&_r=1 (last accessed Feb. 28, 2015).

[3] Baker v. Nelson, 409 U.S. 810, 810 (1972).

[4] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (cert. granted). The consolidated appeal to the Supreme Court includes Bourke v. Beshear, 996 F.Supp.2d 542 (W.D. Kent. 2014), Obergefell v. Hodges, 962 F.Supp.2d 968 (*sub nom.* Obergefell v. Wymyslo), and Tanco v. Haslam, 7 F.Supp.3d 759 (M.D. Tenn. 2014).

[5] United States v. Windsor, 133 S. Ct. 2675 (2013).

[6] DeBoer v. Snyder, 772 F.3d at 395.

[7] Catherine E. Smith & Susannah W. Pollvogt, *Children as Proto-Citizens: Equal Protection, Citizenship, and Lessons from the Child-Centered Cases*, 48 U.C. DAVIS L. REV. 656, 664 (2014). These law professors, along with Professor Tanya Washington, are counsel for the Scholars of the Constitutional Rights of Children and have submitted an amicus brief in support of the *DeBoer* petitioners.

[8] *Id.* at 657. *See also generally* Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013); Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781 (2012).

[9] *See* Brief on the Merits for Respondent Richard Snyder, Governor, State of Michigan, DeBoer v. Snyder, No. 14-571 (U.S. Mar. 27, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-571-bs.pdf. ("In Michigan, as elsewhere, there is no obligation to have children in marriage. Yet it is undeniable that two sexes are necessary to create children. A man and a woman uniquely have the inherent ability together to have a child biologically connected to both parents without the involvement of third parties . . . Through marriage, a state recognizes this reality.").

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interfere with the constitutional rights of children by punishing them in an attempt to regulate adult behavior.[10] Yet in the midst of this heightened consciousness of the legal and social implications for families, the conservative Sixth Circuit majority rebuffed its opportunity to give relief to the plaintiffs and their children:

> [The traditional definition of marriage] deprives them of benefits that range from the profound to the mundane. These harms affect not only gay couples but also their children. Do the benefits of standing by the traditional definition of marriage make up for these costs? The question demands an answer—but from elected legislators, not life-tenured judges.[11]

The dissenting Circuit Judge Martha Daughtrey cast a more tangible and endearing picture of the family that is the epicenter of this constitutional warzone and asked the obvious question of her colleagues—"But what about the children?"[12] The named plaintiff, April DeBoer, and her partner Jayne Rowse are (still) unable to jointly adopt the three children they are raising together.[13] Rowse alone adopted two children, N and J, and DeBoer adopted the third child, R; all three children "had difficult starts in life, and two of them are now characterized as 'special needs' children."[14] Born to single women who could not otherwise care for them, the *DeBoer* children embody the "unintentional offspring" that are "most likely to be put up for adoption."[15] The dissent found no trouble invalidating the marriage bans because the exclusion of same-sex couples from "marriage as an institution . . . within which children may flourish" ignores "the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit."[16]

The constitutional rights of children, particularly those like the children in *DeBoer* seeking adoption from foster care or welfare, deserve attention when considering the merits of same-sex marriage equality. In the past, federal courts have applied a parent-centered focus in constitutional challenges to same-sex marriage bans and the barriers to child adoption that they create.[17] Moving forward with cases like *DeBoer*, the Supreme Court should employ a child-centered focus that considers the social and legal effects that marriage bans have on children's growth as future members of society.[18] Children of same-sex couples suffer separate and distinct injuries from their gay and lesbian parents when they are denied legal and economic benefits that flow from their parents' marital status.[19] But if the Sixth Circuit majority's rote constitutional analysis in *DeBoer* is any indication, children's rights have been permissively subverted by the political agendas that fuel the same-sex marriage debate.[20] The majority seemed convinced that the "less expedient, but usually reliable, work of the state democratic processes" to (eventually) extend mar-

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[10] *See* Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Petitioners, Obergefell v. Hodges, et al., Nos. 14-556, 14-562, 14-571, 14-574 (U.S. Mar. 5, 2015), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556-scholarschildren.pdf. ("[T]he state defendants in these cases explicitly concede that marriage is good for children, yet state marriage bans categorically exclude an entire class of children—the children of same-sex couples—from the legal, economic and social benefits of marriage that states tout. . . . Thus, state marriage bans directly invoke [the] Court's special role in protecting children against unfair discrimination . . . .").

[11] DeBoer v. Snyder, 772 F.3d at 407-08.

[12] *Id.* at 421 (J. Daughtrey, dissenting).

[13] Nancy Polikoff, *It's the Children, Stupid! . . . Or why Ryanne, Nolan, and Jacob still don't have two legal parents*, Beyond (Straight and Gay) Marriage. (Nov. 7, 2014), http://beyondstraightandgaymarriage.blogspot.com/2014/11/its-children-stupid-or-why-ryanne-nolan.html.

[14] DeBoer v. Snyder, 772 F.3d at 423.

[15] *Id.* (citing Baskins v. Bogan, 766 F.3d 648, 662 (7th Cir. 2014)).

[16] *Id.* at 422.

[17] Tanya Washington, *Suffer Not the Little Children: Prioritizing Children's Rights in Constitutional Challenges to "Same-Sex Adoption Bans"*, 39 CAP. U. L. REV. 231, 248 (2011).

[18] Smith & Pollvogt, *supra* note 7, at 660.

[19] *See* Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1592.

[20] *See* Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1, 4 (2012) ("The constitutional rights of children are given a cursory nod and characterized as co-extensive with, or derivative of, parental rights in the contexts of both adoption and marriage bans.").

riage to same-sex couples will somehow counteract the present surplus of children waiting to be adopted with the deficit of available prospective parents.[21]

This Article proposes that in the wake of the Supreme Court's upcoming decision on marriage equality in *DeBoer*, supposing a victory for same-sex marriage, lower courts and state legislatures must consider the subsequent legal implications on children being raised by same-sex couples. For example, within the newsworthy marriage equality debate, same-sex adoption has received fleeting mention from the media and the courts. "Adoption has not attracted the kind of attention nationally that gay marriage has. Advocates say they like it that way. The more it is in the public eye, the greater the chances conservative legislatures will try to block it…."[22] This Article argues that an issue of such importance – the constitutional rights and best interests of children–should not take a political backseat in the debate, but should be used to bolster the argument that same-sex marriage equality will increase stability for families like DeBoer, Rowse, and their three children.

Part II of this Article gives a snapshot of *DeBoer v. Snyder* and sets up the present context of the marriage equality debate. This section overviews the relevant child-centered arguments for and against same-sex marriage equality. First, it outlines and critically challenges the states' primary argument for defending marriage bans—the interest in planning for the "accidental procreation" of children that is inherent only in opposite-sex couples.[23] Then, this section highlights the most persuasive arguments for marriage equality that directly address children's constitutional rights within the family, which could powerfully impact the degree of judicial scrutiny applied by the Supreme Court. The anomalous justification for marriage bans in promoting "stable family units" is seriously called into doubt when the reviewing court prioritizes the constitutional rights of children.[24] Part II concludes by comparing and contrasting the legal effects of marriage equality on the *DeBoer* family, giving a preview of the profound changes that such a holding from the Supreme Court would incite.

Part III analyzes more broadly the legal implications of a marriage equality victory in *DeBoer* on children's rights within families with same-sex parents. First, it proposes reform of same-sex adoptions laws and advocates a renewed child-centered focus on children's rights to adoption. Building on this theoretical victory, this section then envisions how same-sex couples' equal access to the legal status and subsidy of marriage will improve outcomes for their children and for their families within society. Part III considers various critiques of same-sex parenting, such as the comparative well-being of children with same-sex parents to those with opposite-sex parents,[25] and the roles that biological parental connections and dual-gendered parenting play in the best interests of children.[26] In addressing some counterarguments that criticize the trajectory of marriage equality advocacy, this section concludes that marriage equality remains a desirable platform for substantive change in family law more generally. Moreover, the inevitable marriage equality holding will significantly improve future outcomes for children with same-sex parents.

Part IV concludes with a call to action for broader social change for acceptance of same-sex couples and their families once the "inevitable" marriage equality victory is handed down from the Supreme

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[21] DeBoer v. Snyder, 772 F.3d at 396; *see also* Washington, *Suffer Not the Little Children*, *supra* note 17, at 242.

[22] Sabrina Tavernise, *Adoptions by Gay Couples Rise, Despite Barriers*, N.Y. TIMES (June 13, 2011), http://www.nytimes.com/2011/06/14/us/14adoption.html?pagewanted=all.

[23] *See generally* Brief on the Merits for Respondent Richard Snyder, *supra* note 9; *see also* Edward Stein: The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships, 84 CHI.-KENT L. REV. 403 (2009); Nice, *supra* note 8.

[24] *See generally* Washington, *Suffer Not the Little Children*, *supra* note 17; *see also* Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Petitioners, *supra* note 10.

[25] *See* D. Paul Sullins, *Bias in Recruited Sample Research on Children with Same-Sex Parents Using the Strength and Difficulties Questionnaire (SQD)*, JOURNAL OF SCIENTIFIC RESEARCH & REPORTS, 5(5): 375-387, 2015. DOI: 10.9734/JSRR/2015/15298 (suggesting biases in prior same-sex parent studies); *but see* Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, DEMOGRAPHY, 2010 Aug; 47(3): 755-775 ("children of all family types are far more likely to make normal progress through school than are children living in group quarters such as orphanages and shelters.").

[26] *See* Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 LAW & INEQ. 307 (2010).

Court. The legal implications of marriage equality are already being predicted by trained scholars and advocates, but the lasting effects on social and political climates towards same-sex marriage and towards gays and lesbians in general are more difficult to foresee. In concluding that marriage equality should serve as an impetus for change in reshaping the way family law operates to enhance family stability, this Article hopes to reinforce support for arguments in other substantive areas of family law, such as adoption, that prioritize children's rights. The flawed reasoning in abstract legal rules and attenuated policy goals becomes obvious when they are concretely applied to real-life family units like DeBoer, Rowse, and their three children. In sum, this Article strives to build upon the substantial body of scholarship crafted by children's constitutional rights advocates by applying several of their suggested arguments to the imminent facts of *DeBoer*, so that the implications of (inevitable) marriage equality can begin to be addressed.

Part II: ***DeBoer v. Snyder*** **and the Relevant Child-Centered Arguments For and Against Marriage Equality**

DeBoer v. Snyder presents a promising platform for marriage equality. The United States Supreme Court granted certiorari of four consolidated cases from Ohio, Tennessee, Kentucky, and Michigan, in which the respective states upheld their recently-amended constitutional bans on same-sex marriage, known as state mini-DOMAs after *Windsor*.[27] The plaintiffs appear likely to prevail in their appeal from the Sixth Circuit, especially in light of the Court denying review of prior appellate decisions favoring marriage equality from the Fourth, Seventh, Ninth, and Tenth Circuits.[28] According to the majority, there are only two possible outcomes for the appeal to the highest court: either "the Supreme Court will constitutionalize a new definition of marriage" or "the people, gay and straight alike," will amicably use "the customary political processes" to amend state marriage law.[29]

Recognizing the swift trajectory of same-sex marriage within the states and the federal courts, the Sixth Circuit majority has posited that the issue on appeal is a political one, and it should not be removed "from the place it has been since the founding: in the hands of state voters."[30] In the four states that appealed to the Sixth Circuit, the majority of voters approved amendments to their state constitutions to define marriage as between only one man and one woman.[31] When the definitions were challenged, the district courts in each state struck them down, finding none of states' justifications for the definitions plausible. Because the lower courts have overturned the voters' preferences, the Sixth Circuit agreed with the state respondents' arguments that "it is 'demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.'"[32]

But as the dissenting appellate judge points out, the majority's reasoning rests on the false premise that the issue before the Sixth Circuit (and ultimately the Supreme Court) is "who decides?" on the definition of marriage.[33] "These plaintiffs are not political zealots trying to push reform on their fellow citizens", and the self-interest of the political process should not control the exercise of "a civil right that most of us take for granted—the right to marry."[34] Beyond the worthy cause of marriage equality, cases like *DeBoer* now stand to implicate the substantive legal rights of over 220,000 children currently being

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[27] *See* David Cruz, Symposium: Unveiling Marriage Equality? SCOTUSblog (Jan. 17, 2015), http://www.scotusblog.com/2015/01/symposium-unveiling-marriage-equality/.

[28] *Id; but see* DeBoer v. Snyder, 772 F.3d at 402 (majority opinion) ("But this kind of action (or inaction) imports no expression of opinion upon the merits of the case . . . A decision not to decide is a decision not to decide.").

[29] Kristin A. Collins, Comment, Federalism, Marriage, and Heather Gerken's Mad Genius, 95 B.U. L. REV. 615, 633 (2015) (citing DeBoer v. Snyder, 772 F.3d 388, 421 (6th Cir. 2014)).

[30] DeBoer v. Snyder, 772 F.3d at 403.

[31] *Id.* at 396-99. The respective state voter majorities were 59% in Michigan, 74% in Kentucky, 62% in Ohio, and 80% in Tennessee. *Id.*

[32] Brief on the Merits for Respondent Snyder, *supra* note 9, at 57 (citing Schuette v. Coalition to Defend, 134 S. Ct. 1623, 1637 (2014)).

[33] DeBoer v. Snyder, 772 F.3d at 421 (J. Daughtrey, dissenting).

[34] *Id.* at 421-22 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967) ("marriage is one of the basic civil rights of man, fundamental to our very existence and survival") (internal quotations omitted)).

raised by same-sex couples.[35] Despite the states' arguments that voters are concerned with protecting the "stable family unit", in reality, same-sex marriage bans subvert family stability for the children of same-sex couples, whether they are biological[36] or adopted from foster care or welfare.[37]

This is the most troubling aspect of the *DeBoer* majority opinion: its sweeping and insincere mention of the actual injury to family stability suffered by the named plaintiff, April DeBoer, and her partner Jayne Rowse. In glossing over the factual nuances that comprise the sixteen gay and lesbian couples in the consolidated appeal, Circuit Judge Sutton, writing for the majority, characterized "the circumstances that gave rise to the challenges" to the marriage bans as varied:

> Some involve concerns over property, taxes, and insurance, others death certificates and rights to visit a partner or partner's child in the hospital. Some involve a couple's effort to obtain a marriage license within their State, others an effort to achieve recognition of a marriage solemnized in another State. All seek dignity and respect, the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides?[38]

Without ever explicitly detailing DeBoer and Rowse's legal obstacles to becoming joint parents of their three children, the majority tacitly acknowledged that "marriage was not their first objective."[39] Critics of *DeBoer*'s evolution from federal district court in Michigan argue that the case was "hijacked" from the lesbian couple, who could have sought a second-parent adoption in state court, in order to advocate a family-centered gay rights platform for marriage equality.[40] Professor Nancy Polikoff has critiqued the gay-rights movement for advocating a family-oriented position for same-sex marriage that is "dangerously close to acceptance of the ideological stance favoring marriage above all other family forms."[41]

But this criticism overlooks the fact that marriage equality can (and should) be the beginning impetus of profound legal and social change towards same-sex couples and their children. With all of its desirable legal privileges and presumptions, it is difficult to fault same-sex couples for pursuing marriage equality to the merciless end by advancing their own arguments in defense of their families. As this Section discusses, the arguments for and against same-sex marriage equality have evolved over time. States upholding their marriage bans have frequently resorted to rationales based in "traditional notions of family life", and they have advanced new variations of old arguments, however illogical, to deny same-sex couples the right to marry.[42] Supporters of marriage equality and LGBT rights, on the other hand, are responding to states' rationales with their own family-centered arguments that complement traditional individual rights' arguments.[43] As other scholars have suggested, there is now a resurgence in child-centered rationales from supporters and opponents of the marriage bans that advance the benefits of marriage for children as their primary argument.[44]

A. Child-Centered Arguments against Same-Sex Marriage

Advocates of traditional marriage have relied on family-centered arguments throughout the litigation challenging same-sex marriage bans. With history and tradition on their side, opponents of same-sex marriage argue that "the intact, married family is best for children", particularly when "both parents have a

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[35] *See* Gary J. Gates, The Williams Institute, UCLA School of Law, LGBT Parenting in the United States 1 (Feb. 2013) (full report). *Available at*: http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf.
[36] *See* Washington, *What About the Children?*, *supra* note 20, at 2-3.
[37] *See generally* Washington, *Suffer Not the Little Children*, *supra* note 17.
[38] DeBoer v. Snyder, 772 F.3d 388, at 396.
[39] *Id.* at 397.
[40] Nancy Polikoff, *It's the Children, Stupid!*, *supra* note 13; *see also generally* Nancy Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005).
[41] Polikoff, *For the Sake of All Children*, *supra* note 40, at 590.
[42] *See* Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1622.
[43] *See* DeBoer v. Snyder, 772 F.3d at 423 (citing United States v. Windsor, 133 S. Ct. 2675, 2694 (2014); *see also* Washington, *What About the Children*?, supra note 20, at 4 (advocating further that children's rights should be central, rather than ancillary, to determining whether same-sex marriage bans are unconstitutional.).
[44] Smith & Pollvogt, *supra* note 7, at 657.

biological connection to the child" and each spouse specializes in their gender-typical roles in keeping the household.[45] Skepticism towards same-sex marriage is a result of the uncertainty of its placement within existing legal framework: "conservatives do not want to risk losing the benefits of marriage as it exists in order to test what might happen to marriage if it were changed to include same-sex couples."[46] Defenders of marriage bans like those in *DeBoer* ground their child-centered argument in the traditional purpose for state regulation of marriage: "not to regulate love but to regulate sex."[47] Given that male-female relationships have "unique procreative responsibilities", opposite-sex couples have the inherent "need [for] the government's encouragement to create and maintain stable relationships within which children may flourish."[48] Thus, marriage as "an incentive" for biological parents to stay together to raise their children cannot possibly be considered implausible under the innocuous lens of rational basis review.[49]

Other scholars have tracked the evolution of this procreation-based argument advanced in defense of state marriage bans.[50] When it was first accepted by courts in the 1970s,[51] the standard argument from procreation concluded that same-sex couples should not be allowed to marry because marriage "uniquely and crucially" involves procreation, and same-sex couples simply cannot procreate.[52] This overly simplistic logic survived constitutional scrutiny for some time, in recognition of "marriage as the appropriate and desirable forum for procreation and the rearing of children"[53]; but eventually courts began rejecting its major premises. First, the inextricable link between marriage and procreation has been broken in modern society, because many opposite-sex couples who marry lack the intent or ability to conceive children, and because even more opposite-sex couples (and individuals, for that matter) are conceiving children outside of marriage.[54] Second, the premise that same-sex couples cannot procreate is also flawed when considering advances in assisted reproductive technology and the flourishing commercial enterprises for surrogacy arrangements that same-sex and opposite-sex couples alike now utilize.[55] Ultimately, our evolving social views on marriage and procreation have become "synergistically related to" the legal changes in policy, thus rendering the standard argument for procreation unpersuasive and arbitrary.[56]

Now there is an "accidental procreation" argument—like the one offered in *DeBoer*—that asserts the states' interests in protecting the "unplanned" children that can "accidentally" result only from opposite-sex couples.[57] The state respondents suggest that allowing same-sex couples to marry might deter opposite-sex couples from marrying, causing them to conceive out of wedlock more often and then abandon their unintended offspring.[58] "Because same-sex couples cannot themselves produce wanted or unwanted offspring, and because they must therefore look to non-biological means of parenting that require planning and expense, stability in a family unit headed by same-sex parents *is assured without* the benefit of formal matrimony."[59] Under this logic, states may exclusively reserve marriage as an incentive for oppo-

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[45] Family Research Council, Ten Arguments from Social Science Against Same-Sex Marriage, http://www.frc.org/get.cfm?i=if04g01 (quoting Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Boston: Harvard Univ. Press, 1994) 38).

[46] Murray Dry, *The Same-Sex Marriage Controversy and American Constitutionalism: Lessons Regarding Federalism, the Separation of Powers, and Individual Rights*, 39 VT. L. REV. 275, 323 (2014) (citing Amy Wax, *The Meaning of Marriage: The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1082-83 (2005) for a "sympathetic" case for traditional marriage).

[47] DeBoer v. Snyder, 772 F.3d at 404.

[48] *Id.* at 404-05.

[49] *Id.* at 405 (majority opinion).

[50] *See generally* Edward Stein, *supra* note 23; Nice, *supra* note 8; Courtney G. Joslin, Marriage, Biology, and Federal Benefits, 98 IOWA L. REV. 1467 (2013); Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1622.

[51] *See* Baker v. Nelson, 409 U.S. 810 (1972).

[52] Stein, *supra* note 23, at 407.

[53] *Id.* at 405 (citing Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974)).

[54] *Id.* at 408-09.

[55] *Id.*

[56] *Id.* at 412-13.

[57] *Id.* at 416-17.

[58] *Id.*

[59] *Id.* (emphasis added).

site-sex couples, who can "naturally" procreate without foresight or planning, to raise their unplanned offspring within the optimal environment.[60]

But this new accidental procreation argument as articulated in *DeBoer* and other cases is also logically problematic. It assumes, without substantiation, that since same-sex couples invest more time, energy, and money into planning to become parents, they are going to actually *be* better parents and experience more stability.[61] Yet children may have environments that are "no more stable" than those of unplanned children because of the emotional and economic hardships that processes like adoption and assisted reproduction pose on same-sex couples.[62]

States also cannot presume that same-sex couples with children would not benefit from the legal rights and responsibilities that flow from parents united by marriage.[63] Acceptance of this argument does not meaningfully assess the reality that children of same-sex couples can and do suffer economic harm when the relationship dissolves or a parent dies without the child's legal rights to support in place.[64] Finally, the accidental procreation argument is fundamentally at odds with another popular argument of same-sex marriage opponents: that "gays make bad parents."[65] The anti-gay-rights movement is now taking inherently inconsistent positions by arguing on one hand that same-sex couples are stable enough to parent children without the protections of marriage, but then on the other, attacking gay men and lesbians for being sexually promiscuous, unsuited for marriage, and unable to optimally raise their children.[66]

For these reasons, if the "accidental procreation" argument remains the primary justification supporting state marriage bans, a reviewing court should have no trouble perceiving its obvious flaws and questioning the validity of this justification under any level of meaningful judicial scrutiny. The dissenting judge of the Sixth Circuit would have done so in *DeBoer*, as she looked to the Court's precedent in *Windsor* and to renowned Seventh Circuit Judge Richard Posner to debunk the state's rationalization for marriage bans:

> [A]s the court in *Baskin* pointed out, many abandoned children born out of wedlock to biological parents are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married. How ironic that irresponsible, unmarried, opposite-sex couples who produce unwanted offspring must be "channeled" into marriage and thus rewarded with its many psychological and financial benefits, while the same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry. As an obviously exasperated Judge Posner responded after puzzling over this same paradox in *Baskin*, "Go figure."[67]

Professor Catherine E. Smith has drawn meaningful comparisons between the treatment of children of same-sex parents and children born to unmarried parents (non-marital children) to make a compelling argument for heightened judicial scrutiny of the marriage bans that are rooted in "preservation of the traditional family" arguments.[68] Just as when the Supreme Court struck down state workers' compensation laws that precluded non-marital children from financial support, the state cannot justify its denial of bene-

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[60] *Id.* at 424 (citing Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005)).
[61] *Id.*
[62] *Id.*
[63] *Id.* at 426.
[64] Nice, *supra* note 8, at 791.
[65] Stein, *supra* note 23, at 427-28.
[66] *Id.*
[67] DeBoer v. Snyder, 772 F.3d at 422 (dissenting opinion) (citing United States v. Windsor, 133 S. Ct. 2675 (2013) and Baskin v. Bogan, 766 F.3d 648, 654 (7th Cir. 2014)).
[68] Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1602, 1624 (describing how children of same-sex parents "exist as a subset of nonmarital children who can never be placed on an equal footing with marital children"); *see also* Smith & Pollvogt, *supra* note 7, at 668-671 (analogizing exclusionary laws for non-marital children in Levy v. Louisiana, 391 U.S. 68 (1968) with same-sex marriage bans that also attempt to regulate adult behavior at the expense of children).

fits to children based on moral condemnation of the child's parents.[69] The discriminatory effects of marriage bans on children of same-sex couples, like the past disparaging treatment of non-marital children, are "merely another attempt by the state to ensure the 'legitimacy' of children."[70] Therefore, these justifications should not pass constitutional muster, because arguments based on moral condemnation of parents' relationships "reflect deep-seated prejudice rather than legislative rationality in pursuit of some legislative objective" of protecting children.[71] As such, when considered from the purview of children and the impact on same-sex parented family units, the marriage bans are ripe for judicial review based on equal protection and recognition of substantive due process rights within the protected sphere of the family.

B. Child-Centered Arguments Supporting Same-Sex Marriage

Family law professors and supporters of marriage equality have advanced an entire realm of scholarship that advocates children-centered arguments against same-sex marriage bans.[72] This Article seeks to further the advocacy of child-centered arguments as a way to resolve cases like *DeBoer* and for future family law issues beyond marriage equality, such as child adoption. When the Court does assess the merits of marriage equality in *DeBoer* and future cases, it should work from a child-centered framework that meaningfully analyzes the immediate injury to family stability that marriage bans inflict,[73] as well as the long-term consequences that such discrimination perpetuates on children as future members of society.[74]

Throughout the marriage equality litigation, legal scholars have analyzed the constitutional challenges to same-sex marriage bans.[75] On equal protection grounds, it is argued that laws prohibiting same-sex marriage are driven by discriminatory animus that bears no rational relation to any government interest, but rather reflects "prejudice against *discrete and insular minorities* [that] tends seriously to curtail the operation of those political processes" that would otherwise protect individual rights.[76] Substantive due process rights are also implicated by arguments that affirm marriage as a fundamental right, which would demand strict scrutiny in a court's assessment of a compelling government interest with objective means that are narrowly tailored to fulfill that interest.[77] Although defenders of marriage bans have consistently argued that they are protecting children and the traditional family form, the actual substance of states' marriage laws suggests that marriage is "valuable for something other than just procreation."[78] The intent to procreate, or even the ability to procreate naturally or otherwise, has never been a prerequisite for mar-

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[69] *Id.* (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 171 (1972). "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.").
[70] *Id* at 1627.
[71] *Id.* at 1628 (citing Plyler v. Doe, 457 U.S. 202, at 216 n.14 (1982)).

[72] *See generally* Smith & Pollvogt, *supra* note 7; Washington, *What About the Children?*, *supra* note 20; Washington, *Suffer Not the Little Children*, *supra* note 17; Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8; Linda C. McClain, Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law, 28 CARDOZO L. REV. 2133 (2007).
[73] *See* Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1594.
[74] *See* Smith & Pollvogt, *supra* note 7, at 660.
[75] *See generally* Dale Carpenter, Windsor *Products*: *Equal Protection from Animus*, SUP. CT. REV. (forthcoming), April 14, 2014, Minnesota Legal Studies Research Paper No. 14-22. available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424743; Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J. L. & SEXUALITY 17 (2014); Adele M. Morrison, *Same-Sex* Loving: *Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177 (2007); Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204 (2013).
[76] Carpenter, *supra* note 75, at 184 (emphasis in original) (citing United States v. Carolene Products Co., 304 U.S. 144, 153-53 n.4 (1938).
[77] *See* Morrison, Same-Sex *Loving*, *supra* note 75, at 179; *see also* Jean C. Love, *The Synergistic Evolution of Liberty and Equality in the Marriage Cases Brought by Same-Sex Couples in State Courts*, 13 J. GENDER RACE & JUST. 275 (2010).
[78] Linda C. McClain, *Is There a Way Forward in the "War Over the Family"*, 93 TEX. L. REV. 705, 707 (2015) (Book Review, Clare Huntington, Failure to Flourish: How Law Undermines Family Relationships. New York, NY: Oxford Univ. Press, 2014).

riage in any state.[79] Instead, courts who rule in favor of same-sex marriage equality have exalted marriage as "a highly esteemed, incomparable institution and a status that signals one's intimate commitment is worthy of equal respect and dignity."[80] Exclusion from marriage carries the stigmas of inferiority and second-class status, such that same-sex couples are "prohibit[ed] from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance."[81]

This "exaltation of marriage" is an emphatic reason why states, courts, and advocates on both sides regard marriage "as the optimal family form for child rearing."[82] Thus, if states have a genuine interest in protecting children within the family, they should allow same-sex couples to marry to enable the parent-child relationships to flourish and to spare the children from "humiliation and tangible deprivations."[83] But, as same-sex marriage bans continue to be upheld by states, the concerns that Justice Kennedy expressed in *Windsor* persist:

> The differentiation [of marriage laws] demeans the same-sex couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. [DOMA] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[84]

From a child-centered perspective, same-sex marriage bans threaten the stability of the family unit and violate children's rights in a number of unconscionable ways. First, the inability for same-sex couples to marry has a practical effect of depriving their children, whether biological or adopted, of a legally-recognized relationship with both parents.[85] Under the statutory rule of marital presumption in nearly all jurisdictions, children born biologically within an established opposite-sex marriage are presumed to have a legal parent-child relationship with both marital partners, without regard to an actual biological connection to both parents.[86] Similarly, married opposite-sex couples can legally adopt children that are not biologically related to either parent, and both parents will jointly establish legal relationships to their children "with the same parental obligations, rights, and benefits of a child biologically related to his or her parents, or a child born into marriage."[87] But these marital presumptions are obviously only available to persons who can marry, so same-sex parents are barred from this automatic recognition of legal parent-child relationships that flow from the recognition of their marriages.[88] With limited avenues for same-sex parents to establish legal relationships with their children outside of marriage,[89] the current legal framework assures that children of same-sex parents will "never be placed on an equal footing with marital children."[90]

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[79] Stein, *supra* note 23, at 410 (citing Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) (admitting that "encouragement of procreation" does not justify the denial of marriage to same-sex couples because procreation is not a prerequisite for the right to marry).

[80] McClain, Is There a Way Forward, *supra* note 78, at 707 (citing Windsor as a template for states to expand recognition of same-sex marriage as a "relationship deemed by the State worthy of dignity in the community equal with all other marriages." United States v. Windsor, 133 S. Ct. 2675, 2692 (2013)).

[81] *Id.* (quoting Bostic v. Shaefer, 760 F.3d 352, 381 (4th Cir. 2014).

[82] *Id.*

[83] *Id.*

[84] United States v. Windsor, 133 S. Ct. at 2694.

[85] Washington, *What About the Children?*, *supra* note 20, at 2-3.

[86] *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 115 (1989) (noting that the presumption is rebuttable with certain evidence within a statutory period of time)).

[87] Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1601.

[88] *See id.* at 1601-02.

[89] *See* Polikoff, *For the Sake of All Children*, *supra* note 40, at 586 ("Children with gay and lesbian parents need parentage determinations to reap the benefits of this legal revolution; they have become available in many states through adoption decrees, orders of parentage, and, to a lesser extent, through the use of equitable doctrine conferring some, if not all, of the indicia of parenthood.").

[90] Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1602.

By depriving children with same-sex parents the avenues to form legal relationships with both of their parents, marriages bans compromise the best interests of these children in "the permanence, security, and stability inherent to the legal parent-child relationship."[91] These optimal goals for children's well-being are inherent in the legally-recognized relationships to both of their parents, not necessarily to the status of marriage itself.[92] Normally, courts are guided by the best interests of the child standard to determine the most beneficial legal arrangement between children and their parents.[93] This standard requires judges to make an individualized analysis of the unique facts and circumstances within a particular family to determine what arrangement best promotes the child's physical, mental, and emotional well-being and development.[94] But same-sex marriage bans "categorically deprive" children with same-sex parents of this individualized best interests analysis and presume, unfoundedly, that same-sex parenting can never be in the best interests of children.[95] As a result, the cornerstone of family law – the best interests of the child – is turned upon its head and defended only by the lackluster justification of preserving traditional marriage.

On this basis, Professor Tanya Washington suggests that in future litigation against same-sex marriage bans, children and their advocates should assert children's claims upon their own standing for challenges that are independent and complementary to (and not merely "co-extensive with, or derivative of") adult challenges.[96] By establishing an injury-in-fact—the deprivation of dual parent-child relationships with both parents—and a causal relationship between the injury and the marriage bans, children of same-sex parents could establish standing to challenge marriage bans in states that do not offer alternative legal mechanisms for such families to form parent-child relationships.[97] According to Washington, these independent children's challenges can "wield the best interests standard as a sword" by forcing states defending marriage bans to make the individualized assessment that the standard requires.[98] Thus, instead of arbitrarily foreclosing children from legal parent-child recognition based on their parents' relationships, states justifying their marriage bans will be forced to individually assess the competency of the same-sex parents and whether their marriage is in the best interests of their children.[99]

The legal recognition of the parent-child relationship is more than just a desirable status: along with it attaches a host of rights, benefits, and privileges from numerous sources, including benefits from state and federal government.[100] Because of the favorable effects of the marital presumption and increased access to alternative legal mechanisms for creating parent-child relationships, opposite-sex parents and their children enjoy benefits that were "designed to provide basic financial safety nets and facilitate the transfer of wealth."[101] Consequently, children with same-sex parents are often excluded from these benefits, due to their parents' marriage not being recognized by the law or by the lack of a legally-recognized relationship to one of the parents that the child is dependent on.[102]

Benefits governed by state law that children with same-sex parents are excluded from include: workers' compensation benefits for dependents of employees who are injured or killed on the job; property inheritance under state intestacy laws when a parent dies without a will; legally-recognized and enforcea-

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[91] Washington, *What About the Children?*, *supra* note 20, at 3.
[92] *Id.* at 8.
[93] *Id.* at 9.
[94] *Id.* at 9-10.
[95] *Id.* at 10 ("The States' best interests argument is not based upon an individualized examination of the needs of the child and the quality of the parent-child relationship. Rather, it prioritizes marriage between heterosexuals and offers generalizations about how sexual orientation informs parental fitness as a justification for marriage bans.").
[96] *Id.* at 4.
[97] *Id.* at 6-8 ("Even in states with statutes that provide alternative avenues for the creation of the legal parent-child relationship, there is an argument for standing, because these bans foreclose superior protection for a child's legal filial relationship with both parents via the marital presumption.").
[98] *Id.* at 10.
[99] *Id.* at 10-11.
[100] Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1603.
[101] *Id.* at 1602.
[102] *Id.* at 1602-03.

ble rights to child support, custody, and visitation; tort damage recoveries for wrongful death or emotional harm as a bystander for loss of a parent; and civil service benefits including health insurance and family leave for parents who work for the state.[103] Without a legal parent-child relationship established to entitle a dependent child to such benefits, state laws governing these basic financial safety nets do not extend to children with same-sex parents, despite the harsh consequences. For claims for workers' compensation and child support, the child may in fact be financially dependent on a non-biological same-sex parent or a same-sex parental figure that is unable to legally adopt the child, but those financial protections will be denied for want of a legally-recognized relationship.[104] Children of same-sex parents face the potential bleak reality of being rendered "legal strangers" to their non-biological or non-adoptive parent in the event that their legally-recognized parent dies or becomes incapacitated.[105]

Substantial federal benefits are also curtailed for children with same-sex parents. One of the most important and frequently-accessed federal benefits programs, Title II Social Security, is designed to provide basic financial safety nets to families with dependent children.[106] All working adults, regardless of their sexual orientation, pay into social security before retirement.[107] When a primary wage-earning employee dies, the surviving spouse and/or caretaker of surviving children of the deceased employee is eligible to receive payments to assist the family in times of financial crisis.[108] Eligibility for these payments, however, turns upon state law and how states define "spouse" and "child" in their respective family codes.[109] Even in states that legally recognize same-sex marriage, surviving same-sex partners remain ineligible for surviving spouse benefits and for surviving parent-support payments even if they are raising the biological children of their deceased partner.[110] Children do not have to be biologically related to the deceased wage earner to be eligible for surviving child benefits, but there must be an established parent-child relationship either by adoption or court decree.[111] So yet again, the obstacles for children with same-sex parents to establish legal relationships with both of their parents plague their ability to access financial safety nets that were intended to assist families in times of suffering.[112]

Numerous other federal laws privileging opposite-sex marriages have the impact of disadvantaging children with opposite-sex parents, due to their parent's inability to marry and eligibility criteria for children based on their parents' status.[113] Families headed by same-sex couples have disproportionate tax burdens on their employer-provided health insurance benefits, their earned-income tax and qualifying-child tax credits, and taxation of their retirement savings plans as compared to families headed by opposite-sex couples.[114] Other major federal protections denied to children of same-sex parents include: guaranteed leave under the Family and Medical Leave Act (FMLA) for employees to care for children; immigration into the country as a family, without constant fear of deportation; and eligibility for Medicare, Medicaid, and continued health coverage (known as COBRA) in periods of unemployment or job change.[115] Many of these programs categorically exclude family units with same-sex parents because of same-sex marriage bans, but some of these exclusions from federal programs occur even in states that do

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[103] *Id.* at 1603-06 (detailing the practical effect of exclusion from these benefits when either the marriage is not recognized or when there is not an established legal parent-child relationship between the parent entitled to the benefits and the child who is dependent on that parent).
[104] *Id.* at 1603-04.
[105] *Id.* at 1604.

[106] *See* Joslin, *supra* note 50, at 1483-84.
[107] Human Rights Campaign, *Overview of Federal Benefits Granted to Married Couples*, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples.
[108] Joslin, *supra* note 50, at 1486-87.
[109] *See* Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1606.
[110] Human Rights Campaign, *supra* note 107.
[111] Joslin, *supra* note 50, at 1487.
[112] *Id.*; *see also* Washington, *What About the Children?*, *supra* note 20, at 3.
[113] Human Rights Campaign, *supra* note 107.
[114] *Id.*
[115] *Id.*

recognize same-sex marriages.[116] Without corresponding legal reforms in other areas of family law, like child adoption, even married same-sex couples and their children will continue to endure these inequitable exclusions from federal programs. Despite convincing evidence that federal law considers dependency of children rather than biological connection when administering these benefits programs,[117] there are still blatant flaws in current eligibility criteria that do not meaningfully encapsulate the growing number of children being raised by same-sex parents.[118]

Finally, the holistic negative treatment under the laws that children with same-sex parents suffer deserves "special judicial solitude" when considering the lasting effects that such deprivations have on children in their development as citizens.[119] This is the crux of Professors Smith and Pollvogt's argument in their recent legal scholarship and in their amicus brief to the Supreme Court in the *DeBoer* appeal.[120] In what they term "the child-centered cases", the Court has previously applied heightened judicial scrutiny to laws that marginalize and deprive children of important substantive rights that are "foundational to citizenship": rights that attach a "status of belonging to a common civic community" within American society.[121] In this regard, the Court is encouraged to prioritize children's rights when considering the merits of same-sex marriage equality, but not necessarily because children are innocent in the throes of the heated debate.[122] "Rather, because children are at the beginning of the citizenship formation journey, the Court is especially attuned to the ways in which discriminatory laws can interfere with that journey."[123] Through an analysis of cases in which the Court has prioritized children's rights, the argument for legal reform to counteract disparate treatment of children with same-sex parents becomes apparent.[124] Accordingly, the Court can and should apply such a child-centered rationale to the specific facts of the *DeBoer* appeal when considering the Equal Protection Clause's goal of "preventing the formation of an anti-democratic caste society."[125]

C. Applying Marriage Equality to the Family Unit in *DeBoer*

The advantageous legal effect that same-sex marriage equality would have on the family unit is abundantly clear and compelling in the case of DeBoer, Rowse, and their three children. Although the family originally could have sought a second-parent adoption in state court, their path from federal district court, to the Sixth Circuit, and now up to the United States Supreme Court is no accident; this fateful trajectory presents an apt opportunity for the Court to consider marriage equality and its implications on family stability. Beyond the right to marry, a victory for the *DeBoer* petitioners would be an impetus for change in the way federal and state laws recognize and treat families. By comparing and contrasting the treatment of *DeBoer* family unit under current laws to future legal implications that might result from same-sex marriage equality, this section previews Part III's discussion of the subsequent legal implications for family law. Although the Sixth Circuit majority never actually described *any* of the family units deemed unworthy of the right to marry in its appellate opinion, the dissent explained the exigent circum-

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[116] *Id.*

[117] Joslin, *supra* note 50, at 1496-97.

[118] Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1593 ("[T]hey are a growing population in number and visibility. According to the United States Census, twenty-eight percent of cohabitating same-sex couples are raising at least one child under the age of eighteen. The exact number is unknown . . . somewhere between 300,000 and 1 million children [are] being raised by same-sex couples . . . .").

[119] Smith & Pollvogt, *supra* note 7, at 660.

[120] *See id.*; *see also* Brief for Amici Curiae Scholars of the Constitutional Rights of Children in Support of Petitioners, *supra* note 10.

[121] Smith & Pollvogt, *supra* note 7, at 660, n.9.

[122] *Id.* at 664.

[123] *Id.*

[124] *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954) as prioritizing equal access to public educational opportunities for children of all races; Levy v. Louisiana, 391 U.S. 68 (1968) as prioritizing equal inclusion in state and federal law benefit programs for children born outside of marriage; and Plyler v. Doe, 457 U.S. 202 (1982) as again prioritizing public education, regardless of immigration status, for groups that are "disfavored by virtue of circumstances beyond their control . . . ."). *Id.* at 673.

[125] *Id.* at 664.

stances that the children have already faced in life to illustrate what they stand to gain from the law's recognition and protection of their family unit:

> All three children had difficult starts in life. N was born … to a biological mother who was homeless, had psychological impairments, was unable to care for N, and subsequently surrendered her legal rights to N. The plaintiffs volunteered to care for the boy and brought him into their home. J was born . . . to a drug addicted prostitute. Upon birth, he tested positive for marijuana, cocaine, opiates, and methadone. His birth mother abandoned him immediately after delivery. J remained in the hospital . . . and was not expected to live. With Rowse and DeBoer's constant care and medical attention, many of J's physical conditions have resolved. The third child, R, was born to a 19-year-old girl who received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where DeBoer worked.[126]

Because Rowse is the sole legal parent of N and J, and DeBoer the sole legal parent of R, the family unit is vulnerable to exclusionary treatment, much in the same way as biological children of same-sex couples who face impossible barriers in establishing legal parent-child relationships for the non-biological parent.[127] In their home state of Michigan, as in other politically-conservative states, DeBoer and Rowse are more than likely to be precluded from jointly adopting all three children together, even though they share caretaking and financial responsibilities.[128] The legal consequence is that all three children are deprived of a recognized legal relationship with *both* DeBoer and Rowse, which compromises their best interests in the "permanence, security, and stability" that those legal ties foster.[129]

Having established legal relationships between parents and children promotes stability and social legitimization,[130] and it enables access to rights and benefits from public and private institutions meant to serve as a "safety net" to families.[131] By depriving the children of dual parent-child relationships to DeBoer and Rowse, the law then excludes them from the plethora of state and federal benefits that would otherwise be available if Rowse and DeBoer were married, or if they were a traditional opposite-sex couple.[132] Opposite-sex couples, including unmarried couples, have several state-sanctioned mechanisms by which to establish legal relationships with their children, including marriage, biology, adoption, and judicial decrees of paternity.[133] But due to marriage bans and the lack of alternative legal mechanisms for same-sex parents, children of same-sex couples are denied the same access to legal relationships and the benefits and privileges flowing therefrom.[134]

Applied specifically to the dynamics of the *DeBoer* family, the current law disfavors DeBoer, Rowse, and the children and marginalizes their substantive rights to ensuring their family's stability. If serious injury or death were to strike one of the women, particularly Rowse, who is the legal parent of two of their three children, DeBoer would face her grief without assistance from the law; she would not qualify for any spousal support or caretaker support payments from social security despite the family's dependence on both women as equal wage earners.[135] Even presuming Rowse had a testamentary estate plan in place to avoid harsh treatment under state intestacy laws, DeBoer would still be responsible for

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[126] DeBoer v. Snyder, 772 F.3d at 424.

[127] *See* Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1602. ("Although biology establishes the legal link between the child and its same-sex birth mother (or father through surrogacy), it is impossible for the non-biological same-sex parent to establish a legal relationship to the child: same-sex couples cannot marry, the same-sex non-biological parent is not related by blood; gay and lesbian cannot adopt; and there is no alternative legal mechanism….").

[128] DeBoer v. Snyder, 772 F.3d at 424.

[129] *See* Washington, *What About the Children?*, *supra* note 20, at 4.

[130] *See* DeBoer v. Snyder, 772 F.3d at 425. The expert testimony of David Brodzinsky, a developmental and clinical psychologist from Rutgers University, conceded the legitimacy and social effects of marriage for families in the context of showing that children of same-sex couples are no less well-adjusted than children raised by opposite-sex couples (and would therefore benefit from same-sex marriage and same-sex adoption). *Id.*

[131] Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1603-08.

[132] *Id.* at 1602.

[133] *Id.* at 1601.

[134] *See id.* at 1602.

[135] *See* DeBoer v. Snyder, 772 F.3d at 424.

paying disparate amounts of estate tax and tax on Rowse's retirement savings.[136] Beyond this morbid hypothetical though, the family presently lives without equal recognition of their family unit in the eyes of the law, which undoubtedly will have lasting effects on the children's development. Each has already endured insurmountable hardship in their early lives, and with the love and support of their parents, they have made profound physical recoveries.[137] But if the children continue to be treated as second-class citizens under state family law and the federal implications flowing from that lesser status, they cannot be expected to flourish into adult citizens that feel accepted within their community.[138] As long as same-sex marriage bans persist, the *DeBoer* children's best interests will be subverted by the law, creating a legal disability on them in spite of their former struggles in life as orphans.[139]

A marriage equality victory would significantly change these circumstances for the *DeBoer* family and expand their family's protection under the laws. With an extension of the right to marry to same-sex couples, DeBoer and Rowse would finally have the ability to unite their family as a single, legally-recognized family unit. The couple could marry in their home state and then seek a step-parent adoption for each other's children.[140] The resulting establishment of dual parent-child relationships with each child would unequivocally enhance their family unit's stability. State and federal benefits flowing from the legally-recognized parent-child relationships would extend to all three children on behalf of both parents, creating a better safety net in the event of a family crisis. The marital presumption of children born or adopted within the marriage would also extend to any future children of their union. In light of the goal of family stability, the case for same-sex marriage equality is emphatically obvious when applied to families like those in *DeBoer*, who presently await validation of their family units in the eyes of the law. Marriage equality would provide hope for the *DeBoer* children to grow and prosper as future citizens contributing to society, in spite of all they have faced thus far.

Part III: Potential Implications of a Victory in *DeBoer* for Children with Same-Sex Parents and Their Family Units

A Supreme Court precedent that extends marriage to same-sex couples will have profound effects on every aspect of the law, at both the state and federal level. Considering the interdisciplinary nature of family law,[141] it is both exciting and overwhelming to imagine the legal implications that will follow from an extension of the right to marry to same-sex couples. As *Windsor* indicated in its challenges to DOMA, there are 1,138 (and counting) benefits, rights, and protections that contemplate marital status under federal law alone.[142] Many facets of the law—property rights, taxation, insurance, and immigration, among others—will require modification or reform to fulfill the obligations of upholding a marriage equality precedent.

This Article confines its discussion to some of the legal implications that are specific to family law, including child adoption, family legitimacy, and the marital presumption. Child adoption reform is given considerable attention, since non-discriminatory legal channels for adoption likely would have prevented the *DeBoer* family from litigating for their parental rights.[143] In predicting future outcomes for children with same-sex parents in light of inevitable marriage equality, this section will consider some of the cur-

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[136] *See* Human Rights Campaign, *supra* note 107.

[137] *See* DeBoer v. Snyder, 772 F.3d at 424 ("[M]any of JJoss physical conditions have resolved" and R "is in a physical-therapy program to address" issues stemming from birth "including delayed gross motor skills.").

[138] *See* Smith & Pollvogt, *supra* note 7, at 664.

[139] *See* Washington, *What About the Children?*, supra note 20, at 3-4.

[140] Family Equality Council, 50 States of Adoption: Allies for Adoption, http://www.familyequality.org/get_informed/families_for_all/50_states_of_adoption/. Potential legal reform of same-sex adoption laws will be discussed in Part III.

[141] *See generally* Barbara A. Babb, An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective, 72 IND. L. J. 775 (1997).

[142] Human Rights Campaign, *supra* note 107.

[143] *See* DeBoer v. Snyder, 772 F.3d at 423 ("Together they are rearing three children but, due to existing provisions in Michigan's adoption laws, DeBoer and Rowse are prohibited from adopting the children as joint parents because they are unmarried.").

rent scientific debate over whether children with same-sex parents experience more problems than children with opposite-sex parents. These predictions also raise and address some counterarguments that question the beneficial effects of same-sex marriage equality on families, such as the role of biology with dual-gendered parents and critiques of the marital presumption. In response to arguments that would resist full implementation of marriage equality and its implications, this Section concludes that a marriage equality victory—as "inevitable" as it is in *DeBoer* or a subsequent case—should serve as the impetus for steady and consistent change in family law and within the broader framework of American jurisprudence.

A. Translating a Marriage Equality Victory to Legal Reform for Same-Sex Adoption

Of nearly six hundred thousand same-sex couple households surveyed in the 2010 U.S. Census, twenty percent reported having minor, dependent children.[144] Regardless of the couples' marital status, family units headed by same-sex parents are comprised both of biological children from one of the partners and of adopted children of one or both partners.[145] Child adoption is critically interrelated to same-sex households and construction of their family units, particularly because same-sex couples are "more likely to adopt children with developmental and/or mental health problems" than opposite-sex couples, like DeBoer and Rowse did of all three of their special needs children.[146] For these reasons, it is important to observe that as same-sex marriage equality has gained traction in the law, there has been a proportionate increase in legal barriers to child adoption for gay and lesbian couples and individuals.[147] Once the right to marry is extended to same-sex couples, state adoption agencies (and to some extent, private agencies) will be forced to consider marriage equality within its calculus of placing children with families. But even if same-sex couples are able to marry, there will still be state adoption laws and procedures that continue to block them from adopting children or that disfavor them as prospective parents. Accordingly, courts and child-placement advocates should prioritize children's rights to placement in challenges to same-sex adoption bans, in the likely event of persistent legal obstacles for same-sex adoption even after a marriage equality victory.

Adoption laws in general, and specifically those governing same-sex adoptions, are "a patchwork" of laws that vary state by state.[148] These statutes are guided also by administratively-created policies and judicially-enforced practices that govern the placement of children, particularly orphans who are in the state's custody.[149] Most states vest in their family court judges the power to individually determine children's placements on a case-by-case basis, according to the familiar best interests of the child standard.[150] Yet for children who are in the state's custody awaiting placement, especially special-needs children, the best-interests analysis poses even greater stakes for them.[151] These critical state decisions determine whether these children will be placed with gay and lesbian parents who are fit to parent them, or whether they will continue to languish in foster care until aging out of foster care and child welfare.[152]

Currently, thirty five states authorize same-sex couples to jointly petition a state court for adopting children that are biologically related to one partner or who are in the custody of the state.[153] In a separate grouping of states, thirty three states authorize either second parent or step-parent adoptions.[154] In several states, the law is either silent or ambiguous as to whether same-sex couples are permitted to adopt chil-

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144 Daphne Lofquist, U.S. Census Bureau, ACS Briefs: Same-Sex Couple Households, at 2 (Issued Sept. 2011), http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.
145 *Id.* at 4.
146 Tanya M. Washington, *Once Born, Twice Orphaned: Children's Constitutional Case Against Same-Sex Adoption Bans*, 15 J. L. & FAM. STUD. 19, 25 (2013).
147 *Id.* at 20.
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.* at 25.
152 *Id.* at 20.
153 Human Rights Campaign, *Parenting Laws: Joint Adoption*, http://www.hrc.org/state_maps (interactive maps overviewing state-by-state treatment of same-sex marriage, adoption, and related issues).
154 *Id.* (under sub-heading "Second Parent or Stepparent Adoption).

dren,[155] which usually requires the prospective same-sex parents to satisfy "every legitimate parental fitness requirement."[156] And in politically-conservative states, including Kentucky, Ohio, Michigan, Mississippi, and Nebraska, there are explicit laws and judicial practices that outright prohibit all homosexuals, including same-sex couples and gay and lesbian individuals, from adopting children.[157] These and other states have encouraged discriminatory practices in state-funded and private adoption agencies, such as making preferential placement decisions for married opposite-sex couples over decisions for gay and lesbian couples or individuals.[158] Other states, including North Dakota and Virginia, have enacted legislation allowing private adoption agencies to consider traditional religious and moral beliefs as "determining factors" in their placement decisions.[159]

The resulting consequence of these inconsistent state laws governing adoption is less stability for same-sex households with children and greater retention of children waiting in the welfare system.[160] For the three special-needs children adopted by DeBoer and Rowse, state welfare would have been their inevitable fate were it not for the couples' benevolence. Biological children born to one partner in a same-sex household also suffer disparate treatment due to same-sex adoption bans, because adoption by the non-biological parent triggers the establishment of the legal relationship that is so critical to family stability and security. These inequities demand legislative and judicial reform, and they should be swiftly addressed in the wake of a marriage equality victory for same-sex couples. In prior successful challenges to same-sex adoption bans, the court grounded its determinations in the best interests of the child standard:

> [T]he petition for adoption should be determined on the basis of the fitness of a petitioner . . . to adopt the child and whether the adoptive home that would be provided for the child by that petitioner is suitable for the child so that the child can grow up in a stable, permanent, and loving environment. It is within those criteria that the determination as to the best interests of the child is to be made with regard to an adoption petition.[161]

Dependent minor children, particularly those in state custody, once again deserve heightened judicial scrutiny of laws that categorically foreclose placement options that would enhance their security and stability.[162] Children in the welfare system seeking adoption have two types of recognized constitutional rights: (1) affirmative rights to permanency in their placements and the right to an adoptive home when available for adoption; and (2) a negative liberty interest in the fundamental right to be free from unnecessary restraint by the state foreclosing placement options on the basis of prospective parents' sexual orientation.[163] There is no corresponding parental interest to adopting to children as a matter of right, so the placement analysis necessarily turns upon children's rights and best interests.[164] When the state exercises its *parens patriae* authority to decide the best interests of placing an orphan, it should be unequivocally prohibited from rendering judgments that subvert children's best interests in stability in favor of prioritizing moral and political preferences.[165]

There is an ongoing debate amongst child development psychologists and social scientists as to whether children with same-sex parents actually experience worse outcomes than children with opposite-sex parents, such that would justify the prohibitions on placing children with same-sex couples. A recent same-sex adoption study from George Washington University went beyond earlier studies to report evaluations of child behavior and adjustment from teachers and caregivers, as well as parents, of children

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155 *Id.*
156 Washington, *Once Born, Twice Orphaned*, *supra* note 146, at 20.
157 *Parenting Laws: Joint Adoption*, *supra* note 153.
158 Washington, *Once Born, Twice Orphaned*, *supra* note 146, at 23.
159 *Id.*
160 *Id.* at 24.
161 Washington, *Suffer Not the Little Children*, *supra* note 17, at 246 (quoting In re Adoption of John & James Doe (Gill), No. 06-CV-33881, 2008 WL 5006172, at *23-24 (Fla. Cir. Ct. Nov. 25, 2008)).
162 Washington, *Once Born, Twice Orphaned*, *supra* note 146, at 33.
163 Washington, *Suffer Not the Little Children*, *supra* note 17, at 248.
164 *Id.*
165 Washington, *Once Born, Twice Orphaned*, *supra* note 146, at 34.

adopted from birth by both same-sex and opposite-sex parents.[166] Collective feedback from the study concluded that children from same-sex adoptions were "as well-adjusted" as their opposite-sex-parented counterparts, and that the outcomes of children were more significantly influenced by "parenting abilities overall; the stresses of the family; and the satisfaction of the parents' relationship."[167] Numerous court decisions, including the dissenting appellate opinion in *DeBoer*,[168] have also found no support for the proposition that children experience maladjustment or behavioral problems as a result of same-sex parenting.[169]

"There is, however, research documenting the harms associated with extended foster and institutionalized care experienced by children" in the welfare system, "including poverty, homelessness, incarceration, poor academic performance, low graduation rates, and early parenthood."[170] When factoring this evidence into the best interests of the child analysis, courts should be especially critical of adoption laws that subvert the placement of orphan children as well as those that restrict family formation more generally. A child-centered focus that addresses the comparative "harms" of same-sex parenting against the alternative absence of legal parent-child relationships for children's stability is the most compelling for courts to apply in future adoption cases.[171]

On this point, adoption law reform will have to directly square this evidence of "no worse outcomes" of same-sex parenting with state and private adoption agencies' clear preferences for placing children with married (heterosexual) couples. Some states, including Arizona[172] and Utah[173] currently have express statutes that prioritize married heterosexual couples as the preferred placement for children, such that married heterosexuals "get their choice of child while an unmarried person gets the children such couples reject."[174] After same-sex couples are placed on equal footing with opposite-sex couples with the right to marry, there will be new issues regarding how prospective parents' sexual orientation should factor into the best-interests calculus. If all other factors are considered equal between a same-sex couple and an opposite-sex couple in terms of fitness and capability to parent, should there be a preference to place the child with the dual-gendered, heterosexual married couple?

Several considerations must be made as adoption law reforms around a marriage equality holding from the Supreme Court. Although an unlikely possibility, the Court could recognize gay persons, lesbians, and those identifying as homosexual as a "suspect class" of individuals under the Equal Protection Clause,[175] which would trigger heightened scrutiny of subsequent laws that discriminate on the basis of sexual orientation. A recognized protected class for same-sex couples would clearly work against prejudicial adoption bans, but again this type of broad, sweeping holding from the Supreme Court is unlikely.[176] Some research suggests that dual-gendered households are neither necessarily optimal nor required for

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[166] How Do Children Fare in Same-Sex Adoption? Golden Cradle Adoption Resources, available at: http://www.goldencradle.org/how-do-children-same-sex-adoption-fare.

[167] *Id.*

[168] DeBoer v. Snyder, 772 F.3d at 428 (commenting on trial testimony in the district court, DeBoer v. Snyder, 973 F.Supp. 2d 757 (E.D. Mich. 2014), that "clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children.").

[169] Washington, *Once Born, Twice Orphaned*, *supra* note 146, at 24.

[170] *Id.* at 25, 30.

[171] Washington, *Suffer Not the Little Children*, *supra* note 17, at 264.

[172] Nancy Polikoff, *New Arizona adoption statute prefers married heterosexual parents*, Beyond (Straight and Gay) Marriage (April 20, 2011), http://beyondstraightandgaymarriage.blogspot.com/2011/04/new-arizona-adoption-statute-prefers.html (citing Arizona Senate Bill 1188 signed into law that "applies to anyone licensed to place children for adoption.").

[173] Joshua K. Baker & William C. Duncan, *Marital Preferences in Adoption Law: A 50 State Review*, iMAPP Policy Brief (Feb. 5, 2005), http://www.marriagedebate.com/pdf/imappmarriage.adoption.pdf (finding at that time that only Utah had a clear, express statutory preference for married persons, and arguing that all state legislatures should give preference to married (heterosexual) couples in adoption law).

[174] Polikoff, *New Arizona adoption statute*, supra note 172.

[175] *See* DeBoer v. Snyder, 772 F.3d at 402.

[176] *See generally* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014) (describing the Court's practice of "narrowing" when applying precedent cases, to adhere to *stare decisis* while also limiting the future reach of the holding, as a "mainstay" practice of Supreme Court justices).

children to adequately adjust and learn about their respective gender roles.[177] Furthermore, some traditional gender roles for men and women are antiquated and archaic, so they may not even be worth preserving by prioritizing dual-gendered households.[178] "Maternal and paternal roles are not invariably different in importance", therefore a requirement for dual-gendered households would be an impermissible justification to deny placement with same-sex parents.[179]

Ultimately, the barriers to adoption for same-sex married couples, and for gay and lesbian unmarried couples and individuals also, will need to be addressed as soon as possible in the wake of a marriage equality holding. For private adoption placements that are "open" between the birth mothers and the prospective parents, the birth mothers' choice of parents may continue to give preference to married heterosexual couples above other applicants.[180] But there are birth mothers who are willing to place their children with a gay family, because "every woman who selects a placement for her child is guided by her own personal life and values."[181] Private adoption agencies and adoption-placement attorneys that specialize in working with same-sex couples and gay and lesbian individuals are also growing in number.[182] With respect to state placements of orphans and children in foster care, however, sexual orientation of prospective parents should not be a significant factor or a factor at all within the best interests of the child analysis. When all other indicia of parental fitness and ability to parent are equal between a same-sex married couple and an opposite-sex married couple, the child should be placed with the applicants who applied first; this solution avoids prioritizing dual-gendered households and works to ameliorate past discrimination against homosexual prospective parents.

B. Family Legitimacy, the Marital Presumption, and Future Outcomes for Children with Same-Sex Parents

If (and likely when) the Supreme Court extends the fundamental right to marry, it will empower same-sex couples with legitimacy and dignity under a nationwide marriage-equality policy. In turn, these basic notions of individual liberty and personal freedom will induce better outcomes for all gay and lesbian individuals and couples, and in turn to their children. When a state gives a desirable legal status to an applicant whom, in the eyes of the law and the state, is qualified for the associated rights and responsibilities, the legal recognition confers dignity and legitimacy to that status.[183] The hope is that by finally recognizing same-sex marriages as equally worthy of legal validation as opposite-sex marriages, the lingering social and political stigmas will begin to dissipate, much in the same way that interracial marriages

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[177] *See* Golden Cradle Adoption, *How Do Children in Same-Sex Adoption Fare?*, http://www.goldencradle.org/how-do-children-same-sex-adoption-fare (study showing that "all the children showed similar gender behavior as their same-aged peers, whether they were raised by same-sex parents or by heterosexual parents); *see also* Smith, *Challenging the Three Pillars of Exclusion*, *supra* note 26, at 326 (arguing that "gender-based assumptions that women and men bring inherent differences to child-rearing and parental responsibilities . . . rest on gender stereotyping" that should be subject to heightened judicial scrutiny).

[178] *See* Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 726 (2012) ("A burgeoning body of social science suggests that same-sex couples divide responsibilities for income-producing work and domestic care more equally and more equitably than different-sex couples . . . the growing acceptance of same-sex marriage can serve as a model for different-sex couples struggling to share responsibilities for work and for home care.").

[179] Smith, *Challenging the Three Pillars of Exclusion*, *supra* note 26, at 328 (quoting Caban v. Mohammed, 441 U.S. 380 (1979) to reject broad generalizations of fundamental gender-based differences between parents as justifications to curtail children's rights).

[180] Jennifer Cody Epstein, *Starting the Adoption Process*, Parents Magazine Online, http://www.parents.com/parenting/adoption/facts/starting-adoption-process/.

[181] *Id.*

[182] *See id.*; *see also* Lifelong Adoptions, *LGBT Adoption FAQs*, http://www.lifelongadoptions.com/lgbt-adoption; Adoptions Together, *LGBT Adoption*, http://www.adoptionstogether.org/resourcesandsupport/lgbt-adoption/; Golden Cradle Adoption Services, *Questions – Answers*, http://www.goldencradle.org/adoptive-families/questions-answers.

[183] *See* Windsor v. United States, 133 S. Ct. at 2692 ("Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.").

received acceptance after the Court struck down miscegenation laws.[184] Critics of same-sex marriage argue that gay and lesbian couples and individuals are in the minority demographically (less than 20% of the population), and that of that minority, an even smaller margin has an expressed interest in marriage or family.[185] While marriage and family life may not be the current norm in gay and lesbian culture, it is much more likely to be a viable option when the legal recognition of same-sex marriages as a status becomes a reality. Families with same-sex parents who may have previously been deterred from marrying may now finally seek the benefits that marriage offers in acceptance of the obligations between spouses and children, thus satisfying the channeling function of family law.[186]

Equal recognition of same-sex marriages will also invariably alter the way that the marital presumption operates for children born or adopted within an extant marriage. Under traditional operation of the marital presumption, a child born within an established marriage is "presumed to have a legal parent-child relationship with both parties to the marriage, without regard for existence of a biological relationship with the father."[187] Since the practical application of the marital presumption operates without regard to biology (unless the presumption is rebutted by a putative father)[188], the rule can and should be logically extended to same-sex couples with relative ease. If a child is born within an established same-sex marriage, even though that child can necessarily be biologically related to only one of the spouses, the marital presumption should operate to give both *intended* parents a legal parent-child relationship "instantaneously" at the time of birth, without the need for additional legal processes to establish that relationship.[189] Married couples may also invoke the marital presumption when adopting a child, upon successful completion of the adoption screening process, to establish dual parent-child relationships in one legal action for both spouses as joint parents.[190] Extension of the marital presumption will counteract past obstacles to family formation for same-sex couples and will undoubtedly improve their access to the numerous benefits and privileges that flow from legally recognized marriages, thus improving outcomes for children raised by same-sex parents.

The counterargument to these hypothetical improved outcomes for children with same-sex parents is that marriage and parental cohabitation matter less for children's stability, in comparison to biological connections between parents and children. Opponents of same-sex parenting generally argue that children hunger for their biological parents, and that a biological connection between parents and children "increase[s] the likelihood that the parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child."[191] On this reasoning, other scholars note:

> For those who adopt this position, legal rules and outcomes are, or ought to be, dictated by biology. Parenthood and the rights and responsibilities associated with parent-child relationships are seen as necessarily grounded in and flowing out of biological relationships. This is an ancient and still highly influential way of thinking about the family. On the one hand, this position may reflect a view that biological connection itself creates a bond between parent and child so strong that separation is virtually unendurable, so pow-

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[184] *See generally* Morrison, *Same-Sex* Loving, *supra* note 75 (advocating reliance on Loving v. Virginia, 388 U.S. 1 (1967) to extend the fundamental right to marry to same-sex couples).

[185] *See* Stein, *supra* note 23, at 427 (citing and discussing opposition to same-sex marriage because it would not comport with stereotypical gay lifestyle).

[186] *See generally* Linda McClain, Love, Marriage, and the Baby Carriage, *supra* note 71.

[187] Washington, *What About the Children?*, *supra* note 20, at 2.

[188] *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989).

[189] *See* Alexandra Eisman, The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York, 19 CARDOZO J. L. & GENDER 579, 581 (2013).

[190] *See* Smith, *Equal Protection for Children of Same-Sex Parents*, *supra* note 8, at 1601.

[191] Family Research Council, *supra* note 45.

> erful that the biological parent is compelled to subordinate his or her own interests to those of the child.[192]

Although biological connection is regarded "as the foundation stone of parenthood with caregiving and other social values", it is not the sole criteria that determines who may be a parent.[193] Professor Mark Strasser admittedly acknowledges that it is "difficult to tell" whether preliminary observations of better outcomes for children living with their married biological parents as compared to children living with unmarried biological parents are "due to marriage per se" or instead to other economic or social factors that had not been held constant.[194] Whether biology plays a role in children's well-being that is important enough to maintain exclusionary privileges for opposite-sex married couples remains up for debate. But in light of how that exclusion denies children access to state and federal benefits flowing from a non-biological same-sex parent, biological connection alone cannot suffice as a justification for subverting the rights of children with same-sex parents.[195] "When there is a non-biological parent affirmatively seeking parental responsibility – financially, psychologically, and socially—biology should not be a prerequisite."[196] Accordingly, legislatures and courts should value substance over form within families and should continue to use biological connection as only one factor in its best interests of the child analysis when bestowing legal rights upon the family.

One final counterargument that this section wishes to address is the criticism that the present marriage equality debate, as outlined in Part II, treads "disturbing close to . . . the ideological position favoring marriage above all other family forms" when same-sex marriage advocates "embrace the argument that children do best when raised by a married couple."[197] Professor Polikoff argues that same-sex marriage advocates currently conflate the legal advantages of marriage with the status itself, making it "appear that marriage is the solution", instead of recognizing the benefits of legal parent-child relationships as separate and apart from marriage.[198] She suggests that "an equally effective solution . . . would be eliminating the benefits that now go only to children whose parents are married to each other."[199]

In response to Polikoff's and other's critiques of same-sex marriage as a desirable norm for gays and lesbians, it is easy to concede that many aspects of family law need reform in light of the changing dynamic of the American family over time. The "channeling policy" of family law is questionable with respect to marriage law, and it has been argued the family law's current outdated structure works as a "failure to foster family well-being and strengthen family relationships."[200] But when viewed with optimism for legal change, same-sex marriage should be considered as an impetus for change that can offer "the opportunity to rethink aspects of marriage law more generally."[201] "For better or worse, marriage *is* currently the primary means of structuring and recognizing family relationships",[202] so in this regard, same-sex marriage can and should incite further legal reform of family law more broadly.

Part VI: Conclusion

> "A certificate on paper isn't going to solve it all, but it's a damn good place to start. No law is going to change us, we have to change us."[203]

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[192] Mark Strasser, *Marriage, Cohabitation, and the Welfare of Children*, 3 ALA. C.R. & C.L. L. REV. 101, n.27 (quoting Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 3, 9 (2003)).
[193] Smith, *Challenging the Three Pillars of Exclusion*, *supra* note 26, at 329.
[194] Strasser, *supra* note 192, at 108.
[195] Smith, *Challenging the Three Pillars of Exclusion*, *supra* note 26, at 330.
[196] *Id.*
[197] Polikoff, *For the Sake of All Children*, *supra* note 40, at 584-86.
[198] *Id.* at 585.
[199] *Id.*
[200] Linda McClain, *Is There a Way Forward in the "War Over the Family?"*, *supra* note 78, at 705, 709 (examining the context of the family-law reform argument in her book review of *Failure to Flourish*).
[201] Widiss, *supra* note 178, at 729.
[202] *Id.* (emphasis in original).
[203] Ryan Macklemore, *Same Love*, The Heist (2012).

As the marriage equality debate has gained attention from legislatures and courts across the country, popular culture has aided support for broader social changes in attitudes towards same-sex marriage and towards gays and lesbians in general. The law's aim to promote stability within American families by extending marriage to same-sex couples should serve as an impetus for correcting negative assumptions about families with same-sex parents. Several recent scientific studies identified increased prevalence of hyperactive disorders[204] and emotional problems[205] in children with same-sex parents, in which both accounted biological parental connections as a notable factor for reducing such risks to children. An additional study presented suggestive evidence of bias from prior research studies reporting "no different outcomes" for children with same-sex parents; this study criticized those studies' methodology of self-reporting from same-sex parents themselves and of recruiting participants from gay-friendly groups.[206]

But a critical observation of these studies (and all others within the scientific debate thus far) is that they were all conducted *without* equal protection for same-sex couples. They do not account for the legal benefits that same-sex marriage *would* confer if it were legitimized. Based on the rationales advanced by the child-centered arguments, the desirable status and subsidy of marriage will enable better actual outcomes for same-sex couples and their children. Social change should follow legal reform of marriage equality, which will promote new research studies that capture more accurate depictions of family life within same-sex marriages. Ultimately, judicial opinions and research studies only lend persuasion to either side of a broader social debate on marriage equality and protection of family life.

When the Supreme Court of the United States reviews the omnibus appeal that includes *DeBoer v. Snyder*, it will be poised to change the landscape of American family law as we know it. If *DeBoer* is not the end-all case that (inevitably) resolves the marriage equality debate, this Article hopes to have built upon a child-centered legal framework that will successfully unite children with their same-sex parents under meaningful relationships that are recognized and respected by the law. As Part III previously alluded to, there are powerful legal implications beyond the scope of this paper that marriage equality will incite. Even before the Court has heard oral arguments, the probability of a ruling in favor of same-sex marriage equality has already incited new resistance within the states.[207] But with the goal of family stability in mind, a change in social policy should follow legal reform of rules and privileges associated with marriage.

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[204] D. Paul Sullins, *Child Attention-Deficit Hyperactivity Disorder (ADHD) in Same-Sex Parent Families in the United States: Prevalence and Comorbidities*, British J. of Medicine and Med. Research 6(10): 9870998 (2015), DOI: 10.9734/BJMMR/2015/15897.

[205] D. Paul Sullins, *Emotional Problems among Children with Same-Sex Parents: Difference by Definition*, British J. of Educ., Society, & Behavioural Science, 7 (2): 99-120 (2015), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500537.

[206] Sullins, *Bias in Recruited Sample Research*, *supra* note 25.

[207] Gary J. Gates, *Why the American Family Needs Same-Sex Parents*, HuffPost Gay Voices (April 23, 2015), http://www.huffingtonpost.com/gary-j-gates/why-the-american-family-n_b_7131516.html (observing states like Indiana and Arkansas passing their Religious Freedom Restoration Acts (RFRAs) to refuse equal treatment of gays and lesbians on the basis of free exercise of religion).

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

SAPCR
TEMPORARY ORDERS

TRIAL COURT COULD NOT ENTER TEMPORARY ORDER CONDITIONALLY CHANGING PARENT WITH RIGHT TO DESIGNATE CHILDREN'S PRIMARY RESIDENCE.

¶15-6-01. *In re Kyburz,* No. 05-15-01163-CV, 2015 WL 6935912 (Tex. App.—Dallas 2015, orig. proceeding) (mem. op.) (11-10-15).

Facts: Mother and Father divorced, and Mother was appointed as joint managing conservator with the exclusive right to designate their Children's primary residence. Subsequently, Father filed a SAPCR seeking the exclusive right to designate the Children's primary residence. Father testified about certain CPS reports, but there was no evidence that CPS took any action after its investigations. Further, Father had not personally observed claims that the Children were dirty or had bugs as alleged in the CPS reports.

Mother had been awarded the marital home in the divorce, but she had not been making payments on the mortgage. Foreclosure was imminent, but Mother testified that she had made living arrangements for herself and the Children. The trial court entered temporary orders requiring Mother to refinance the home and stating that if Mother failed to refinance, the trial court would appoint Father as the conservator with the exclusive right to designate the Children's primary residence. Mother filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A trial court may not issue a temporary order that has the effect of changing the designation of the person who has the right to determine the children's primary residence unless the change is in the children's best interest and the children's current circumstances would significantly impair their physical health or emotional development. Here, there was no evidence of a significant impairment of the Children's physical health or emotional development.

Editor's Comment: Judicial ultimatums can be inappropriate. *See In re Winters,* No. 05-08-01486-CV (Tex. App.—Dallas Dec. 11, 2008, orig. proceeding) (mem. op.) (trial court abused its discretion when, in temporary orders, it ordered a JMC parent with the exclusive right to designate a child's primary residence to move back to Dallas from Round Rock on pain of granting the JMC father that exclusive right instead). *J.V.*

Editor's Comment: Great to see a mandamus being granted on this giving some teeth to the statute. With the loosening of the mandamus standards, I think this opens up the possibility for more mandamuses in the family law context. *M.M.O.*

Editor's Comment: This case is interesting because the court conditioned the switch in "primary" parent from mother to father on mother's ability to refinance the mortgage on her home. Clearly, although mother can attempt to refinance the mortgage, the court's condition is based on something out of mother's control--whether the mortgage company will allow her to refinance. That would be like saying father can have possession of the children only if he is not sued for nonpayment of his credit cards. *J.H.J.*

SAPCR
CONSERVATORSHIP

IV-D COURT LACKED AUTHORITY TO MODIFY CONSERVATORSHIP AND ERRED IN DENYING INCARCERATED FATHER'S REQUEST TO PARTICIPATE IN HEARING BY ALTERNATE MEANS.

¶15-6-02. *In re T.J.H.*, No. 12-15-00062-CV, 2015 WL 5439746 (Tex. App.—Tyler 2015, no pet. h.) (mem. op.) (09-16-15).

Facts: Mother was named the sole managing conservator of her and Father's three Children. About a year later, the Children's maternal grandparents filed a SAPCR. Subsequently, the Office of the Attorney General ("OAG") sought a modification of the child support order. The case was then transferred to an associate judge of a IV-D court. Father filed an answer asking for an attorney and a bench warrant. Alternatively, he asked to participate by telephone, video conference, or other means. The associate judge of the IV-D court explicitly denied Father's request for a bench warrant, implicitly denied his request to participate by alternate means, appointed Mother and the maternal grandparents joint managing conservators, and appointed Father possessory conservator.

Father appealed, arguing that the SAPCR was improperly referred to the IV-D court and that the trial court abused its discretion in failing to allow Father to participate in the hearing.

Holding: Reversed and Remanded

Opinion: Referral of Title IV-D cases to an associate judge as ordered by the presiding judge of an administrative judicial region is mandatory under Tex. Fam. Code § 201.101(d). However, the authority of the associate judge is limited by Tex. Fam. Code § 201.104(e) and does not include the authority to grant orders for conservatorship. Thus, it was not error to refer the child support case to the Title IV-D associate judge upon the OAG's initiation of the Title IV-D case. However, it was an abuse of discretion for that associate judge to modify conservatorship.

Litigants cannot be denied access to the courts simply because they are inmates. While an inmate does not have an automatic right to appear personally, he should be allowed to proceed by affidavit, deposition, telephone, or other means. Here, the record reflected that Father was not present during the hearing, and the transcript made no reference to Father's affidavits filed with his answers.

Editor's Comment: This opinion includes a nice overview of how automatic referral works in IV-D cases. *J.V.*

Editor's Comment: So now we are to have a bifurcated process when the OAG and IV-D court is involved – child support here and conservatorship there. How does that benefit judicial economy? *M.M.O.*

Editor's Comment: Interestingly, the respondent here was incarcerated, and as a result the Court of Appeals held that the inmate should still be allowed to present his case, even to the detriment of the other party. Essentially, inmates can bypass the evidentiary rules and submit testimony in forms that are not otherwise admissible to support their claims. For example, let's say an inmate chooses to participate in his divorce by affidavit, making numerous allegations against the petitioner in his affidavit. Alas, without the inmate being present, and by just appearing by affidavit, the petitioner has been stripped of the ability to cross examine the witness, the failure of which may cause a detriment to the petitioner's case. *J.H.J.*

SAPCR
CHILD SUPPORT

IN CALCULATING CHILD SUPPORT AWARD, TRIAL COURT COULD CONSIDER MONEY RECEIVED BY FATHER FROM HIS EXTENDED FAMILY IN ADDITIONAL TO HIS INCOME POTENTIAL, DESPITE HIS EXPIRED NON-IMMIGRANT WORK VISA.

¶15-6-03. *R.J. v. K.J.*, No. 02-14-00266-CV, 2015 WL 5778775 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (10-01-15).

Facts: Mother and Wife moved with one Child from Pakistan to the U.S., where they had a second Child. Father was admitted to the U.S. under a non-immigrant visa, and Mother was admitted as a non-immigrant dependent. Father left his employment, and his visa expired. At the time of the parties' divorce, Mother had obtained her own employer-sponsored temporary-work visa. During the parties' divorce proceedings, Father testified that his family in Pakistan had been supporting him through his unemployment and that they had given him more than $300,000. Father testified that the money was given as loans and should not be considered income. He testified that he earned rental income, but that his monthly expenses far exceeded that income. The trial court found that Father was intentionally under- or unemployed, that he had the ability to earn $50,000 a year, and that his net monthly resources were $4,000. Thus, the trial court ordered Father to pay $1,000 a month in child support. Father appealed, arguing the evidence was insufficient to support the child support award.

Holding: Affirmed

Opinion: A court may take into consideration a parent's earning potential from whatever sources available to that parent. Whether or not Father could legally work in the U.S., he could not evade his child support obligation by voluntarily remaining unemployed. Nothing in Tex. Fam. Code § 154.006 requires further proof of the motive or purpose behind the unemployment or underemployment.

Editor's Comment: This case and *In re R.R.*, *infra*, expose competing public policies. On the one hand, we don't want aliens to work illegally in the United States. On the other hand, we want aliens to support their children even if they pay child support based on illegal employment. Disclosure: I represented father in this appeal. *J.V.*

Editor's Comment: Dad testified that the monies he received from his family were loans, but the Court didn't buy it. Try to have your clients execute promissory notes with family members when they loan the client funds. I don't know if it would have made a difference here, but it's usually worth a shot. *R.T.R.*

Editor's Comment: This case is a good example of utilizing sources of income, regardless of their source, for child support purposes. Despite a person's job title, they can receive income just by accepting family funds. What about other forms of income? What about a college student on scholarship? Does that scholarship equal income for child support purposes? Arguably I think it certainly could under this case. *J.H.J.*

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FATHER REQUIRED TO PROVIDE SUPPORT FOR CHILDREN REGARDLESS OF STATUS AS ILLEGAL IMMIGRANT

¶15-6-04. *In re R.R.*, No. 05-14-00773-CV, 2015 WL 5813391 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (10-06-15).

Facts: Mother and Father lived together and had two Children. Mother testified that during the relationship, Father was emotionally and physically abusive. Mother filed a SAPCR and sought sole managing conservatorship. The trial court ordered supervised visitation, but attempts to exercise that visitation were unsuccessful because the Children were so fearful of Father. Father testified that he was never abusive and that Mother had poisoned the Children against him because Mother was jealous after he married another woman. At the final hearing, a social worker and the Children's counselor also testified regarding the Children's fear of Father.

Father had been working in the U.S. illegally for about 20 years. He alleged that he was presently unemployed because he was attempting to gain legal status and no longer wanted to work under a false name. He had a trucking company, which he claimed to have sold—although the trucks remained on his property. He claimed to help his wife run her trucking business in return for no pay by doing maintenance on the trucks when they broke down. Later in his testimony, he claimed that he only put air in the tires and water in the reservoirs.

The trial court found that there had been no family violence in the prior two years but appointing Mother as the sole managing conservator would be in the Children's best interest. The trial court awarded Father supervised possession and provided for reunification therapy. Additionally, the court found that Father was intentionally unemployed and awarded child support based on the average wage of a diesel mechanic. Father appealed, arguing the trial court abused its discretion in appointing Mother sole managing conservator when there had been no family violence finding. Additionally, he argued that there was no evidence to support the court's finding that he could have been employed as a diesel mechanic because he had never been trained as one.

Holding: Affirmed

Opinion: While there was evidence of family violence, there was no evidence of family violence within the past two years. Nevertheless, when determining whether appointing parents joint managing conservators, the trial court should consider the enumerated factors of Tex. Fam. Code 153.134(a). Here, the Children feared Father, and their physical, psychological, and emotion needs and development would not benefit from appointing the parents joint managing conservators. There was evidence that the parents could not reach shared decisions in the best interest of the Children. Additionally, Mother had always been the Children's primary caregiver.

Regardless of Father's legal status, he had a duty to support his Children. Father's testimony regarding his current unemployment was inconsistent, and the trial court could have reasonably determined he was employable as a diesel mechanic.

Editor's Comment: *See* comment to *R.J. v. K.J., supra. J.V.*

Editor's Comment: It appears father was attempting to use his status in the United States both as a shield and a sword. While father was in the United States availing himself of the legal remedies provided in Texas, when it came to paying child support for the children he fathered in Texas, father alleged he could not pay support due to his illegal status. This case stands for the proposition that no matter your legal status in Texas, if you come here, you are going to be ordered to support your children. On top of that, this ruling seems to indicate that even if you can't get employment due to your legal status, the court can still impute income based on a parent's skills and workability. Alas, a parent cannot come to this country ille-

gally, and then turn around and say that the parent's illegal status in the country stops them from supporting their children. *J.H.J.*

MOTHER AWARDED FATHER'S SHARE OF EQUITY IN HOME AS LUMP CHILD SUPPORT PAYMENT BECAUSE FATHER INCARCERATED FOR DURATION OF CHILD SUPPORT OBLIGATION.

¶15-6-05. ***Tran v. Nguyen,*** ___ S.W.3d ___, No. 14-14-00640-CV, 2015 WL 7475221 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (11-24-15).

Facts: Mother and Father had two Children during their relationship. Mother had another child from a prior relationship, although that child believed Father was her father until she was ten-years old. When the oldest child was thirteen, Father sexually molested her multiple times over the course of a year. When the crime was discovered, Mother and Father separated. Father pleaded guilty and was sentenced to 12 years in prison. Mother filed a petition for divorce, alleging a common-law marriage. Father filed a counter-petition. The trial court granted a divorce based on Father's sexual-assault conviction, appointed Mother sole managing conservator, and divided the marital estate.

During trial, Mother testified that prior to his incarceration, Father was a banker and that his net monthly resources were $3600 at that time. The trial court acknowledged that Father would not be up for parole before his child support obligation expired. The trial court determined that from the time of divorce through the time the Children turned 18, Father would owe more in child support than his community share of the equity in the parties' home. Thus, at Mother's request, the trial court awarded to Mother Father's share of the equity in satisfaction of his child support obligation.

Father appealed, contending, among other complaints, that the trial court erred in calculating his child support obligation based on his salary prior to his incarceration. Father asserted that the trial court should have based his obligation on the presumption that he made the federal minimum wage for a 40-hour work week. Mother did not file a response in the appellate court.

Holding: Affirmed

Majority Opinion: (J. Jamison, J. Busby)

An appellate court is not required to accept as true uncontradicted assertions of fact that are unsupported by record references. Here, Father did not offer a citation to the record to support his assertion that the trial court simply applied the guidelines.

Further, Tex. Fam. Code § 154.122(b) sets out fourteen factors a court may consider in determining whether the child support guidelines would be unjust or inappropriate in a particular case. While the trial court did not issue findings in support of a deviation from the guidelines, Father did not challenge that failure on appeal.

Here, Mother would be caring for the Children 100% of the time, Father would be unable to pay child support while in prison, and the equity in the house was an available financial resource that could be awarded to wife as a lump sum child support payment.

Dissenting Opinion: (C.J. Frost)

Tex. R. App. P. 38.1(g) provides that an appellate court must accept as true facts cited in a brief's statement of facts unless contradicted by another party. That rule also separately requires that the statement of facts be supported by the record. Thus, an appellate court must take as true uncontradicted facts regardless of whether those facts are supported by the record.

Further, a trial court is required to issue specific findings—whether or not requested by a party—if a child support order deviates from the Family Code's guidelines.

Here, Father asserted that the trial court's child support order was based on the Family Code's guidelines and his income prior to his incarceration. Mother did not file a responsive brief or challenge Father's statement of facts. Additionally, the trial court did not issue any findings to support a deviation from the guidelines. Moreover, because Father asserted that the trial court followed the guidelines, he did not have a reason to assert that the trial court erred in failing to issue findings to support a deviation from the guidelines, and he should not have been required to do so.

Additionally, the majority decided an issue of first impression not briefed by the parties, concluding that the trial court could have deviated from the child-support guidelines and based its child-support determination on the equity interest in the parties' home because it was a "financial resource" under Tex. Fam. Code § 154.123(b)(3), without any determination that the interest was party of Father's "net resources."

Editor's Comment: The majority might more easily have affirmed this case by holding that the trial court ordered guideline child support based on the obligor's earning potential. *E.g.*, *In re Lassmann*, No. 13–09–00703–CV (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2010, no pet.) (mem. op.). As to the dissent, it does not appear that the majority considered the equity in the house to be part of net resources but instead held that the equity could be the subject of a lump-sum child support payment. *See* Tex. Fam. Code § 154.003(2). *J.V.*

Editor's Comment: I guess equity in a home could be considered a "financial resource" for calculating child support, but this seems like a pretty broad stroke to me. The dissenting opinion is interesting and worth a read, as the Chief Justice draws a careful and nuanced distinction between the question the parties briefed (whether the trial court erred in calculating dad's child support under the child-support guidelines) and the question the majority opinion answered (whether the trial court could have deviated from the child-support guidelines and based its child-support determination on the equity interest in the home). *R.T.R.*

Editor's Comment: **S**ounds like a case that made up the law based on bad facts and bad briefing. *M.M.O.*

Editor's Comment: Here is another parent trying to use their own behavior as a way of getting out of child support. The father here committed terrible acts of abuse, for which he was placed in jail for several years. If not for the acts committed by father, father would still be employed and have the ability to pay child support. The father here essentially wants mother and the children to be punished for father's own actions, which the court can easily find is not in the children's best interest. On a separate note, the dissenting opinion points out an interesting fact. The trial court failed to make any findings regarding child-support and it's deviation from the child support guidelines. The majority opinion noted this, but found that the father waived any claim to this due to his failure to raise this issue on appeal. However, the dissenting opinion is correct. If the court deviates from the guidelines, the trial court has a duty to make findings regarding those deviations regardless of whether or not a party makes the request. The dissent also point out that the court did not find that the equity in the house was a net resource of the father. It seems that if a party is going to request a lump sum of support, or if a party is going to request that an asset be utilized when imputing income to a party, that party needs to ask the court to first make findings regarding the deviation of the child support guidelines, and second, the party needs to ask for a finding that the asset is a net resource of the payor, as net resource is defined under the family code. *J.H.J.*

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SAPCR
CHILD'S NAME CHANGE

TRIAL COURT DID NOT ABUSE DISCRETION IN CHANGING CHILD'S LAST NAME WHEN BEST INTEREST EVIDENCE WAS "MIXED."

¶15-6-06. ***Anderson v. Dainard,*** ___ S.W.3d ___, 01-15-00081-CV, 2015 WL 5829645 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (10-06-15).

Facts: Mother and Father never married. After they broke up, Mother told Father she was pregnant with his Child. He asked Mother to take a paternity test, but she refused. The Child was given Mother's last name. Some months later, the Attorney General initiated a parentage and child support action. The trial court ordered a paternity test, and Father was established as the Child's father. After the entry of temporary orders appointing the parents joint managing conservators, Father filed a SAPCR seeking to change the Child's last name to his own. The trial court granted Father's request. Mother appealed, arguing the evidence was insufficient to support a finding that the name change was in the Child's best interest.

Holding: Affirmed

Opinion: Neither parent's name would cause the Child embarrassment nor was there any evidence either name was accorded particular respect in the community. There was no evidence of parental misconduct or neglect. The Child had no full- or half-siblings. The Father testified that because the Child spent a significant time with Mother, having his last name would help create a familial bond between himself and the Child. The Mother testified that although the Child was young, the Child knew her last name and was known by that name to her daycare, doctors, and others. The Mother planned to keep her maiden name if she were to subsequently marry.

The appellate court noted that the evidence before the trial court was mixed and that the trial court's decision "was a difficult one to be sure."

Editor's Comment: I always like seeing and reading a name change case, because there aren't many out there, and they are all so super fact-specific. As usual, the abuse of discretion standard trumps all. *R.T.R.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

ERROR TO ADMIT ENTIRE INVESTIGATIVE REPORT UNDER RULE OF OPTIONAL COMPLETENESS BECAUSE SOME ASPECTS OF REPORT WERE UNRELATED TO PORTION INITIALLY OFFERED.

¶15-6-07. ***In re C.C.,*** ___ S.W.3d ___, 07-15-00160-CV, 2015 WL 5244401 (Tex. App.—Amarillo 2015, no pet. h.) (09-01-15).

Facts: TDFPS filed a petition to terminate Mother's and Father's parental rights. During the proceedings, Mother and Father offered into evidence the first page of an investigative report drafted by TDFPS.

Mother and Father believed information on that page established that the Children were not suffering physical abuse. Once that page was admitted, the trial court granted TDFPS's request to admit the entire report under Tex. R. Civ. P. 107 ("Rule of Optional Completeness"). After the parents' rights were terminated, Mother and Father appealed. Among other complaints, they argued that the trial court erroneously allowed the admission of the entire investigative report into evidence.

Holding: Affirmed

Opinion: Tex. R. Civ. P. 107 allows the admission of otherwise inadmissible evidence to fully and fairly explain a matter broached by the adverse party. Nevertheless, the omitted portion of the statement must be on the same subject and must be necessary to make the admitted portion fully understood.

Mother and Father attempted to enter only the first page of the report, which stated that the Children appeared to be in good condition and that there was no abuse suffered by the Children. The TDFPS employee who drafted the report testified that looking only at the first page would be misleading because aspects of the omitted report included descriptions of the Children's deplorable living conditions. However, other portions of the report were unrelated to potential abuse, including the parent's childhood and criminal histories. The trial court abused its discretion in admitting the entire report without redacting irrelevant aspects of it. However, because the erroneously admitted evidence was cumulative of other evidence not complained of by Mother and Father on appeal, there was no harm and no reversible error.

Editor's Comment: It's interesting that this case requires, in order to use the rule of optional completeness, the entire report be redacted only to show the "related" portions. Since the entire report was created and utilized in the termination proceeding, how is the entire report not related to the findings by the Department as to whether the Department found abuse? *J.H.J.*

APPOINTMENT OF TDFPS AS SOLE MANAGING CONSERVATOR IS A CONSEQUENCE OF TERMINATION PURSUANT TO TEX. FAM. CODE § 161.207.

¶15-6-08. ***In re N.T.*** and ***In re M.T.,*** ___ S.W.3d ___, No. 05-15-00343-CV and No. 05-15-00838, 2015 WL 5155713 (Tex. App.—Dallas 2015, no pet. h.) (09-02-15).

Facts: Mother and her two Children had multiple mental health issues, Mother abused illegal drugs, and there was evidence that Father was abusive. After the trial court terminated her parental rights, Mother appealed. In addition to complaining that the evidence was insufficient to support the termination, Mother argued that the evidence was legally insufficient to support the appointment TDFPS as managing conservator of the Children. Mother argued that the parental presumption should apply unless the court found that such appointment would impair the Children's physical health or emotional development or that there was a history of family violence. Mother argued that because the Children's needs were such that they would have to live in a treatment center, there was no reason that she should not be appointed as managing conservator, which would allow her to choose the treatment center for the Children.

Holding: Affirmed

Opinion: Appointment of TDFPS as sole managing conservator may be considered a consequence of termination pursuant to Tex. Fam. Code § 161.207. Here, the evidence supported termination of Mother's parental rights. Additionally, Mother provided no authority for the proposition that she was a "suitable competent adult" as contemplated by that section or that the parental presumption of Tex. Fam. Code § 153.131 would apply to a parent whose rights had been terminated.

TERMINATION BASED ON PRIOR TERMINATION NOT "SLAM DUNK" BECAUSE BEST INTEREST FINDING ALSO REQUIRED

¶15-6-09. ***In re J.D.S.,*** ___ S.W.3d ___, 10-15-00217-CV, 2015 WL 6437722 (Tex. App.—Waco 2015, no pet. h.) (10-22-15).

Facts: During a home visit, TDFPS found Mother incoherent on the floor of the home while the Child was home but unable to open the door for the caseworker. The Child was removed from Mother's care, and a trial court terminated Mother's rights to the Child based on Tex. Fam. Code § 161.001(M), which is established by clear and convincing evidence that the parent's rights to another child have been terminated on the basis of endangerment grounds (D) or (E). Mother appealed.

Holding: Affirmed

Majority Opinion: Mother argued that a ground (M) finding makes the case a "slam dunk" and should require a re-review of the present removal to determine whether evidence supports one of the endangerment grounds. However, Mother ignored the requirement that a termination must also be supported by clear and convincing evidence that termination is in the child's best interest. Mother did not challenge the trial court's best interest finding.

Because the evidence supported termination of Mother's rights, Mother's complaint that the trial court erred in improperly allowing TDFPS to retain custody of the Child after his initial removal was moot.

Concurring Note: (J. Davis) Mother failed to challenge the actual grounds on which termination was based, and a complaint of temporary orders is moot when a final order has been rendered.

IMPRISONMENT FOR DWI INSUFFICIENT TO SUPPORT TERMINATION BECAUSE DWI IS STRICT LIABILITY OFFENSE, AND TEXAS FAMILY CODE REQUIRES PROOF THAT PARENT "KNOWINGLY ENGAGED" IN CONDUCT RESULTING IN CONVICTION.

¶15-6-10. ***In re A.R.,*** ___ S.W.3d ___, No. 06-15-00056-CV, 2015 WL _____ (Tex. App.—Texarkana 2015, no pet. h.) (11-09-15).

Facts: TDFPS sought to terminate Father's parental rights on the ground that he had been sentenced to imprisonment after a conviction for a DWI. The trial court terminated Father's rights. Father appealed, arguing the evidence was insufficient to support the judgment.

Holding: Reversed and Rendered

Opinion: To support termination under Tex. Fam. Code § 161.001(b)(1)(Q), the evidence must show that a parent knowingly engaged in criminal conduct that resulted in the parent's conviction and confinement or imprisonment and inability to care for the child for not less than two years from the date of the filing of the petition.

A DWI conviction is a strict liability offense for which proof of mental culpability is not required. Thus, a conviction does not meet the "knowingly engaged" requirement of Tex. Fam. Code § 161.001(b)(1)(Q), and TDFPS did not present any proof that Father knowingly engaged in the conduct that resulted in his conviction.

Editor's Comment: The court criticized TDFPS for presenting "very little testimony or evidence" at the termination hearing. The court quoted from *In re C.D.E.*, 391 S.W.3d 287, 300-01 (Tex. App.—Fort Worth 2012, no pet.), another termination case based on a strict liability crime, to set forth the type of evidence TDFPS should have attempted to unearth. *J.V.*

EVIDENCE LEGALLY INSUFFICIENT TO SUPPORT TERMINATION UNDER ICWA BECAUSE NO TESTIMONY FROM QUALIFIED EXPERT WITNESS.

¶15-6-11. ***In re V.L.R.,*** ___ S.W.3d ___, No. 08-15-00250-CV, 2015 WL 7280987 (Tex. App.—El Paso 2015, no pet. h.) (11-18-15).

Facts: At two-and-a-half-years old, the Child was removed from her Mother's custody and placed with her paternal aunt in a custody proceeding involving the Child's Indian tribe. About twelve years later, after learning the Child had been a victim of neglect or sexual abuse, TDFPS filed a petition to terminate Mother's parental rights and to be named the Child's managing conservator. Although the Child's tribe was notified of the proceeding, it stated that it "would not be stepping in," and the tribe filed no written response in the trial court. After a bench trial, the trial court found that the evidence established "beyond a reasonable doubt" that the Mother had constructively abandoned the Child and had failed to comply with provisions of a court order and that termination was in the Child's best interest. Mother appealed, challenging the legal and factual sufficiency of the judgment.

Holding: Reversed and Rendered

Opinion: Under the Indian Child Welfare Act ("ICWA"), the burden of proof to support a termination of parental rights is "beyond a reasonable doubt," and the grounds for termination must be supported by testimony of a qualified expert witness as defined by the ICWA—someone recognized by the tribal community as having knowledge of tribal customs—that continued custody by the parent or Indian custodian is likely to result in serious harm to the child. Here, no testifying witness qualified as an expert witness under the ICWA. Further, even if the testifying TDFPS caseworker were a qualified expert witness, she did not testify that continued custody by Mother or the Child's paternal aunt was likely to result in serious harm to the Child.

MISCELLANOUS

FATHER HAD NO CLAIM FOR DAMAGES AFTER MOTHER STOLE HIS SPERM TO IMPREGNATE HERSELF WITH TWINS.

¶15-6-12. ***Pressil v. Gibson,*** ___ S.W.3d ___, 14-14-00731-CV, 2015 WL 5297689 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (09-10-15).

Facts: Mother and Father engaged in a consensual sexual relationship. They used condoms for birth control. Without Father's knowledge, Mother collected Father's sperm, took it to a fertility clinic, and told the clinic that she was married to Father and that the couple needed help getting pregnant. The clinic took Mother at her word and successfully inseminated Mother with twin boys. Subsequently, Father sued the clinic for negligence, conversion, violations of the Texas Theft Liability Act, and conspiracy. Father sought damages for mental anguish, loss of opportunity, loss of enjoyment of life, child support, the cost of raising two children, lost earnings, and lost earning capacity. Pursuant to a motion filed by the clinic,

the trial court dismissed Father's claims with prejudice on the ground that the claims were health care liability claims under Tex. Civ. Prac. & Rem. Code ch. 74, which requires a timely filed expert report.

Holding: Affirmed

Opinion: A wrongful pregnancy action is a lawsuit brought by the parents of a healthy, but unexpected, unplanned, or unwanted child against a medical provider for negligence leading to conception or pregnancy. Such a claim usually arises after a negligently performed sterilization procedure; the failure to properly diagnose a pregnancy or perform an abortion; negligence in the insertion or removal of an IUD or in dispensing contraception prescriptions; or in the failure of a contraceptive pill or condom.

In Texas, a plaintiff cannot recover damages related to the support and maintenance of a healthy child born as a result of the medical provider's negligence because the intangible benefits of parenthood far outweigh the monetary burdens involved. The damages available to a plaintiff in a wrongful pregnancy case are limited to the medical expenses associated with the failed procedure.

Here, not only was no procedure performed on Father, but the procedure was a rousing success that resulted in the birth of healthy twin boys.

Additionally, because damages in this case were unavailable as a matter of law, any expert testimony on whether the law would afford Father a remedy would have been inadmissible.

Editor's Comment: The court's analysis is in the context of a malpractice suit by the father against his former attorneys. In the underlying suit, the attorneys sued the fertility clinic on the father's behalf, but the trial court considered the suit a health care liability claim under Tex. Civ. Prac. & Rem. Code ch. 74 and dismissed the suit for failure to timely file the requisite expert report. *J.V.*

WIFE'S BILL OF REVIEW DENIED BECAUSE SHE FAILED TO SHOW THAT A NEW PROPERTY DIVISION WOULD BE MORE FAVORABLE TO HER OR THAT HER FAILURE TO PRESENT A DEFENSE IN THE DEFAULT DIVORCE WAS DUE TO HUSBAND'S FRAUD.

¶15-6-13. *In re Estate of Curtis*, No. 09-14-00242-CV, 2015 WL 5604772 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (09-24-15).

Facts: Wife and Husband were married for 44 years. Husband filed for divorce. However, Wife alleged that Husband subsequently told her that he changed his mind and was no longer seeking a divorce. Husband never moved out of the house but was "in and out of" a trailer on the couple's property until he moved into an assisted living facility. Before moving to the assisted living facility, Husband controlled the only key to the couple's locked mailbox, so Wife only received her mail after Husband collected it and passed it on to her. Husband obtained a default divorce, but Wife alleged that she had no notice that there had been a divorce. About a year later, Husband died.

A will contest ensued between Wife and Husband's illegitimate son. In a separate proceeding that was consolidated with the will contest, Wife filed a petition for bill of review to set aside the default divorce decree, asserting the decree was grossly unequal, that the divorce was obtained secretly, and that her failure to present a defense was not due to any intentional act of fault or result of negligence. The trial court denied her bill of review, and Wife appealed.

Holding: Affirmed

Opinion: To succeed on a bill of review when the petitioner was properly served in the underlying proceeding, a petitioner must present a meritorious defense. Here, however, Wife presented no evidence as to

the values of assets received by Husband in the divorce. Thus, the trial court was unable to assess whether Wife would receive a more favorable property division even if her allegations were true.

Additionally, a bill of review petitioner must establish that her failure to present her alleged meritorious defense was a result of the extrinsic fraud, accident, or wrongful conduct of the opposing party. Because Wife presented no evidence besides her own testimony to corroborate alleged statements made to her by Husband, the evidence was properly excluded by Tex. R. Evid. 601 ("'Dead Man's Rule' in Civil Actions"). Wife presented no evidence other than her own self-serving statements to support her allegations of fraud.

Editor's Comment: This case dives fairly deep into the meritorious defense prong of a bill of a review in a divorce case. That is helpful, because most of the case law in this area tends to analyze the extrinsic fraud prong. This case reminds us that, in order to prove a meritorious defense in a divorce action, you have to prove that your client would have gotten a better deal on retrial. How do you do that? You must have your client provide testimony and evidence about the value of the assets that your client received in the divorce, as well as the value of the assets received by the opposing party. Otherwise, the trial court and court of appeals really can't analyze whether a more favorable property division would be possible on retrial. *R.T.R.*

AWARD OF NO ATTORNEY'S FEES IMPROPER IN CHILD SUPPORT ENFORCEMENT, BUT MOTHER REQUIRED TO PRESENT EVIDENCE OF AMOUNT AND REASONABLENESS OF FEES.

¶15-6-14. ***Russell v. Russell,*** ___ S.W.3d ___, 14-13-01100-CV, 2015 WL 5723109 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (09-29-15).

Facts: Mother and Father divorced after having one Child. Father was ordered to pay child support, and Mother was awarded control of the Child's bank account. Subsequently, Mother filed a petition to enforce payment of child support and to enforce a provision of the decree that required Father to deposit funds into the Child's bank account. Although the trial court entered a judgment for arrearages and ordered Father to comply with the final decree, the trial court refused to find Father in contempt and refused to award Mother her attorney's fees. She appealed. The court of appeals reversed and remanded the case on the issue of attorney's fees.

In its prior order, the court of appeals held that the trial court abused its discretion in failing to award Mother her attorney's fees without stating good cause. On remand the trial court again did not award Mother her attorney's fees, stating "I do not think the law is that I must award attorney's fees in a child support issue…when I do not find Father in contempt." Mother appealed again.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Because contempt finding is not necessary for an award of reasonable attorney's fees under Tex. Fam. Code § 157.167, the trial court again abused its discretion in failing to award Mother her attorney's fees *without stating good cause*.

Because the award to Mother of the Child's bank account was contained in the "Division of the Marital Estate" section of the final decree, it was not an award for child support. Thus, Mother was not entitled under the Texas Family Code to attorney's fees incurred while enforcing that provision of the decree. However, the final decree included a fee-shifting provision that allowed for the recovery of attorney's fees to a successful party in a suit to enforce the final decree. Thus, the trial court should have determined whether Mother was a "successful party" entitled to an award of attorney's fees incurred in enforcing the provision related to the Child's bank account.

Because Mother presented some evidence to support an award of attorney's fees, an award of no fees was improper. However, Mother failed to offer evidence that her attorney's fees were reasonable. Additionally, because the requirements to recover fees under the final decree and under the Texas Family Code differed, Mother was required to segregate her fees related to the recovery of child support from her fees related to enforcing the final decree.

Finally, the trial court did not abuse its discretion in not awarding Mother her appellate attorney's fees or fees associated with the remand because she failed to present any evidence of those fees to the trial court. However, she could seek such fees on this subsequent remand and introduce evidence at that time.

Editor's Comment: Although an award of attorney's fees under Tex. Fam. Code § 157.167(a) does not require a contempt finding, such an award may be enforced by contempt. *J.V.*

Editor's Comment: This case is interesting for the comment on seeking appellate attorney's fees after the case is reversed and remanded on appeal. Huge mental note… if you forget or fail to ask for appellate attorney's fees the first time around, this case stands for the proposition that you are not precluded after winning the appeal and remand for new trial. *M.M.O.*

Editor's Comment: Here, the award of attorney's fees hinged not only on whether it was proper under the family code, but whether the mother properly proved up her claim. As mother was enforcing two different provisions, one related to child support, and one related to property, different provisions of the family code were at play. Therefore, mother had the duty to separate her attorney's fees between those utilized to enforce child support, and those utilized to enforce a property division. One of the safest ways to segregate and separate attorney's fees simply to make an entirely new billing number related to that specific cause of action. In addition, regardless of whether a statute allows fees or not, a party still has a duty to prove those fees up as reasonable and necessary, and that must be done for each set of attorney's fees that are requested. Here, mother did not do so. *J.H,J.*

MOTHER PROVIDED SUFFICIENT, UNCONTRADICTED EVIDENCE TO ESTABLISH ATTORNEY'S FEES UNDER TRADITIONAL METHOD.

¶15-6-15. *In re E.B.*, No. 05-14-03980-CV, 2015 WL _____ (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (09-29-15).

Facts: Mother and Father filed cross petitions to modify the parent-child relationship with respect to their only Child. At the conclusion of the trial, the trial court awarded Mother her attorney's fees and costs. Father appealed, arguing the evidence was insufficient to support the award of attorney's fees under the lodestar method.

Holding: Affirmed

Opinion: When a party opts to use the traditional method to prove up the reasonableness of his or her attorney's fee, requirements of the lodestar method are inapplicable. When determining an award of attorney's fees under the traditional method a court looks to:

(1) the time, labor, and skill required to properly perform the legal service;
(2) the novelty and difficulty of the questions involved;
(3) the customary fees charged in the local legal community for similar services;
(4) the amount involved and the results obtained;
(5) the nature and length of the professional relationship with the client; and
(6) the experience reputation and ability of the lawyer performing the services.

Here, Mother's attorney testified that he was licensed in Texas and had been practicing for over twenty years. He testified as to his hourly rate, the number of hearings in the case, and various costs incurred throughout the litigation. He additionally testified that redacted invoices had been provided to everyone in the case, although those invoices were not admitted into evidence. Father's attorney did not object to any of the evidence, did not cross-examine Mother's attorney, and did not offer any evidence or witness to contradict Mother's attorney.

Editor's Comment: The traditional method for proving up attorney's fees is appropriate for cases like this one that involve a single cause of action, here a SAPCR. When litigating multiple causes of action, some of which allow an award of attorney's fees and others of which do not, the fees incurred must be segregated. *See Russell v. Russell, supra. J.V.*

NO EXCEPTION APPLIED TO PERMIT TRIAL COURT TO DECLARE DIVORCE DECREE VOID AFTER ITS PLENARY POWER EXPIRED.

¶15-6-16. ***In re Martinez,*** ___ S.W.3d ___, 14-15-00429-CV, 2015 WL 5770829 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (10-01-15).

Facts: Husband and Wife were from Honduras and did not speak English. Husband filed a petition for divorce, but the case was dismissed for want of prosecution. Husband filed a motion to reinstate, and without reinstating the case, the trial court held a final hearing. Twenty-nine days after the dismissal order was signed, the trial court signed an agreed final decree and an order reinstating the case.

About nine months later, Husband filed a petition to set aside the divorce decree or to modify or reform the decree to award the house to him instead of to Wife. Wife filed a motion to enforce the decree alleging that Husband refused to vacate the home and had obstructed her efforts to take ownership of it. After a hearing, the trial court found that:

- neither party understood the agreed decree at the time of the prove-up;
- neither party was capable of providing any evidence through testimony to support a just and right division because there was no interpreter;
- under the circumstances, there could not have been a legal prove-up; and
- the decree was void on its face.

The trial court signed an order declaring the divorce decree void. Mother filed a petition for writ of mandamus to set aside that order.

Holding: Writ of Mandamus Conditionally Granted

Opinion: After a trial court's plenary power has expired, a court may sign an order in that case under limited circumstances:

(1) judgment nunc pro tunc to correct a clerical error;
(2) order declaring prior judgment void because:
    (a) prior order was signed after expiration of plenary power;
    (b) court lacked subject matter jurisdiction to render judgment;
    (c) complete failure or lack of service violated due process; or
    (d) any ground allowing a collateral attack of the judgment.

The court of appeals assumed *arguendo* that the trial court here declared the order void because:

- the parties did not understand the decree and could not prove it up;
- the trial court had not reinstated the case prior to signing the decree;
- the decree failed to divide all the marital property; and
- the decree omitted orders for Wife's children born during the marriage.

Even assuming all of the above were true, those facts do not fall under the limited circumstances under which a trial court may sign an order after its plenary power has expired.

Editor's Comment: This is an interesting case where you have someone trying to set aside a decree after plenary power has expired. *M.M.O.*

BECAUSE AWARD OF ATTORNEY'S FEES UNDER TEX. FAM CODE § 106.002 ARE NOT "COSTS," TEX. R. CIV. P. 143 DID NOT APPLY TO AWARD OR TO FATHER'S FAILURE TO PAY AWARD.

¶15-6-17. *In re M.A.M.*, No. 05-14-00040-CV, 2015 WL 5863833 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (10-08-15).

Facts: Father filed a petition to recover excess child support. Mother filed a counterpetition to modify the parent-child relationship. Father failed to appear at a hearing on three motions filed by Mother. The trial court granted Mother's motions and awarded Mother attorney's fees under Tex. R. Civ. P. 143. When Father failed to pay the attorney's fees as ordered, Mother filed a motion to dismiss his pleadings as required by Tex. R. Civ. P. 143. The trial court granted Mother's motion and dismissed all of Father's claims for affirmative relief without prejudice. Father appealed.

Holding: Affirmed in Part; Reversed in Part

Opinion: Tex. R. Civ. P. 143 provides that a party seeking affirmative relief may be required to give security for costs at any time prior to a final judgment and that a failure to comply results in the claim for affirmative relief being dismissed. There are two statutory provisions authorizing attorney's fees in modification suits: Tex. Fam. Code §§ 106.002 and 156.005. Mother did not plead for attorney's fees under Section 156.005. In 2003, the legislature removed "as costs" from Section 106.002. Thus, because attorney's fees under Section 106.002 are not costs, Tex. R. Civ. P. 143 does not apply, and the trial court abused its discretion in striking Father's pleadings pursuant to that rule.

WIFE WAS ESTOPPED FROM APPEALING PROPERTY DIVISION BECAUSE SHE ACCEPTED THE BENEFITS OF THE JUDGMENT AND DID NOT SHOW THAT ANY EXCEPTION APPLIED.

¶15-6-18. *White v. White*, No. 14-14-00593-CV, 2015 WL 5893225 (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (mem. op.) (10-08-15).

Facts: Husband and Wife married after Husband had been working for the fire department for 27 years. He continued working for the fire department for an additional 13 years. Four years after he retired, Wife filed for divorce. The trial court determined that the vast majority of Husband's retirement benefits were his separate property and divided the community portion equally between the parties. Wife appealed the division of the retirement benefits. Wife additionally complained of the trial court's refusal to change her name back to her maiden name. Husband filed a motion to dismiss her appeal in its entirety because Wife accepted the benefits of the judgment.

Holding: Affirmed in Part; Reversed in Part

Opinion: To support her claim that the economic necessity exception applied, Wife filed a supporting affidavit identifying her monthly expenses, but she provided no documentary evidence to substantiate those expenses. Additionally, although Wife claimed that certain motorcycles awarded to her were left at her home by Husband without her consent, Wife provided no explanation for her acceptance of a Buick awarded to her in the decree. Moreover, Wife did not contend that she lacked the ability to borrow money or obtain money through a request for temporary orders pending appeal.

Wife claimed the entitlement exception applied because the award of her share of Husband's retirement was supported by Husband's sworn affidavit and his expert witness. However, nothing would prevent the trial court from changing that award on remand and awarding her less than she had previously received.

Wife finally argued that the cash benefits exception applied because she only accepted cash. However, the cash benefits exception generally applies only when the cash accepted is relatively small in comparison with the total value of the community property. Wife took control of essentially the entire cash amount awarded her, which represented half the community estate. Further, Wife did not deny that she accepted non-cash benefits, including the Buick.

Because Wife accepted the benefits of the judgment that she appealed, she could not complain of that judgment's property division. However, her complaint regarding her name change was severable from the property division. The trial court abused its discretion in denying Wife her request to change her name without stating a reason for the denial.

Editor's Comment: Interesting case on acceptance of the benefits. This is a dangerous doctrine when appealing a property division. There are exceptions but they are very, very limited. *M.M.O.*

Editor's Comment: This case makes a good point about appeals. If an appeal is imminent, or if a client is considering an appeal, it is vital that certain precautions are taken so that a party does not waive the right to appeal because they have taken the benefits of the courts award. Although it seems like the court here considered the totality of what wife accepted, part of that consideration was that wife took a Buick that is awarded to her by the court. What if the Buick is the only car that wife has to drive? Or, what if wife was ordered to take possession of that Buick by a date certain and her failure to do so, in order to preserve appeal, brings on an enforcement action? It seems like more actions should take place in order to preserve wife's claim, such as filing temporary orders pending appeal and making requests that certain property or items be preserved. Further, it may be necessary to request a stay of the trial court proceedings. *J.H.J.*

BOYFRIEND NOT ENTITLED TO JURY TRIAL IN FAMILY-VIOLENCE PROTECTIVE-ORDER PROCEEDING.

¶15-6-19. ***Roper v. Jolliffe,*** ___ S.W.3d ___, 05-14-00500-CV, 2015 WL 5946680 (Tex. App.—Dallas 2015, no pet. h.) (10-09-15).

Facts: Boyfriend and Girlfriend lived in an apartment together. He was physically abusive to her. After an attack, Girlfriend called the police who took her statement and photographs. Subsequently, the district attorney's office filed an application for a protective order against Boyfriend, and a final hearing was set. Boyfriend perfected his request for a jury trial about six weeks before the final hearing. However, the trial court denied the jury request and proceeded with the trial. The trial court found that family violence had occurred and was likely to occur in the future and granted a two-year protective order. Boyfriend appealed, raising a number of issues, including a complaint that the trial court abused its discretion in denying his request for a jury trial.

Holding: Affirmed

Majority Opinion: (J. Stoddart, J. Brown) The portion of the family code pertaining to Protective Orders and Family Violence was originally passed in 1979. The statutory language provides that the court will act as the "sole fact finder." By using the word "court" and omitting "jury," the legislature made clear that the courts, not juries, have the responsibility to make the necessary findings prior to issuing a family-violence protective order.

Although the Texas Constitution provides the right to a trial by jury, civil law did not address domestic violence at the time of the constitution's adoption. Where no common law action or government scheme existed in 1876, no jury trial is required. Additionally, no other state has found the right to a jury in a proceeding for a domestic violence protective order.

Ordinary permanent injunctions are distinct from family-violence protective orders. A permanent injunction is an equitable remedy for some other cause of action requiring a liability finding after a hearing on the merits. In contrast, a family violence protective order is obtained through an independent statutory proceeding with no underlying cause of action.

Further, a family-violence protective-order proceeding is not a "cause" as defined by Tex. Const., art. V, § 10. It does not seek to remedy past wrongs or punish criminal acts, but rather to protect the applicant and prevent future violence. Moreover, the delay and expense inherent in jury trials make them unsuitable for protective orders because of the serious need for an expedited and efficient procedure to prevent family violence.

Dissenting Opinion: (J. Evans) Family-violence protective orders are appealable, permanent injunctions. Whether the restraint continues for six months or six years has no bearing on the question of "permanency." Before granting a permanent injunction, a trial court must make both factual and equitable determinations. Because the right to a trial by jury is inviolate, Boyfriend should not have been denied his request to have a jury determine the questions of fact.

Further, because parties to a hearing on a permanent injunction have been entitled to a jury since before the adoption of the 1876 constitution, Boyfriend had a right to a jury despite the fact that family-violence protective orders did not exist at that time. The right to a jury trial in permanent injunction hearings existed before the 1876 constitution and cannot be abrogated by statute.

Additionally, the legislature's use of the "the Court" did not distinguish the role of trial judge from the jury. When a jury is sworn in, its members become officials of the court. The Family Code frequently explicitly provides whether an issue may be decided with or without a jury, and if this fact question were to be decided without a jury, the legislature could have easily stated precisely that.

WIFE DENIED DUE PROCESS IN CONTEMPT PROCEEDING WHEN TRIAL COURT ENTERED DIRECTED VERDICT AGAINST HER WITHOUT ALLOWING HER TO FULLY PRESENT HER DEFENSE.

¶15-6-20. *In re Harrison*, No. 14-15-00370-CV, 2015 WL 5935816 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (mem. op.) (10-13-15).

Facts: Husband filed a motion for enforcement asking that Wife be held in contempt for violations of a final decree of divorce, even though that decree had been reversed by the court of appeals. Husband also asked the trial court to hold Wife in contempt for violations of the parties' MSA and an agreed interim order entered after the reversal of the final decree. At the hearing on Husband's motion, while Wife was testifying to her defense, Husband's counsel interrupted and objected that Wife had not filed an answer or pleaded any affirmative defenses and moved for a directed verdict. The trial court granted a directed verdict and denied Wife's request to continue her testimony.

Subsequently, a contempt order was signed confining Wife to jail for violations of the decree, the MSA, and the agreed interim order. Several other orders were entered over the next few months on the basis of that order. Wife filed a petition for writ of habeas corpus.

Holding: Writ of Habeas Corpus Granted

Opinion: "To deny an accused the right to inform the court why he had not complied with an order is, in effect, to deny him trial. That is not due process." There is no requirement that a respondent file a written pleading to avoid admitting the truth of the movant's allegations. The trial court abused its discretion in granting a directed verdict without giving Wife an opportunity to present her defense.

Additionally, a party may not be held in contempt for violating an agreement unless the court has signed an order commanding the parties to comply. Incorporating an MSA by reference is not sufficient. Thus, the contempt order was void to the extent that it punished Wife for violations of the MSA.

The Final Decree of Divorce was reversed by the court of appeals. Wife could not be held in contempt for violating a reversed judgment.

If a contempt order lists each failure separately and assesses punishment separately for each failure, only the invalid portion is void, and the remainder can be severed and enforced. Here, the trial court did not assess separate punishments for each of Wife's alleged violations. Moreover, the subsequent contempt orders were each based on the original void contempt order. Therefore, each of the subsequent contempt orders were also void.

Editor's Comment: In a contempt enforcement proceeding, the trial court cannot infringe upon the defendant's ability to present its case. Due process requires that the defendant have full opportunity to present its defense to the contempt. *M.M.O.*

Editor's Comment: Under this case, it is clear that a party that is defending an enforcement must have the opportunity to put on a defense. Although conceptually the defending party can ask for a directed verdict, since the movement has the complete burden in an enforcement, The request for a directed verdict by the movement is a violation of due process. If granted, the court has essentially shifted the burden on the enforcement to the defendant, and has then refused to allow the defendant to provide their own defense. *J.H.J.*

PREMARITAL AGREEMENT'S PROVISIONS FOR DISSOLUTION BY DEATH CONTROLLED OVER PROVISIONS FOR DISSOLUTION BY DIVORCE WHEN HUSBAND DIED DURING PENDING DIVORCE.

¶15-6-21. *In re Estate of Loftis*, No. 07-14-00135-CV, 2015 WL 6447179 (Tex. App.—Amarillo 2015, no pet. h.) (mem. op.) (10-23-15).

Facts: Husband and Wife signed a premarital agreement, which provided that no community estate would be created during the marriage. Section 7 of the agreement contained provisions that would take effect in the event of a divorce, and section 8 contained provisions that would take effect in the event of Husband's death. In section 8, Wife would receive the house in which the parties lived and the car that the parties drove upon Husband's death, free of debt.

About five years later, Husband created a revocable trust and conveyed the parties' residence to the trustee, who was initially Wife. About a year later, however, Husband amended the trust, removed Wife as trustee and appointed his Son in her place. Shortly after that, Husband filed for divorce, and Wife filed a counterpetition for divorce. Husband died while the divorce was pending.

Husband's Son was appointed independent executor of Husband's estate, and he sued Wife for enforcement of section 7 of the premarital agreement and sought the return of the residence, which was un-

disputedly Husband's separate property. Wife argued that section 8 controlled because the marriage was dissolved by Husband's death. Husband's Son contended that section 7 was triggered by "the filing of" a petition for divorce and that in doing so, Wife lost any interest in Husband's separate property. The parties filed cross-motions for summary judgment. The trial court found in favor of Wife and ordered Husband's Son to convey the house and a car to Wife. Husband's Son appealed.

Holding: Affirmed in Part; Reversed in Part

Opinion: Although section 7 referred to consequences of filing a divorce petition, read as a whole, section 7 provided for an agreed-upon release of interests in the other's separate property in conjunction with an *order* of divorce. Because the marriage was dissolved by Husband's death, not a court, section 7 was inapplicable, and section 8 controlled.

NO FIDUCIARY RELATIONSHIP BETWEEN HUSBAND AND HIS MISTRESS.

¶15-6-22. *Markl v. Leake*, No. 05-15-00455-CV, 2015 WL 6664843 (Tex. App.—Dallas 2015, no pet. h.) (mem. op.) (11-02-15).

Facts: Husband and Wife sued Husband's Mistress for breach of fiduciary duty, fraud, constructive trust, conversion, and promissory estoppel. During Husband and Mistress's 10-year extramarital relationship, Husband gave Mistress money, put her on his business's payroll, gave her a gasoline credit card, and maintained her vehicle and real property. Husband claimed that based on their "committed relationship" he invested $25,000 on Mistress's primary residence and $10,000 on her rental property. Husband testified that there was a plan for him to live with Mistress in her residence or to receive the residence on her death. The couple each owned a life insurance policy designating the other as a beneficiary. Mistress previously had a will granting Husband her assets upon her death.

Subsequently, Mistress began a relationship with Husband's nephew, and the relationship between Husband and Mistress ended. Mistress acknowledged having a serious relationship with Husband but described it as simply a dating relationship without any heightened duty of trust. Mistress also testified that Husband often told her that he was planning to divorce his wife and marry Mistress. Mistress had revoked the will leaving her assets to Husband and had changed the beneficiary of her life insurance policy.

Husband and Wife sought a temporary injunction to prevent Mistress from disposing of her residence and rental property. They alleged that the evidence clearly established fiduciary relationships between Husband and Mistress and between Wife and Mistress. The trial court denied their request, and Husband and Wife filed an interlocutory appeal.

Holding: Affirmed

Opinion: Husband and Wife cited no authority recognizing a fiduciary relationship between a wife and her husband's paramour. Further, there was no evidence that Wife was aware of the extramarital relationship when it was ongoing. Additionally, Husband cited no authority declaring the existence of a fiduciary relationship based on an extramarital affair. While the life insurance policies and Mistress's prior will evidenced some subjective trust between Husband and Mistress, those documents did not establish a fiduciary relationship. Further, Mistress testified that she attempted to reimburse Husband for his labor on her residence, but he refused to accept payment, indicating that his efforts were intended as gifts.

TRIAL COURT LOST JURISDICTION OVER WIFE'S COUNTERCLAIMS AGAINST HUSBAND'S PARAMOUR WHEN HUSBAND DIED DURING DIVORCE.

¶15-6-23. *In re Footman*, No. 03-15-00477-CV, 2015 WL 7164170 (Tex. App.—Austin 2015, orig. proceeding) (mem. op.) (11-10-15).

Facts: Husband and Wife were parties to a divorce. Wife filed a counter-petition asserting Husband breached his fiduciary duty to her by wasting money on his Paramour. While the proceedings were still ongoing, Husband died. In an amended counter-petition, Wife named Paramour as a defendant and sought to have Husband and Paramour found jointly and severally liable for breach and fraud on the community. Husband's attorney filed a motion to dismiss, and Wife filed a motion to sever the claims against Paramour and dismiss only the divorce proceeding. The trial court granted Wife's motion and severed the proceeding against Paramour. Paramour filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Death of a party abates a divorce and its incidental inquiries of property rights and child custody. Additionally, death of a party to a divorce withdraws the court's subject matter jurisdiction. Thus, when Husband died, the trial court lost its jurisdiction to do anything other than sign an order of dismissal.

WIFE NOT ENTITLED TO DIVORCE ON GROUND OF CRUELTY EVEN IF RECORD SUPPORTED SUCH A FINDING.

¶15-6-24. ***Villalpando v. Villalpando,*** *___ S.W.3d ___, No. 14-14-00526-CV, 2015 WL 7259291* (Tex. App.—Houston [14th Dist.] 2015, no pet. h.) (11-17-15).

Facts: Husband and Wife had two Children during their marriage. Husband filed for divorce on the basis of insupportability. Wife filed a counter-petition for divorce on the grounds of cruel treatment. During trial, Husband admitted to having a problem with alcohol during the marriage. Wife testified that Husband pushed her, pulled her hair, left bruises on her arms, threatened to kill her, threatened to take the Children from her, and threatened to kill himself. Wife's sister corroborated her testimony. The trial court granted a divorce solely on the basis of insupportability. Wife appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 6.002 allows a court to grant a divorce on the basis of cruel treatment, but it does not require a court to do so—even if the record reveals evidence of cruelty.